

(1998) 09 AHC CK 0062
In the Allahabad High Court
Case No : C.M.W.P. No. 28213 of 1998

Mukesh Kumar Srivastava

APPELLANT

Vs

Anant Sahkari Avas Samiti Ltd., Allahabad and others

RESPONDENT

Date of Decision : 16-09-1998

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 3
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32, Order 39 Rule 2A, Order 43 Rule 1, 104, 105
Uttar Pradesh Co-operative Societies Act, 1965 — Section 100, 67(2), 68, 70(1), 71(3)

Citation : (1999) 1 AWC 636

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Sharad Malviya, for the Appellant; R.B. Singhal, for the Respondent

Judgement

S.R. Singh, J.—Challenge in the instant petition is focussed on the order dated 13.8.1998 passed by Civil Judge (Sr. Division). Allahabad in Execution Case No. 3 of 1998, Mukesh Kumar Srivastava v. Anant Sahakari Avas Samiti and others, by which the learned Civil Judge (Senior Division), Allahabad rejected the petitioner's application for execution of an order of ad-interim injunction dated 22.1.1998 passed by the Arbitrator/ Executive Engineer U. P. Avas Evam Vikas Parishad in exercise of power u/s 71 (3) of the U. P. Cooperative Societies Act, 1965.

2. Briefly stated, the factual matrix of the case is that in a dispute between Mukesh Kumar Srivastava on one hand and Anant Sahakari Avas Samiti Ltd., through its Secretary--Sri Ravindra Nath, 39, Jawaharlal Road, Allahabad : Sarvasri Ravindra Nath and Radha Raman Pandey on the other, the Arbitrator by his order dated 22.1.1998 interdicted the defendants from making any construction on plot No. 18B George Town House No. 29, Amar Nath Jha Marg, Allahabad and also from alienating the same attached with a direction to maintain status quo in respect of the said property. This led the petitioner to

move an application in the Court of Civil Judge (Sr. Division), Allahabad with the allegation that the injunction order aforestated was being flouted by the parties arrayed therein as opposite parties. The application came to be registered as Execution Case No. 3 of 1998. The prayer therein was that the District Magistrate, Allahabad and Senior Superintendent of Police, Allahabad be directed to enforce execution of the order of ad interim injunction dated 22.1.1998, and the parties be directed to observe in compliance the order of the Court. The application was attended with a further prayer that the parties arrayed as opposite parties to the application, be visited with penalties envisaged under law. It was alleged in the application that the order of injunction was sent to the concerned parties, but they did not stop the construction in manifestation of their disregard to the order of injunction, which was enforceable and executable at par with an order of civil court by virtue of Section 92 of the U. P. Co-operative Societies Act, 1965. The learned Civil Judge (Sr. Division), Allahabad by means of the order dated 18.7.1998, mandated the District Magistrate and the Senior Supdt, of Police, Allahabad to enforce the order of injunction passed by the Arbitrator and at the same time, restrained the opposite parties from making any construction over the property in dispute.

3. On 27.7.1998, an application/objection came to be moved by Dr. S. C. Gaur and Dr. Aruna Gaur attended with the prayer to recall the Parwana dated 18.7.1998 and hear the execution matters on merit. The text of the application was that the applicants namely, Dr. S. C. Gaur and Dr. Aruna Gaur, were not the parties in the proceedings before the Arbitrator and the execution proceedings were wrongly launched against them by having resort to manipulation and by practising fraud upon the Court. The execution application, it was further alleged, "was not maintainable under the law."

4. The learned Civil Judge (Sr. Division), by his order impugned herein held, *infer alia*, that Smt. Aruna Gaur, Sri Vivekanand Rai and Sri Suresh Chand Gaur impleaded as opposite parties 4, 5 and 6 in the execution application, were not impleaded in the Arbitration Case No. 276 (E) of 1997, Sri Mukesh Kumar Srivastava v. Anant Sahkari Avas Samiti Ltd. and two others and, therefore, the order of temporary injunction sought to be executed was incapable of execution against them ; the order of ad-interim injunction was issued as against Anant Sahkari Samiti Ltd., and two others, namely, Sarvasri Ravindra Nath and R. R. Pandey and since no allegation was made that they were making any construction over the plot in dispute in disregard of the injunction order, the application for execution as against them too would not be maintainable; Parwana was issued without notice to the parties and it was, therefore, liable to be recalled; the order of ad-interim injunction was not capable of execution in the manner, it was sought to be executed by means of the execution application ; and the application for execution was not capable of execution u/s 92 of the U. P. Co-operative Societies Act, 1965 in that the order of ad-interim injunction could be executed only in the manner prescribed by Order XXXIX, Rule 2A, C.P.C. which proceedings can be initiated only by the parent court and not by

the execution court and, therefore, the application for execution was liable to be rejected on this count also. The application for reasons aforesated. culminated in rejection vide order dated 13.8.1998.

5. I have heard Sri Sharad Malviya, appearing for the petitioner and Sri R. B. Singhal, appearing for the caveator, Dr. S. C. Gaur. and Smt. Aruna Gaur arrayed herein as a party-respondents 5 and 4 respectively.

6. The learned counsel for the caveator raised a preliminary objection that the petitioner has an alternative remedy under the CPC and, therefore, the petition commends itself to be dismissed on this ground alone. The learned counsel also submitted that the executing court was, in the facts and circumstances of the case, justified in rejecting the execution application as it was not maintainable as, against those who were not impleaded as parties in the arbitration proceeding Case No. 276 (E) of 1997 and no grievance was made in the execution application as against those who were impleaded as opposite parties in the arbitration proceeding. Sri Sharad Malviya unfolded his submission stating that ad interim order of injunction was passed by the Arbitrator against the society and, therefore, Dr. Gaur and Smt. (Dr.) Gaur being members of the society were bound by the order and the petitioner was foreclosed in his remedy against the impugned order under the Code of Civil Procedure.

7. I have bestowed my anxious considerations to the submissions made across the bar. Section 71 of the U. P. Co-operative Societies Act, 1965 (in short the "Act") which empowers the Arbitrator to pass injunction order in a reference pending adjudication under the Act is excerpted below :

"71, Reference of dispute to Arbitration.--(1) On receipt of a reference under sub-section (1) of Section 70, the Registrar may, subject to the provisions of the rules, if any-

(a) decide the dispute himself, or

(b) refer it for decision to an arbitrator appointed by him, or

(c) refer it, if the parties so request in writing, for decision to a board of arbitrators consisting of the three persons to be appointed in the prescribed manner.

(2) The Registrar may, for reasons to be recorded, withdraw any reference made under clause (b) or (c) of sub-section (1) and refer it to another arbitrator or board of arbitrators or decide it himself.

(3) The Registrar, the arbitrator or the board of arbitrators, to whom a dispute is referred for decision under this section may, pending the decision of the dispute, make such interlocutory orders including attachment of property as he or they may deem necessary in the interest of justice.

(4) The decision given by the Registrar, the arbitrator or the board of arbitrators under this section shall hereinafter be termed as award.

(5) The procedure to be followed by the Registrar the arbitrator or the board of arbitrators in deciding a dispute and making an award under this section shall be as may be prescribed."

It is eloquent from Section 71 of the Act, that the arbitrator has been conferred with the power to pass such interim order including attachment of property as he may deem necessary in the interest of justice pending decision of the dispute referred to him u/s 70 (1) of the Act and any such interlocutory order can be executed u/s 92 of the Act, which is quoted below :

"92. Execution of certain orders and awards.-- Every award made u/s 71, and capable of execution in the manner provided below, and every order so capable of execution made by Registrar u/s 67 of sub-section (2) of Section 68 or u/s 91, or by the liquidator u/s 74 or by an appellate authority on appeal u/s 97 or 98 or on review u/s 99, or as an interlocutory order u/s 100 (or a certificate for recovery issued u/s 95A) shall, if not carried out, be executed-

(a) in the manner provided by. law for the time being in force for the recovery of arrears of land revenue :

Provided that an application for the recovery of any such sum is made to the Collector and accompanied by a certificate signed by the Registrar or any person authorised by him in this behalf:

Provided further that such application is made within 12 years from the date fixed for payment in the order or award and if no such date is fixed, from the date of the order or award, as the case may be ; or

(b) by the Registrar or any other person subordinate to him and empowered by him in this behalf, by attachment and sale or sale without attachment of any property of the person or the co-operative society against whom the orders or award has been made ; or

(c) by the civil court having jurisdiction over the matter as if the order or award were the decree of that Court."

The expression "every order" includes an order of injunction granted u/s 71 (3) of the Act and the expression "so capable of execution" is a pointer to the modus of execution visualised by clauses (a), (b) and (c) of Section 92 of the Act. The expression as if the order or award were decree of that Court", occurring in clause (c) of Section 92 of the Act would attract related provisions including those contained in Part II, Section 115, C.P.C. and Order XXXIX, Rule 2A of the Code of Civil Procedure. Part II of the Code provides for execution of decrees and which by virtue of Section 36 of the Code, the provisions relating to execution shall, so far as they are applicable, be deemed to apply to the execution of "orders". The executing court in the instant case has rejected the application for execution on the ground, inter alia, that an order of injunction can be executed by the parent court under Order XXXIX, Rule 2A and not by the executing court. The said view of the Court is unsustainable. By virtue of fiction "as if "created by

clause (c) of Section 92 of the Act. It shall be deemed as if the order of injunction was passed by the executing court itself. The order of injunction granted by the Arbitrator u/s 71 (3) of the Act, can be executed and enforced in the manner envisaged in Order XXI. Rule 32 of the Code as the order of injunction shall, by virtue of the legal fiction visualised by clause (c) of Section 92 of the Act, be treated as a decree passed by the civil court. Action can also be taken under Order XXXIX, Rule 2A of the Code if disobedience of any injunction order granted u/s 71 (3) of the Act is established. I am further of the view that it is the substance of the relief claimed in the execution application that matters and not its form. The applicant seeking execution and enforcement of an order u/s 71 (3) may be given opportunity to suitably amend the application for execution and/or the relief may be suitably moulded in tune with the provisions of Order XXI. Rule 32 and/or Order XXXIX, Rule 2A of the Code. Rejection of the application on the ground that the manner in which the execution was sought was incompatible with the provisions of Order XXI, Rule 32 of the Code sans an opportunity being given to the applicant to amend the application was not justified. "Justice should, in my opinion, be administered in our Courts in a common sense liberal way and be broad-based on human values rather than on narrow and restricted considerations hedged round with hair-splitting technicalities"-- Parshotam Lal Dhingra Vs. Union of India (UOI),

8. The next question that begs answer is whether order passed by the executing court is appealable or it is revisable under any provisions engrafted in the Code of Civil Procedure. Determination of any question within "Section 47 or Section 144" of the Code amounted to a "decree" within the meaning of the term as defined in Section 2(2) of the Code of Civil Procedure, 1908 as it stood before its amendment by Section 3 of Act 104 of 1976 with effect from 1.2.1976. The word and figures "Section 47 or 1 were omitted from the definition of the term "decree" vide Section 3 of Act 104 of 1976 with effect from 1.2.1977. Consequently, determination of any question within the meaning of Section 47 of the CPC would not come within the purview of the term "decree" and as such, it would not be appealable u/s 96 of the C.P.C. Section 105 of the C.P.C. provides that save as otherwise expressly provided, no appeal shall lie from any "order" made by the Court in exercise of its original or appellate jurisdiction. Section 104 and Order XLIII. Rule 1, C.P.C. provide for appeal against certain orders referred to therein. An order rejecting an execution application is not one within the reckoning of the orders referred to in Section 104 and/or Section 43. Rule 1, C.P.C. and therefore, the order passed by the executing court in the instant case is not an appealable order.

9. The question then arises is whether the order under challenge is revisable u/s 115 which as substituted in relation to Uttar Pradesh reads as under :

"115A. Revision.--The High Court, in cases arising out of original suits or other proceedings of the value of twenty thousand rupees and above, including such suits or other proceedings Instituted before August 1, 1978, and the District

Court in any other case, including a case arising out of an original suit or other proceedings instituted before such date, may call for the record of any case which has been decided by any Court subordinate to the High Court or the District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate court appears--

- (a) to have exercised a jurisdiction not vested in it by law ; or
- (b) to have failed to exercise a jurisdiction so vested : or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

the High Court or the District Court, as the case may be, make such order in the case as it thinks fit :

Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the District Court, the High Court alone shall be competent to make an order under this section :

Provided further that the High Court or the District Court shall not, under this section, vary or reverse any order. Including an order deciding an issue, made in the course of a suit or other proceedings ; except where-

- (i) the order, if so varied or reversed, would finally dispose of the suit or other proceedings ; or
- (ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Explanation. -- In this section, the expression "any case which has been decided" includes any order deciding an issue in the course of a suit or other proceeding."

10. The words "of the value of the twenty thousand rupees and above including such suits or other proceeding instituted before August 1, 1978" have been substituted by the words "of the value exceeding one lakh rupees or such higher amount not exceeding five lakhs rupees as the High Court may from time to time fix, by notification published in the Official Gazette including such suit or other proceeding instituted before the date or commencement of the Uttar Pradesh Civil Laws (Amendment) Act, 1991 or as the case may be, the date of commencement of such notification" by U. P. Act No. XVII of 1991.

11. The order rejecting an execution application, filed u/s 92(c) of the Co-operative Societies Act read with Section 36 of the C.P.C. is, in my opinion, a "case decided" within the meaning of Section 115A of the Code as it applies in relation to the State of Uttar Pradesh. In V. Uthirapathi v. Ashrab Ali and others JT 1998 SC 55 the Apex Court was considering Section 18 of the Tamil Nadu Building (Rent and Control) Act, 1960, (as introduced in 1973) which visualised that the order of eviction passed under Sections 10 14 15 16 and 17 "shall be executed by the Controller as if such order is an order of the civil court and for

this purpose, the Controller shall have all the powers of the civil courts." Construing the expression as "if in" Section 18 of the Tamil Nadu Act aforementioned, the Apex Court held that the eviction order would be deemed to be an order of the civil court and the execution petition has to be treated as execution petition filed in the civil court for execution of an order of the civil court.

12. In *The Dargah Committee, Ajmer Vs. State of Rajasthan*, the question entered the consideration of the Apex Court whether an appeal could be filed u/s 93 of Ajmer Marwara Municipality Regulation, 1925 against an order u/s 222 (1) which visualised that any money recoverable by the Committee under the said provisions would be recoverable "as if it were taxes levied by the Committee." Interpreting the words "as if the Supreme Court held as under :

"If by the fiction introduced by Section 222 (4), the amount in question is to be deemed as if it were a tax. It is obvious that full effect must be given to this legal fiction, and in consequence, just as a result of the said fiction the recovery procedure prescribed by Section 234 (for taxes) becomes available to the Committee, so would the right of making an appeal prescribed by Section 93 (1) be available to the appellant."

13. The decision aforesaid found its echo in the case of *V. Uthirapathi v. Ashraf Ali and others* JT 1998 SC 55. In my own lights, the language in which Section 92 (c) of the Act is couched, is comprehensive enough to attract the relevant provisions relating to execution of decrees and orders of civil court as embodied in the CPC as well as the remedial provisions of appeal or revision contained therein. Since I have taken the view that determination of any question within the meaning of Section 47 of the Code and for that purpose, an order rejecting an execution application is not appealable under the Code and that such order is a "case decided" within the meaning of Section 115A of the Code, the order under challenge herein is reviseable u/s 115 of the Code of Civil Procedure. A perusal of the plaint (Annexure-2 to the petition) would evince that the value of the suit is pegged at Rs. 1,40,625 and that being so, the revision lies in the District Court in view of the amendment made in Section 115 by U. P. Act No. XVII of 1991 by which the expression "of the value of twenty thousand rupees and above", has been substituted by the words "of the value exceeding one lakh or such higher amount not exceeding five lakhs rupees". It is in this backdrop that I feel called not to enter into correctness or otherwise of the view taken by the executing court on issues other than those dwelt upon and answered in this judgment. If aggrieved, the petitioner may invoke the procedure of revision u/s 115 of the C.P.C. on ground specified therein.

14. As a result of the discussions aforestated, the petition is disposed of. It need hardly be said that in case any revision is filed, the same shall be heard and disposed of expeditiously.