
(2018) 05 GAU CK 0220
In the Gauhati High Court
Case No : CRP 59 of 2015

Ms. Nasiba Sultana Hussain And Anr.

APPELLANT

Vs

Atul Pathak

RESPONDENT

Date of Decision : 29-05-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 47
Constitution of India 1950 — Article 227

Citation : (2018) 05 GAU CK 0220

Hon'ble Judges : PRASANTA KUMAR DEKA, J

Bench : Single Bench

Advocate : S B Rahman, J Das

Final Decision : Disposed Off

Judgement

1. Heard Mr. S. B. Rahman, learned counsel for the petitioners. Also heard Mr. S. Sahu, learned counsel appearing on behalf of the respondent.

2. In this revision application the order dated 06.08.2013 passed in Title Execution No.3/2011 in the Court of learned Munsiff No.1, Jorhat is put under challenge by the petitioner/Decree Holder. The Decree Holder/petitioner filed Title Suit No.83/1988 against the present Judgment Debtor/respondent

as the sole defendant for khas and vacant possession of

the suit premises after evicting the Judgment Debtor/respondent along with claim for arrear rent and for compensation etc.

3. The suit premises described in the plaint is reproduced herein below:

â??Schedule-A:

Suit Premises:- One Assam Type House bearing Jorhat municipal holding No.199 in ward No.13 of Jorhat town situated on a plot of land covered by

dag No.359/1088 of PP No.253 of Block No.5, Jorhat town Mouza within the following boundaries: North-Land and house of Late Harun Rashid

South-Land with holding No.206 of ward No.13, Jorhat town. East-Land and house of late Mahiba West-Lane.â??

4. The said suit was dismissed by the trial court whereafter Title Appeal No.3/1995 was filed in the learned court of the then Civil Judge, (Senior

Division), Jorhat and the said first appeal was decreed in favour of the Decree Holder/petitioner vide judgment dated 21.07.1999. The Judgment

Debtor/respondent thereafter preferred CRP No.4/2000 in this Court and the same was also dismissed vide judgment and order dated 16.03.2006.

Being dissatisfied with the finding of this Court in the said CRP No.4/2000, a review application bearing RP No.51/2006 was preferred by the

Judgment Debtor/petitioner. Therein a specific point was raised which is reproduced herein below:-

â??Mr. Banerjee has argued that as both the Courts below had held against the tenancy in respect of suit premises, the decree for delivery of khas

possession thereof, by branding the review applicant to be an encroacher, is per se unsustainable in law and that this Court having left out of

consideration of the above aspect of the matter, the judgment and order dated 16.03.2006 ought to be reviewed.â??

5. Against the said point raised, this Court vide order dated 05.06.2006, disposed of the review application RP No.51/2006 by holding as follows:-

â??I have carefully perused the judgment and order sought to be reviewed. It appears therefore that not only the pleaded assertions of the parties had

been dealt with but also the arguments advanced on behalf of the parties were duly taken note of in arriving at the conclusion recorded therein. The

review applicant-defendant explicitly averred in his written statement that he was neither a tenant in respect of the suit premises nor in possession

thereof. The declaration of the respondent-plaintiffâ??s right, title and interest therein, was thus valid. Consequently, the decree for delivery of

possession thereof, by clearing the same of any encroacher cannot be said to be vitiated by any legal infirmity. If the review applicant-defendant is not

in possession of the suit premises as claimed by him, the decree cannot in any view of the matter be prejudicial to him. The point urged by no means

can be construed to be a valid ground for review under the law. No error apparent on the face of the record in the judgment and order sought to be

reviewed is perceptible. The review application being without any merit, is therefore dismissed. No costs.â??

6. The Decree Holder/petitioner thereafter put the said decree for ejectment in Title Execution No.3/2011 in the Court of learned Munsiff No.1,

Jorhat. It would not be out of place to mention here that prior to the said execution proceeding, another execution proceeding was preferred which

was dismissed for default. In the pending execution proceeding, the Judgment Debtor/respondent preferred an application with a prayer to drop the

execution proceeding on the ground that the Decree Holder/petitioner inserted Schedule-B for the possessory right whereas there was no Schedule-B

in the decree passed in Title Suit No.83/1988 and thereafter in Title Appeal No.3/1995. In addition to that, in the earlier execution proceeding which

was numbered as Title Execution No.5/2000, the Nazir vide his report dated 08.05.2007, submitted that the decretal land measuring 7 lechas was not

under the possession of the Judgment Debtor/respondent. Further it was raised that the boundaries mentioned in the Schedule of execution proceeding

are not correct and as such execution proceeding is liable to be dismissed. Being faced with such a situation, the learned Executing Court was

satisfied to call the concerned Lat Mandal under the concerned Circle Office, Tax Collector under Jorhat Municipal Board for identification of the

decretal premises. Considering the evidence on record of the said witnesses the Executing Court dropped the Execution Case by holding that the

decretal land is not identifiable. Thereafter, the present Decree Holder/petitioner preferred this revision application challenging the said order dated

06.08.2013 under Article 227 of the Constitution of India in the year 2015.

7. Mr. Rahman, the learned counsel for the petitioner submits that the Executing Court had gone beyond the jurisdiction in an execution proceeding by

going against the finding of the learned court below that the decretal property is not identifiable. Mr. Rahman submits that the same is very much

identifiable inasmuch as the same is well defined in the plaint by showing its boundaries on all four sides. According to him, the learned Executing

Court failed to consider the materials on record and passed the impugned order which is liable to be interfered with.

8. Mr. Sahu, on the other hand, submits that the suit originally was for eviction of the tenant under the Rent Control Act but after dismissal of the

same by the trial court, the learned First Appellate Court exceeded its jurisdiction and declared right, title and interest of the Decree Holder/petitioner

which it cannot do. It is the contention of Mr. Sahu that a Court exercising jurisdiction under the Rent Control Act has its jurisdiction limited. The

relationship of landlord and tenant is to be considered and violation of any terms and conditions thereof but not the right, title and interest of the

landlord. The decree being without jurisdiction the same is nullity and it is inexecutable. The question of nullity in such a situation can be raised at any

time or at any stage and under such circumstances, the Executing Court was correct in arriving to the conclusion that the decree is not executable. It

is also submitted that the revision petition is not maintainable inasmuch as the same is filed under Article 227 of the Constitution of India and that too

with unexplained delay. Moreover, this application was filed without any petition for condonation of delay and as such it ought not to have entertained

by this Court. It is also submitted that the point raised in the review application was not with respect to the question of nullity of the decree but with

respect to the exercising of the jurisdiction of the learned First Appellate Court and as such the said finding in the review application cannot bar the

Executing Court from entering into the issue of nullity of the decree passed by the learned First Appellate Court. In addition to that it is submitted that

the decree which is a nullity remains as it is and it can be challenged at any stage. Submitting such, Mr. Sahu sought for dismissal of this revision

application.

9. Considered the submission of learned counsel. This revision application arises from the order dated 06.08.2013 passed in an execution proceeding.

An aggrieved party in an execution proceeding can take resort to Article 227 of the Constitution of India in order to seek for invoking the power of

superintendence to examine the application of the jurisdiction by the subordinate courts under the High Court if there is no other prescribed efficacious

remedy in the Code of Civil Procedure, 1908 which is the present case in hand. Submission of Mr. Sahu with respect to unexplained delay cannot be

accepted, more so, as against the point raised by Judgment Debtor/respondent in his affidavit-in-opposition, there is an explanation from the Decree

Holder/petitioner that another counsel was engaged for preferring this revision application and the petitioner was upon the bonafide belief that the

same was filed. Later on, having come to know that the same was not filed, the brief was taken back from the said counsel and engaged the present set of counsel.

10. The other submission of Mr. Sahu is that the decree itself is a nullity and as such it is not at all executable owing to the reason that a court under the Rent Control Act has no jurisdiction to pass any decree for right, title and interest of the landlord and on the basis of the said declaration of the right, title and interest a decree for ejectment of a tenant cannot be passed. This point was raised before the Revisional Court and the said Court opined that considering the factual matrix and the stand taken by the Judgment Debtor/respondent, the declaration of the right, title and interest of the Decree Holder/petitioner was valid and as such the decree for delivery of possession thereof by clearing the same from any encroachers cannot be said to be vitiated by any legal infirmity.

11. Herein it would be appropriate to take note of the jurisdiction of an executing court under Section 47 of the Code of Civil Procedure as held in

Brakewel Automotive Components (India) (P) Ltd. V. P.R. Selvam Alagappan reported in (2017) 5 SCC 371 wherein the Honâ??ble Apex Court

relying Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman reported in AIR 1970 SC 1475 held as follows:-

Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on

the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman in

essence enunciated that only a decree which is a nullity can be the subject matter of objection under Section 47 of the Code and not one which is

erroneous either in law or on facts. The following extract from this decision seems apt:

â??6. A Court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its

tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or

revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead

at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.â??

12. In the present case in hand the point of nullity or lack of jurisdiction of the courts below was already scrutinised in the Review Petition and the same cannot be reagitated before the Executing Court. The Executing Court can decide the executability of a decree and for that purpose the learned Executing Court can look into the pleadings of the parties. As hereinabove stated, the suit premises in the pleading, more specifically in the plaint the Decree Holder/petitioner specifically described the suit premises under Schedule-A. The suit premises is under the municipal holding No.199 of Jorhat Municipal Board and the evidence of the Tax Collector if considered it is very much apparent that there exists holding under the said No.199 along with the name of the owner as per demand register of the said Municipal Board. It stood in the name of Nasiba Sultana, the present petitioner. Such being the position, there is no doubt that the decretal premises is identifiable inasmuch as in the written statement it was not disputed so far the boundaries as mentioned in the suit premises are concerned, rather it was the stand of the Judgment Debtor/respondent that the suit premises and the premises under his occupation are totally separate.

13. Keeping in view of the observation made in the order dated 05.06.2006 in the Review Petition No.5/2006 and the description of the suit premises in the plaint, in my considered opinion, the decree so passed cannot be termed to be nullity and the learned First Appellate Court which passed the decree was well within the jurisdiction keeping in view the factual matrix and the said decree is valid. The suit premises which is the decretal premises in the decree is identifiable as per Schedule-A of the plaint and as such the

learned Executing Court will confine the execution for ejectment and delivery of possession to the Decree Holder/petitioner as per boundaries mentioned in the Schedule-A of the plaint in Title Suit No.83/1988 and not beyond that.

14. Accordingly, this revision petition stands disposed of by setting aside the impugned order dated 06.08.2013.

15. Interim order passed earlier stands vacated.