

(2021) 01 SHI CK 0245
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 158 Of 2019

Karam Chand

APPELLANT

Vs

Paras Ram

RESPONDENT

Date of Decision : 05-01-2021

Acts Referred:

Limitation Act, 1963 — Article 135, 136

Code Of Civil Procedure, 1908 — Section 47, 115, Order 21 Rule 35, Order 26 Rule 9

Citation : (2021) 01 SHI CK 0245

Hon'ble Judges : Ajay Mohan Goel, J

Bench : Single Bench

Advocate : Jiya Lal Bhardwaj, H.R. Jhingta

Final Decision : Dismissed

Judgement

Ajay Mohan Goel, J

1. Brief facts necessary for the adjudication of this petition are as under:-

Respondent herein filed a suit for permanent prohibitory and mandatory injunction against the present petitioner, i.e. Civil Suit No. 175/1 of 2001,

which was decreed by the Court of learned Civil Judge (Jr. Divn.) Arki, District Solan, H.P. on 09.06.2010 in the following terms:-

“This suit coming on this 9th day of June, 2010 for final disposal before me (Sapna Pandey), Civil Judge (Jr. Divn.), Arki, District Solan, H.P. in the

presence of Sh. Bhupinder Sharma, Advocate for the plaintiff and defendant already ex-parte. It is ordered that the suit of the plaintiff is decreed for

permanent prohibitory injunction restraining the defendant from interfering with the possession of plaintiff over land comprising khasra No. 79,

measuring 1-7 bigha situated in village Kiar, Pargna Kolka, Tehsil Arki, District Solan, H.P. and decreed for mandatory injunction. The suit is decreed

with costs. Relief of mandatory is subject to the condition stated above in para No. 13.â??

Copy of the decree sheet is appended with the petition as Annexure P-1.

2. Thereafter, the decree holder filed an application under Order 21, Rule 35 of the Civil Procedure Code for execution of the decree in issue before

the learned Executing Court. As present petitioner/judgment debtor did not appear before the learned Executing Court despite service of summons, he

was ordered to be proceeded against ex parte on 22.09.2015.

3. For the setting aside of ex parte order, an application was filed by the present petitioner before the learned Executing Court in the month of April,

2018, which stood dismissed by the learned Executing Court vide order dated 13.5.2019. Thereafter, on 31.10.2019, learned Executing Court has

ordered issuance of warrant of possession by demolishing whatever construction is found raised by judgment debtor over the suit land.

4. Feeling aggrieved, the petitioner/judgment debtor has filed this petition under Section 115 of the Civil Procedure Code against orders dated

13.05.2019 and 31. 10.2019, praying for the following reliefs:-

â??It is, therefore, most respectfully prayed that this petition may kindly be allowed throughout with cost and the impugned orders dated 22.09.2015

and 31.10.2019 passed by learned Executing Court i.e. Civil Judge, Arki, Distt. Solan, H.P. in Execution Petition No. 6/10 of 2015, in Civil Suit No.

175/1 of 2010, titled â??Paras Ram versus Karam Chandâ? while dismissing the application for setting aside ex parte order dated 22.9.2015 and

further issuing warrant of possession by demolishing whatever construction is found raised on Khasra No. 79, Khara Khatauni No. 13/14, area

measuring 1-7 bighas, situated in Village Kiar, Pargana Kolka, Tehsil Arki, District Solan, H.P. may kindly be quashed and set-aside and the warrant

of possession issued may kindly be recalled unexecuted and furthermore, execution petition may kindly be dismissed and justice be done. Any other

relief(s) as may be deemed just and proper may also be passed while allowing the petition and justice be done.â??

5. Learned Counsel for the petitioner has argued that the orders under challenge are not sustainable in the eyes of law for the following reasons:(a)

the relief of mandatory injunction was granted in favour of decree holder subject to filing of requisite Court fee before the learned Trial Court within

one month from the date of the judgment which was not done by the decree holder; (b) the execution petition was time barred as the same was not

filed within the limitation provided under Article 135 of the Limitation Act; (c) the impugned order dated 31.10.2019 passed by learned Executing

Court was bad in law as the same was passed by ignoring that there was no decree of possession passed in favour of the decree holder by the learned

Civil Court. No other point was urged.

6. The stand of the learned Counsel for the respondent/Decree Holder has been that the Court fee was deposited, though later on by the decree

holder and the same was accepted by the learned Trial Court which has not been assailed by the judgment debtor till date and the orders passed by

learned Executing Court are in consonance with the decree which stood passed in favour of decree holder and the execution was not time barred as

urged by the petitioner/judgment debtor.

7. I have heard learned Counsel for the parties and also gone through the pleadings as well as the record of the learned Trial Court which stood

requisitioned by this Court.

8. The judgment and decree passed by learned Civil Judge (Junior Division) was to the effect that the decree holder was held to be the exclusive

owner in possession of the suit land and defendant was found to have encroached upon three biswas of the suit land. Accordingly, learned Court

decreed the suit for permanent prohibitory injunction, vide which, the defendant was restrained from interfering with the possession of the plaintiff

over the suit land comprised in Khasra No. 79, measuring 1-7 bighas, situated in village Kiar, Pargana Kolka, Tehsil Arki, District Solan, H.P. by way

of digging or carrying out construction over any portion of the suit land. The suit was also decreed for the relief of mandatory injunction with the

direction for demolition of the cow shed/shed constructed on the portion of the suit land by the defendant, which relief was subject to filing of Court

fee by the plaintiff within one month from the date of order.

9. Record demonstrates that vide application dated 7. 07.2010, decree holder applied for extension of time in making good the deficiency in Court fee

and vide order dated 23. 07.2010, learned Court allowed the same by ordering that deficient Court fee be filed within 10 days. The Court fee

admittedly was filed on 07.08.2010, which was accepted by the learned Court

below and there is no challenge to this by the judgment debtor.

10. In this view of the matter, in my considered view, there is not much merit in the contention of learned Counsel for the petitioner/judgment debtor

that the decree in issue could not have been executed as the deficiency in Court fee was not made good within the time granted by the learned Court

below. The factum of Court fee being accepted subsequently by the learned Court below demonstrates that by the act of acceptance of the same, the

Court impliedly extended the time for filing the same.

11. Further, it is not in dispute that the decree which was passed by learned Civil Court in favour of decree holder was both for permanent prohibitory

injunction as well as for mandatory injunction. It is also not in dispute that decree till date has not been complied with, which has led to passing of the

orders by the learned Executing Court to the extent that fresh warrant of possession be issued against the judgment debtor with the direction to

execute the warrant of possession by demolishing whatever construction was found raised by the judgment debtor over the suit land.

12. A perusal of the order dated 31.10.2019 passed by learned Court below demonstrates that it is not as if learned Executing Court has taken the

decree passed in favour of decree holder to be a decree for possession. Learned Court has made an observation that the decree holder has been held

entitled for possession of a portion of land encroached upon by the judgment debtor which observation is strictly in terms of the judgment and decree

passed by the learned Civil Court in favour of the plaintiff wherein learned Court held that besides decree for permanent prohibitory injunction, the

decree holder was also entitled for decree of mandatory injunction with the direction for demolition of cow shed constructed on the portion of the suit

land by the defendant. Incidentally, it is not the contention of the judgment debtor that he has complied with the decree and has removed whatever

structure was raised by him over the suit land.

13. Before proceeding further, this Court would also dwell upon the issue of the judgment debtor having been proceeded against ex parte in the

execution proceedings as well as the dismissal of the application filed for recalling of the ex parte order by the learned Executing Court. It is not in

dispute, as is also borne out from the record, that in the execution proceedings, the judgment debtor was duly served, yet he failed to appear before the

learned Executing Court. In these circumstances, but natural, the only option available with the learned Executing Court was to proceed against the judgment debtor ex parte, which was rightly done by it. Therefore, per se, there is no illegality with the order passed by the learned Executing Court proceeding against the judgment debtor ex parte in the execution proceedings.

14. The application which was filed for setting aside the ex parte order has been dismissed by the learned Executing Court on 13.05.2019. A perusal of the said order demonstrates that the following reasons stand assigned by the learned Executing Court while dismissing the application:-

6. Perusal of record shows that the present execution petition was registered on 02.07.2015 and summons were issued to the JD returnable for

22.09.2015. The JD was duly served for 22.09.2015, however, none appeared on behalf of the JD on the date aforementioned and the JD was

proceeded against ex parte on the date aforementioned. Thereafter, this Court vide order, dated 04.09.2017, had issued warrant of possession against

the JD and direction were issued to demolish the cowshed constructed by the JD by encroaching upon land comprised in Khasra No. 79. The warrant

of possession issued by this Court was not received back either executed or unexecuted and on 03.04.2018, the JD filed the present application before

the Court for setting aside the ex parte order passed against him on 22.09.2015.

7. The JD has contended that he is illiterate and was under impression that summons was issued to him by the Revenue Court. However, there is no

merit in the aforesaid contention of the JD, as the summons issued by this Court to the JD returnable for 22.09.2015 not only bears the seal of this

Court but it is also reported by the serving official that the summons were duly served upon the JD and the JD was also intimated about the date of

hearing before this Court.

8. Furthermore, the conduct of the JD remains to be seen in the present case. He appeared before the Court on 03.04.2018, after a period of two and

half years passing by since the order, dated 22.09.2015, was passed by this Court and that too after warrant of possession was issued against the

JD by this Court. Appended to the present execution petition is record of Civil Suit No. 175/1 of 2001, titled Paras Ram Vs. Karam Chand, perusal of

which goes to show that this Court had decreed the suit filed by the DH and a decree for mandatory injunction was passed in favour of the DH with

the direction to demolish cowshed constructed by the JD over the suit land. Noticeably, the JD had initially contested the suit aforementioned by filing written statement and had also moved an application under Order XXVI Rule 9 CPC for appointment of a Local Commissioner, when the case was listed for plaintiff's evidence. Thus, it transpires that the JD was very much aware of the suit filed by the DH and as such, the contention of the JD that he is illiterate and was under impression that the summons were issued by the Revenue Court further becomes doubtful and cannot be considered.

15. During the course of arguments, learned Counsel for the petitioner could not demonstrate that the reasoning which stood assigned by the learned Executing Court while dismissing the application of the petitioner/judgment debtor was per se bad and not borne out from the record. This demonstrates that the act of the judgment debtor of not appearing before the learned Executing Court despite being served was a deliberate act and it was only after a warrant of possession stood issued against the judgment debtor by the learned Executing Court that he approached the Court and that too at a belated stage for having ex parte order set aside. Therefore, this Court finds no infirmity in order dated 13.05.2019 passed by the learned Executing Court, vide which, the application of the judgment debtor for setting aside the ex parte order was dismissed by it. Otherwise also, in my considered view, the dismissal of the said application has now lost its efficacy because in present proceedings, full opportunity stood granted by the Court to judgment debtor to put forth its case against the execution proceedings initiated against him by the decree holder as well as against the order passed by learned Executing Court dismissing the application for setting aside said ex parte order as also the order of issuance of warrant of possession against him.

16. Now reverting back to the contention of the petitioner that the execution was beyond the limitation and further, no warrant of possession could be issued as there was no decree of possession. In my considered view, there is no merit in this submission made on behalf of the petitioner as Hon'ble Supreme Court of India in *Jai Dayal and others v. Krishan Lal Garg and another*, AIR 1997 Supreme Court 3765, has been pleased to hold that if a judgment debtor has suffered the decree, no attempt to circumvent

the perpetual injunction and mandatory injunction, can be permitted.

Meaning thereby that the judgment debtor has to obey the decree and the decree holder cannot be driven to file another suit for non-compliance on the part of the judgment debtor.

17. In the present case, the decree was both for permanent prohibitory injunction as well as for mandatory injunction. It is not in dispute that in terms of the provisions of Article 135 of the Limitation Act, the period of limitation for execution of any decree other than the decree granting mandatory injunction is 12 years. As a result of the structure raised by the judgment debtor over the suit land not being removed by him, undoubtedly, besides disobeying the decree for mandatory injunction, the judgment debtor is also not obeying the decree of permanent prohibitory injunction as he continues to interfere with the possession of the plaintiff over the suit land through the construction which stood raised by him over the suit land. That being the case, in my considered view, it cannot be said that the execution petition was time barred or that in the peculiar facts of this case, the execution was to be governed by the provisions of Article 135 of the Limitation Act as far as limitation is concerned. In these circumstances, this Court finds no infirmity with the order passed by learned Executing Court dated 31.10.2019 vide which the learned Executing Court has directed the execution of the decree by issuance of warrant of possession by demolishing whatever construction is found to have been raised by the judgment debtor over the suit land.

18. Learned Counsel for the petitioner by relying upon the judgments passed by Honâ??ble Supreme Court of India as well as different Honâ??ble High Courts, including this Court, has argued that it is settled law that the Executing Court cannot go behind the decree. There is no dispute with the said preposition of law, however, the petitioner has not been able to demonstrate that by issuance of a direction to execute the warrant of possession by demolishing whatever construction is found raised by the judgment debtor over the suit land, the Executing Court has gone behind the decree. This I say so for the reason that the decree which has been passed in favour of the plaintiff by the learned Court below, is for permanent prohibitory injunction as well as for mandatory injunction.

19. Before parting, this Court wants to observe that in exercise of its revisional

powers under Section 115, this Court interferes with the orders passed by the learned Courts below in the event of learned Court either exercising jurisdiction not vested in it or not exercising jurisdiction vested in it or exercising jurisdiction vested in it with material irregularity. In the present case, none of these three ingredients have been satisfied by the petitioner.

The order whereby the present petitioner was proceeded against ex parte obviously was a valid order passed by learned Executing Court because once the judgment debtor despite valid service did not put in appearance before the learned Executing Court, said Court had no option but to proceed against him ex parte. Similarly, the dismissal of the application for setting aside ex parte order has been done by the learned Executing Court by way of a reasoned order and there is no material irregularity in exercise of jurisdiction by the learned Executing Court as valid reasons have been given while dismissing the application for setting aside ex parte order, which reasons are supported by record. As far as the last order passed by learned Executing Court dated 31.10.2019 is concerned, this Court has already observed that as the execution was within limitation, therefore, learned Executing Court was will within its domain to pass said order. Learned Counsel for the petitioner has relied on judgment passed by Honâ??ble High Court of Punjab and Haryana at Chandigarh in Imperial Hotel and Restaurant Pvt. Ltd. Versus Sh. Karnail Singh and others, (CR No. 4171 of 2010 (O&M), decided on 30.06.2014). However, this Court with due respect does not concurs with the view taken by Honâ??ble Punjab and Haryana High Court because in the considered view of this Court, the execution petition filed by the present case could not be said to be barred by limitation for the reasons already enumerated hereinabove.

20. This Court in Ashok Bala wife of Kamal Kishore and another versus Ms. Sarla Devi and others, 2013 (1) Shim. LC 334 ,in which the issue involved was with regard to the limitation vis-a-vis the execution of a decree for perpetual injunction and mandatory injunction, the findings returned were as under:-

â??11. I am in respectful agreement with the principles of law as laid down supra. In these circumstances, I find no merit in this petition which is accordingly dismissed. I direct that the execution of the decree cannot be thwarted by urging limitation. In these circumstances, the judgment debtors

shall dutifully obey the decree even if as a consequence it involves the removing of any structure raised by the judgment debtors. To hold otherwise

would be grant an unfair advantage to the judgment debtors who can disobey the decree with impunity. This direction in no manner contravenes

Article 136 as the execution of the perpetual injunction may involve removal of obstacles etc., or carrying out a positive act to drain away the water

from the land of the decree holders.â??

21. Honâ??ble High Court of Bombay in Shri Benedito (Betty) Dias Alias Benedict Dias and Others Versus Shri Armando Benedita Fernandes

(Through LRâ??s) and others (Writ Petition No. 353 of 2011, decided on 09.02.2017), under similar circumstances, has been pleased to hold as

under:-

â??10. I have carefully considered the rival circumstances and the submissions made. I would first propose to deal with the challenge on the ground

of limitation. It is a matter of record that the decree sought to be executed is passed on 29.10.1990, while the application for execution was filed on

14.05.2003. The decree as set out above, is a composite decree consisting of both, a mandatory part and the one granting prohibitory injunction. There

are separate Articles dealing with the period of limitation for execution of a decree of mandatory injunction and for a decree other than granting

mandatory injunction, which are contained in Articles 135 and 136 of the Limitation Act respectively. While in Article 135, the period for enforcement

of the mandatory injunction is three years, provisions of Article 136 and the proviso thereto would make it explicit that execution of a decree granting

perpetual injunction, is not subject to any period of limitation. It can clearly be seen that mandatory injunction was in respect of a mud structure

admeasuring 15 square metres and two huts admeasuring 5 square metres each and the extended portion of the suit structure admeasuring 10 to 12

square metres. It has clearly come on record that the petitioners after the passing of the decree had carried out RCC construction of a ground plus

one structure and that too, without any license/permission from the local Authority. The structure, which was originally standing on the land and the

present structure, have clearly come on record by virtue of photographs at Exhibit 64, which are proved before the Executing Court.

11. It can thus be seen that what was sought to be executed was the part of the

decree granting prohibitory injunction, or so to say a breach thereof, which would be governed by proviso to Article 136 of the Limitation Act. The relief in clause (j)(b) in the execution application, is referable to a construction made subsequent to the passing of the decree.

12. The decision of the Kerala High Court, in the case of M.G. Simon (supra), cannot take the case of the petitioners any further and in fact, would assist the respondents. In that case also, it has been held that an application for enforcement of the decree granting prohibitory injunction shall not be subject to any period of limitation and where there is a composite decree, granting mandatory and prohibitory injunction, one part is subjected to limitation period of three years, whereas the other is not subjected to any period of limitation. The petitioner can enforce the prohibitory injunction, whenever violation of that part takes place.

13. In the case of Jai Dayal (supra), the Hon'ble Supreme Court has held that once the decree of perpetual and mandatory injunction has become final, the judgment debtor is required to obey the decree and a party cannot and should not, by his action be permitted to drive the decree holder to file a second suit. It has been inter-alia held that non-compliance is a continuing disobedience in respect of which a separate/fresh suit is barred under Section 47 of the CPC. Thus, in my considered view, the contention based on the execution being barred by limitation, cannot be accepted.â??

22. Similarly, Honâ??ble High Court of Judicature at Allahabad in Som Nath v. S Vith A.D.J. Bareilly (Civil Miscellaneous Writ Petition No. 9442 of 1993, decided on 31. 01.2011), has been pleaded to hold as under:-

(7) The grievance of the defendant/J.D./petitioner is that the decree, which was ultimately passed by this High Court on 30.11.1979 was a decree for mandatory injunction, hence by virtue of Article 135 to the Schedule annexed to the Limitation Act, 1963, the limitation to file execution application for such decree was only three years, which expired on 29/30.11.1982 and the execution application was filed beyond time by about five weeks. The Executing Court/ First Additional Civil Judge, Bareilly issued writ of demolition through orders dated 25.1.1983, 27.1.1983, 3.2.1983 and 18.2.1983.

Copies of the said orders are contained in the order-sheet, copy of which is Annexure-VI to the writ petition. Against the said orders, petitioners filed Civil Revision No. 41 of 1983. A.D.J. (III), Bareilly allowed the revision through

order dated 21.9.1985 and quashed all the four orders and directed Executing Court to issue notices to other J.Ds. for filing objection, and decide the matter thereafter. True copy of the judgment dated 21.9.1985 is Annexure-VII to the writ petition. Thereafter objections were filed. Thereafter the Executing Court through orders dated 14.1.1987 and 24.1.1987 again issued writ of demolition. The said orders are also contained in the order-sheet, copy of which is Annexure- VI to the writ petition.

(8) It is stated in Para-19 of the writ petition that learned District Judge, Bareilly suo motu summoned the record and exercised the power of revision

under Section 115, C.P.C. Annexure-IX to the writ petition is the order of District Judge, Bareilly dated 28.5.1987 given in Civil Revision No. 73 of

1987, Somnath and others v. Smt. Katori Devi. The order mentions that ""on matter being brought to my notice by Sri Govind Prasad, advocate I

examined the record of Execution Case No. 1 of 1983."" In the said order it has further been mentioned that it appeared from the record that writ of

demolition and possession had been issued without consideration and compliance of order dated 21.9.1985 passed in the earlier revision (Civil Revision

No. 41 of 1983) and without information or notice to counsel of J.D. No. 1/1 who had filed objections and without disposal of question of limitation.

Thereafter, the said revision was dismissed on 3.11.1992 by A.D.J. (VI), Bareilly. Copy of the said judgment is Annexure-X to the writ petition. The

Revisional Court considered the question of limitation. The Revisional Court held that it was not merely a decree for mandatory injunction, hence it

was not covered by Article-135 of the Limitation Act as the plaintiff was to get possession also after demolition. The Revisional Court placed reliance

upon 1986 AWC 10. Through this writ petition, prayer for setting aside the judgment and order dated 3.11.1992 passed in Civil Revision No. 73 of

1987 has been sought. Orders passed by the Executing Court issuing writ for demolition have also been sought to be set aside. Writ of mandamus has

also been sought commanding the respondents to dismiss Execution Case No. 1 of 1983.

(9) I do not agree with the contention of learned counsel for the petitioner that the decree was for mandatory injunction alone, hence it could not be

executed after more than three years. Firstly other prayers were also there apart from prayer of mandatory injunction. Secondly, even in the prayer of

mandatory injunction in the plaint (sa) the first part of the prayer was that defendant must be directed to remove the construction made in the passage, however in the same sentence it was also prayed that in case defendant did not do so, through Court Amin plaintiff should be delivered possession after demolition of new constructions.

(10) Accordingly, it could not be said that it was pure and simple relief of mandatory injunction. In this regard revisional Court rightly referred to Dakhilal Kushwahav. A.D.J., 1986 AWC 10.

(11) In the aforesaid authority it has been held that if the suit is decreed for demolition and possession then decree for demolition becomes non executable if execution is not filed within three years, however, decree for possession may be enforced by filing execution application within 12 years

and in the latter contingency defendant/JD would be either entitled to take away the superstructure or he would be paid the cost thereof. Same

principle applies to a combined decree of mandatory injunction and prohibitory injunction. The third relief granted by the trial Court and maintained uptil

this Court is for a perpetual prohibitory injunction. The operative portion of the judgment by the trial Court is not very happily worded, however,

reading it alongwith issue No. 5 regarding relief it is quite clear that it has also been decreed that the plaintiff has right of passage through

ABCDEFGA unobstructed in any way. It means that decree for permanent prohibitory injunction has also been granted. Such a decree cannot be

enjoyed unless constructions in the passage apart from wall E X are removed. For executing a decree for permanent prohibitory injunction no time

limit is prescribed (proviso to article 136 of the Schedule to the Limitation Act 1963). The trial Court passed the decree for removal of construction

also. Accordingly, in my opinion, just as decree for possession remains intact even if execution application for executing decree for mandatory

injunction is not filed within three years, similarly, decree for permanent prohibitory injunction remains executable even if application for executing that

part of the decree through which mandatory injunction has been granted is not filed within three years. Further, if in order to execute the decree for

permanent prohibitory injunction, removal of some construction is necessary then it may be done at any time even though it was also directed to be

done through the decree by way of mandatory injunction.â??

In view of the findings returned hereinabove, as this Court does not finds any merit in this petition, the same is accordingly dismissed.