

(1990) 04 OHC CK 0051

In the Orissa High Court

Case No : Civil Revision No. 227 of 1984

Kairu ' Kai Kisan and Another

APPELLANT

Vs

Smt. Munki Kisani and Others

RESPONDENT

Date of Decision : 26-04-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 36, 47

Citation : (1990) 70 CLT 396

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : R.K. Mohapatra, K.B. Kar, B. Routray, S.P. Misra and S.S. Das, for the Appellant; P.K. Misra, N.C. Pati and A.K. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—Judgment-debtors" objection to the plea of the decree-holder that the decree should be held to have been satisfied as possession of the immovable properties had been delivered to her having been held to be incompetent they have filed this revision challenging the order of the learned Subordinate Judge, Sambalpur, in Execution Case No. 20 of 1979.

2. Opposite party No. 1 instituted Title Suit No. 45 of 1970 for a declaration of title and recovery of possession of the property specified in Schedule-C appended to the plaint. Her suit was, decreed. She levied execution of the decree. Objections were taken, by the judgment-debtors that the parties were jointly recorded in the finally published Major Settlement Record-of-Rights with plot numbers different from the numbers which the property bore during the Hamid settlement. The suit having been filed with reference to Hamid settlement plot numbers which were non-existent, execution and delivery of possession was not possible; and having regard to the joint recording, unless there was a partition, possession of specific property could not be delivered to the decree-holder; That objection was rejected by order dated 20-8-1982 with the following laconic observation:

... Heard. The objection filed by the judgment debtor is overruled. If the decree-holder can take possession of the land as per the R.O.R. prepared by the Hamid settlement, then the objection by the judgment-debtor is of no consequence....

The decree-holder was called upon to take steps. On 21-3-1984 a memo was filed by the advocate for the decree-holder stating that the decree-bolder had already taken delivery of possession through Court and the execution case should be dismissed on full satisfaction. The judgment-debtors filed an application u/s 47 of the CPC objecting to the disposal of the execution case on full satisfaction on the ground that no delivery of possession had been effected and they filed another petition for stay of further proceedings in the execution case. The decree-holder challenged the maintainability of the objection when she admitted delivery of possession and wanted dismissal of the execution case on full satisfaction. The executing Court took up the question of jurisdiction preliminarily. It held, relying upon *Tavanappa v. Veerabhadrapa*, 1968 (1) Mysore Law Journal 311 that under the provisions of the CPC the judgment-debtors were not competent to raise objection that delivery of possession accepted by the decree-holder as complete and effectual was a paper delivery and at the stage of delivery of possession the Code did not contemplate any objection by the judgment-debtors to the delivery of possession. If there was excess delivery of property not covered by the, decree was delivered he was entitled to raise objection though. The executing Court preferred to follow *Tavanappa's* case (supra) in preference to a decision of the same High Court in *Raghavendra v. Siwaya Basya* AIR 1970 Mys 108 on the ground that the latter decision could not have taken a different view.

3. In the second objection that was, filed on 21-3-1984, the judgment-debtors stated that the report of the process server dated 9-3-1984 that as per the identification given by the decree-holder he gave delivery of possession of the lands as mentioned in the writ was false because on all previous occasions several process servers had gone to effect delivery of possession but they could not and reported back that delivery of possession could not be effected as the decree-holder expressed her inability to identify the lands. On several occasions the writ was returned unexecuted inasmuch as the decree-holder had no idea about the lands. The process servers had even reported that unless a revenue knowing commissioner or Revenue Inspector was deputed to identify the land, delivery of possession could not be effected as the lands could not be identified on the spot.

4. The suit was "filed with reference to Hamid settlement plot numbers and the decree-holder claimed portions of various plots. By way of description of the portion of each plot, a map was appended. The decree was passed in terms thereof. The decree was, therefore, in respect of part of plots and could be definitely located only with reference to the map.

5. By the time of delivery of possession, Major settlement had taken place and the record-of-rights bore different plot numbers. Hence, establishing the identity

by way of co-relating the plots was essential. However, I am not expressing any opinion inasmuch as the trial Court did; not decide the matter on merits out on the point of jurisdiction.

6. The question is: Was it open to the judgment-debtors to raise objection that delivery of possession had not been effected when the decree-holder asserted delivery of possession and delivery of possession was reported by process server and wanted disposal of the execution case on full satisfaction ? The decision in Tavanappa's case supports the stand taken by the decree-holder and was accepted by the executing Court. The following observation occurred in Tavanappa's case.

In my judgment, at the stage of delivery the judgment-debtor has no interest in the property to protect and he is not entitled to raise any, objection to the delivery effected through the process of the -Court which is accepted by the decree-holder except where objection is raised that there is excess delivery or that property not covered by the decree is delivered.

The learned Single Judge of the High Court in Raghavendra's case (supra) did not follow the rule laid down in Tavanappa's case holding that the decision of the Supreme Court in B.V. Patankar and Others Vs. C.G. Sastry, was not brought to the notice of the Judge who decided Tavanappa's case. In B.V. Patankar's case the Supreme Court observed;

... the question whether the decree was completely satisfied and therefore, the Court became functus officio is a matter relating to execution, satisfaction and discharge of the decree.

It was further observed:

When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between parties to the decree, only by an application u/s 47, and not in a separate suit.

After referring to the observation of the Supreme Court, referred to above, to learned Judge in Raghavendra's case held that where the decree-holder filed a memo acknowledging delivery of possession and seeking suitable orders and the judgment-debtor sought by application to raise objections in regard to the validity of the order passed for delivery of possession and the consequent order disposing of the execution petition, the rejection of that application was illegal. The Court should dispose of the same on merits after giving the decree-holders all opportunity to file their objections.

In M.P. Shreevastava Vs. Mrs. Veena, , it has been observed:

...An application made by the judgment-debtor which raises a question relating to execution, discharge or satisfaction of a decree in a suit to which he, or the person of whom he is a representative, was a party is an application before the

Court executing the decree, and must be tried in that Court.

In *Shankar Dass and Ors. v. Captain Bhola Nath and Anr.* AIR 1972 J&K 16, a, Division Bench consisting of Fazl Ali, C. J. and Jaswant Singh, J. (as their Lordships then were), laid down:

An objections by the judgment-debtor that possession of land different from that mentioned in the decree was handed over to the decree-holder in execution of the decree can be raised only by an application u/s 47 and not by a separate suit.

Case of *Rama Subudhi and Others Vs. Bhagirathi and Others*, , analyses in detail the requirement of Order 21, Rules 35 and 36 and the circumstances in which it would be held that the delivery of possession is riot actual and effective and hence not legal. It is held therein that where there is no legal, complete or effective delivery of possession oil an earlier occasion, it is competent for the decree-holder to apply again for physical delivery of possession.

7. Mr. P. K. Misra, the learned Counsel for the opposite parties, has submitted that it is open to the decree-holder to ask that possession has not been delivered. But such a plea is not available to the judgment-debtors when the decree-holder says that he has got delivery of possession and report has been submitted to the Court that possession has been delivered. He strongly relied upon *Tavanappa*" s case.

8. I would, however, prefer the decision of the learned Single Judge of Mysore in *Raghavendra*'s case. That appeals to logic and commonsense. If there was, in fact, no delivery of possession effective, complete or legal the decree is not satisfied, whatever the decree-holder may say to the contrary. This follows from *Rama Subudhi*"s case, referred to above. I do not understand why on principle it shall be open to the decree-holder to move the second application even for delivery of possession despite report that possession had been delivered but the judgment-debtor would be deprived of his right to objection that possession has not, in fact, been delivered. I do not agree with the observations in *Tavanappa*"s case that the judgment-debtor has no interest in the property to protect. Fraudulent delivery of-possession might land him in troubles and his interest in the property might be in jeopardy. For example, when he is, in fact, in possession and possession has not been taken from him, it would be open to the decree-holder to institute criminal proceedings for his occupation alleging that he had entered upon the land or done some act after delivery of possession. Therefore, he is vitally interested in objecting to the decree-holder"s plea or the report of the process-server that possession has been delivered when it is not so. Many other illustrations can be given, but it is unnecessary for me. The language of Section 47 does not admit of any such exclusionary rule. As the language reads, objection can be raised to the satisfaction of the decree. If the decree-holder can much more so the judgment-debtor. Hence, I am of the view that it was open to the judgment-debtors., notwithstanding the report of the process server and statement of the decree-holder that possession was delivered, to

raise objection that possession of the immovable property was not delivered.

9. In the result, order dated 24.-3-1984. passed by the executing Court is set aside and the revision is allowed. The objection is held to be maintainable and the executing Court is directed to proceed to enquire into the allegations. There would be no order for costs.

Revision allowed.