
(2003) 04 CAL CK 0028
In the Calcutta High Court
Case No : Civil Order No. 2925 of 2002

Mstt. Sarwari Begum	Vs	APPELLANT
Nazir Ahmed and Others		RESPONDENT

Date of Decision : 24-04-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 15, Order 21 Rule 16, 47

Citation : AIR 2003 Cal 230 : (2003) 2 CALLT 583

Hon'ble Judges : Subhro Kamal Mukherjee, J

Bench : Single Bench

Advocate : Ashoke Banerjee and Shyamal Sanyal, for the Appellant; Priyabrata Mukherjee, Sachin Kumar Santra and Murari Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

Subhro Kamal Mukherjee, J.—This is to consider an application under Article 227 of the Constitution of India challenging the judgment and order dated September 3, 2002 passed by the learned Additional District Judge. Third court, Howrah in Civil Revision Case No. 5 of 2001 affirming order dated December 18, 2002 passed by the learned Civil Judge (Junior Division), Third Court, Howrah in Misc. Case No. 26 of 1992.

2. The predecessor-in-interest of the decree holders/opposite parties, Md. Idris, instituted Title Suit No. 215 of 1976, inter alia, for declaration of his title in respect of suit property and for recovery of possession. Ultimately the said suit has been decreed.

3. The decree holders put the decree into execution giving rise to Title Execution Case No. 23 of 1991 and Mstt. Sarwari Begum, the defendant No. 2 in the said suit, filed an objection u/s 47 of the CPC challenging the executability of the decree, which was registered as Misc. Case No. 26 of 1992 in the executing Court. The learned Civil Judge (Junior Division), third Court, Howrah dismissed the said objection u/s 47 of the CPC holding, inter alia, that the pleas taken by

the petitioner in the objection u/s 47 of the CPC could not be agitated again in the executing Court. Accordingly, the application u/s 47 of the CPC was rejected on contest with costs.

4. The present petitioner moved a civil provisional application u/s 115A of the CPC in the Court of the learned District Judge, Howrah challenging the order dated December 18, 2000 passed by the learned Civil Judge (Junior Division), Third Court, Howrah in Misc. Case No. 26 of 1992. The aforesaid civil revisional application was registered as Civil Revision Case No. 5 of 2001, which was eventually transferred to the court of the learned Additional District Judge, third Court at Howrah.

5. In the revisional Court an application for amendment was filed and it was contended that the decree holders transferred their right, title and interest in respect of the suit property by registered deeds dated March 13, 2002 and May 15, 2002 to different purchasers. It was, further, contended that as the properties stood vested in the purchasers, the decree holders had no subsisting interest in respect of the suit property and as such they had no right to execute the decree. In the revisional court copies of the said deeds of conveyance were filed.

6. My attention has, also, been drawn to a petition purportedly filed by the decree holder No. 2, Rafique Ahmed, on or about September 23, 2002 in connection with the Title Execution Case No. 23 of 1991 admitting that the property in suit has been transferred by two registered deeds of conveyances and as such he was not ready to proceed with the said execution case.

7. By the judgment and order dated September 3, 2002 the revisional court dismissed the revisional application and affirmed the order passed by the executing court.

8. Being aggrieved the petitioner has come up with this application under Article 227 of the Constitution of India.

9. Mr. Ashoke Banerjee, learned senior advocate, appearing for the petitioner, argued that the decree holders have transferred their right, title and Interest in the suit property and, therefore, they have lost their rights to execute the decree, particularly, when the suit was for declaration of title. Mr. Banerjee in this connection cited two decisions of the Supreme Court of India in the cases of Haji Sk. Subhan Vs. Madhorao, :and Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, Mr. Banerjee, further, submitted that it was for the subsequent purchasers to come and to obtain leave from the executing Court to execute the decree under Order 21, Rule 16 of the Code of Civil Procedure.

10. In Haji Sk. Subhan (supra) the respondent before the Supreme Court of India filed a suit for possession of certain fields and based his claim on his proprietary right to recover possession and not on loss of possession on account of the dispossession by the appellant. The suit was decreed and the decree was

upheld by the High Court. Before the delivery of the judgment by the High Court, M. P. Abolition of Proprietary Rights (Estates. Mahals, Alienated Lands) Act, 1950 (M.P. Act No. 1 of 1951) came into operation. The said fact was not brought to the notice of the High Court. The decree holder filed execution application for the recovery of costs and for delivery of possession on July 23, 1951. The judgment debtor filed an objection to the prayer for delivery of possession on the ground that the decree holder had no right to dispossess the judgment debtor as the decree holder had lost its proprietary rights to the fields and the judgment debtor had acquired rights to occupy them under the said M, P. Act No. 1 of 1951 subsequent to the confirmation of the decree for recovery of possession by the High Court. It was contended that the State had, after the date of vesting, collected rent from the judgment debtor recognising that the land in suit to be tenancy land of the judgment debtor. The Apex court, in the aforesaid factual background, held that under the provisions of the said act, the proprietary rights in an estate in the area specified in the notification were to pass from such proprietor and vest in the State for the purposes of the State free from all encumbrances. Therefore, the provisions of the said Act were sufficient to divest the proprietor of such estate of his proprietary right. The decree holder was not in possession of the land in suit on the date of vesting and no question of continuing to retain possession arose. In those circumstances, it was observed that the executing court could refuse to execute, the decree on account of change in law and its effect. The observations of the Supreme Court of India runs as under :

The contention that the Executing Court cannot question the decree and has to execute it as it stands, is correct, but this principle has no operation in the facts of the present case. The objection of the appellant is not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection is based on the effect of the provisions of the Act which has deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the respondent has obtained the right to remain in possession of it. In these circumstances, we are of opinion that the Executing Court can refuse to execute the decree holding that it has become inexecutable on account of the change in law and its effect".

11. The reliance placed on the said decision, in the facts and circumstances of the case, is, therefore, not correct. In the said reported decision the objection was not based on the validity of the decree, but on the effect of the M. P. Act No. 1 of 1951 on the rights of the decree holder to recover possession. The problems and the facts involved in the case in hand are, therefore, different.

12. In Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, interpretation of the provisions of the Bihar Land Reforms Act, 1950 was involved. The Supreme Court of India, in interpreting the various provisions of the said Act, held that after the vesting of the estate of an intermediary in the State under the provisions of the said Act, a mortgagee-decree holder, who had

obtained his mortgaged decree before the vesting in respect of the mortgaged property, which was an "estate" within the meaning of the said Act and which included both bakashat and as well as other lands, had to proceed exclusively u/s 14 of the said Act. He could not proceed with the execution of the decree against the bakashat land of the judgment debtor by virtue "deemed settlement" u/s 6 of the said Act.

13. In my considered opinion the said decision does not, also, help the petitioner. The said decision concerns with the right of the mortgagee to levy execution. The right to levy execution was claimed by the decree holders as mortgagees after the estate mortgaged to them had vested in the State. Under the aforesaid circumstances the Supreme Court of India held, that mortgagees' remedy was only to proceed under the relevant provisions of the said Act.

14. The petitioner is not contending that the decree is not executable as invalid, but she contends that the decree was not executable by the named decree holders as they have transferred their right, title and interest in the decretal properties in favour of the third parties by registered deeds of conveyances. The point is no longer *res integra*. A Division Bench of this Court in the case of *Sambhunath Auddy Vs. Tarak Nath Auddy and Others*, held that mere transfer of property was not a transfer of the decree. The executing court was bound to allow execution at the instance of the recorded decree holders, unless the transferees should come in under Order 21, Rule 16 of the Code of Civil Procedure.

15. With reference to the application purportedly filed by the decree holder No. 2 in the executing Court on or about September 23, 2002 expressing that he was not ready to proceed with the execution case any more suffice is to say that Sub-rule (1) of Rule 15 of Order 21 of the CPC allows execution of the decree by one of the joint decree holders. The said provisions is intended more for the benefit of the judgment debtor as the judgment debtor would not be troubled with various execution proceedings by each of the decree holders. Therefore, it is not necessary that all the joint decree holders must join in making execution application. It is settled law that once a decree is passed jointly in respect of a piece of property, there is no scope for separate execution for recovery of possession of the property by each of the decree holders. Any one of the decree holders in whose favour the decree has been passed can execute the decree for benefit of all.

16. Accordingly, I do not find any substance in the application under Article 227 of the Constitution of India, which is, therefore, rejected without, however, any order as to costs.

17. Xerox certified copy of this order, if applied for, is to be supplied within seven days from the date of making application for the same.