

(1975) 06 GAU CK 0005
In the Gauhati High Court
Case No : Civil Revision No. 49 of 1975

Quazi Toufiqur Rahman

APPELLANT

Vs

Mst. Nurbanu Bibi

RESPONDENT

Date of Decision : 30-06-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227

Citation : AIR 1976 Guw 39

Hon'ble Judges : M.C. Pathak, C.J

Bench : Single Bench

Advocate : B. Sharma and D.K. Sharma, for the Appellant; A.R. Kalita, for the Respondent

Final Decision : Allowed

Judgement

M.C. Pathak, C.J.—By this petition under Article 227 of the Constitution of India read with Section 115 of the Code of Civil Procedure, the petitioner has prayed for quashing the order dated 20-11-1974 passed by the learned Sadar Munsif, Gauhati In Title Suit No. 141 of 1969 by which the execution of the Decree in Title Suit No. 52 of 1964 has been stayed till decision of the Title Suit No. 141 of 1969 pending in the Court.

2. The facts leading to this revision petition may be, briefly stated as follows:-

3. Petitioner Quazi Toufiqur Rahman filed as plaintiff Title Suit No. 52 of 1964 on 27-3-1964 against opposite party Mst. Nurbanu Bibi as defendant. Title Suit No. 52 of 1964 was filed for ejectment of the defendant-opposite party as a tenant in respect of the suit land. The defendant-opposite party filed written statement in Title Suit No. 52 of 1964 on 30-9-1964 but the suit was decreed ex parte on 30-11-1965 for default of the defendant-opposite party. An application for setting aside the ex parte decree was filed by the defendant-opposite party and that petition was registered as Misc. Case No. 4 of 1965 and in due course the Misc. Case was allowed and the ex parte decree was set aside and the Title Suit No. 52

of 1964 was restored to file. Thereafter Title Suit No. 52 of 1964 was decreed ex parte on 14-11-1967 for the second time. The defendant-opposite party filed another application for setting aside the ex parte decree which was numbered as Misc. Case No. 19 of 1967. But the said Misc. Case was again dismissed for default on 14-2-1968 and the application for revival of the petition was also dismissed. Consequently the ex parte decree dated 14-11-1967 in Title Suit No. 52 of 1964 for ejectment of the defendant-opposite party as a tenant has stood effective. Thereafter the decree holder-petitioner put the decree in Title Suit No. 52 of 1964 into execution in Title Execution Case No. 13 of 1969 against the judgment-debtor/opposite party.

4. During the pendency of the Title Execution Case No. 13 of 1969 the judgment-debtor opposite party Mst. Nurbanu Bibi has filed Title Suit No. 141 of 1969 against the decree-holder petitioner Quazi Toufique Rahman for a declaration that defendant Quazi Toufique Rahman is not entitled to obstruct and/or interfere with the possession of the plaintiff Musstt. Nurbanu Bibi in respect of the suit land in Title Execution Case No. 13 of 1969 which is for execution of the fraudulent decree in Title Suit No. 52 of 1964. In Title Suit No. 141 of 1969 the plaintiff-opposite party Mustt. Nurbanu Bibi also filed an application under Order 39. Rules 1 and 2. Civil Procedure Code, praying for restraining the defendant-petitioner Quazi Toufique Rahman from proceeding with Title Execution Case No. 13 of 1969. The application for injunction was rejected by the Court by order dated 18-8-1971 passed in Title Suit No. 141 of 1969. Against the order dated 18-8-1971 rejecting the application for injunction the plaintiff-opposite party preferred a Misc. Appeal before the learned Assistant District Judge who rejected the Misc. Appeal by order dated 20-3-1972.

5. The plaintiff-opposite party thus having failed to restrain the defendant-petitioner from executing the decree in Title Suit No. 52 of 1964 in Title Execution Case No. 13 of 1969 filed an application under order 21. Rule 29 CPC on 12-9-1972 in Title Suit No. 141 of 1969 for staying the execution case (Title Execution case No. 13/691 till disposal of the suit. The learned Munsiff by his order dated 20-11-1974 has stayed Title Execution Case No. 13 of 1969 pending disposal of Title Suit No. 141 of 1969 and the present revision petition is directed against this order dated 20-11-1974.

6. Mr. B. Sarma, the learned counsel for the defendant-petitioner firstly submits that the learned Munsiff has no jurisdiction to pass the impugned order under Order 21, Rule 29, Civil Procedure Code, inasmuch as Order 21, applies to execution case only and therefore the impugned order could not have been passed in Title Suit No. 141 of 1969.

7. The learned counsel for the petitioner next submits that even if the Court has jurisdiction to pass the impugned order under Rule 29 of Order 21, Civil Procedure Code, the learned Munsiff has failed to exercise that jurisdiction judicially and the impugned order was hit by constructive res judicata.

8. Order 21. Rule 29. CPC reads as follows:-

Stay of execution pending suit between decree-holder and judgment-debtor. Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

9. In Title Suit No. 52 of 1964 which was decreed by the Sadar Munsiff on 14-11-1967, the decree-holder is Quazi Toufiqur Rahman and the judgment-debtor is Mustt. Nurbanu Bibi. The judgment-debtor Mustt. Nurbanu Bibi has filed Title Suit No. 141 of 1969 in the court of the Sadar Munsiff against Quazi Toufiqur Rahman and that suit is pending. That being the position, in view of the language of Rule 29 of Order 21, the Court may on such terms as to security or otherwise, as it thinks fit, stay execution of the decree in Title Suit No. 52 of 1964 pending disposal of Title Suit No. 141 of 1969 if the Court is satisfied that in view of the facts and circumstances of the case and for the ends of justice such a stay order is required to be passed. Hence I find that the first submission of the learned counsel for the petitioner that the learned Munsiff had no jurisdiction to pass the impugned order has no substance.

10. Rule 29 of Order 21 states that the Court may stay execution on such terms as to security or otherwise as it thinks fit. But the discretion conferred on the Court by Rule 29, shall be exercised judicially and not mechanically as a matter of course.

11. While exercising the discretion conferred under Rule 29 of Order 21, the Court should duly consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good and cogent reasons. So long as the decree is not set aside by a competent court it stands good and effective and it should not be lightly dealt with so as to deprive the holder of the lawful decree of its fruits. If the judgment-debtor brings a suit for setting aside an earlier decree on ground of fraud and/or collusion or that the decree was not binding on him for some legal grounds, the allegations made in such a suit should be carefully examined by the Court before exercising the discretion conferred under Rule 29. If the subsequent suit is brought for setting aside the earlier decree on ground of fraud and/or collusion etc. Court should also see whether the pleading of the party concerned has complied with the requirements of Rule 4 of Order 6 of the Civil Procedure Code. A party should not be deprived of the fruits of the decree obtained by him from a competent court merely because a suit has subsequently been filed for setting aside that decree. A decree passed by a competent court should be allowed to be executed and unless a strong case is made out on cogent grounds no stay should be granted. Even if stay is granted it must be on such terms as to security etc., so that the earlier decree is not made ineffective due to lapse of time.

12. In the instant case as observed hereinabove, the opposite party who was the

defendant in Title Suit No. 52 of 1964 filed written statement on 30-9-1964. The suit was allowed to be decreed ex parte on 30-11-1965 for default. Then the ex parte decree was set aside at her instance but again the suit was allowed to be decreed ex parte on 14-11-1967. Thereafter also an application was filed for setting aside the ex parte decree but that application was allowed to be dismissed for default on 14-2-1968. An application for revival of that petition was also dismissed. As a result the ex parte decree dated 14-11-1967 stood valid. The Title Execution Case No. 13 of 1969 for executing the decree in Title Suit No. 52 of 1964 was filed on 5-6-1969 and the judgment-debtor appeared in Title Execution Case No. 13 of 1969 on 10-7-1969 and she applied for time to file objection. Thereafter she has filed Title Suit No. 141 of 1969 on 1-9-1969. The plaintiff in Title Suit No. 141/69 has prayed for a declaration that the defendant is not entitled to obstruct and/or interfere with her possession in respect of the suit land in Title Execution Case No. 13/69 which is for the execution of the alleged fraudulent decree in Title Suit No. 52/64. In Title Suit No. 141/69 the plaintiff's case is not that she wants a declaration that the decree in Title Suit No. 52/64 was obtained by fraud and collusion or undue influence or such other ground and therefore the decree was vitiated and not binding on her. On the other hand some question of title of the plaintiff in Title Suit No. 52/64 has been raised and in that way she has sought for a declaration that her possession may not be interfered with in the Title Execution Case No. 13/69. In the plaint of Title Suit No. 141/69 no particulars of fraud or collusion etc. have been specifically stated. The conduct of the opposite party in Title Suit No 52/64 and the pleading in Title Suit No. 141/69 are eloquent enough that the opposite party's main intention is to deprive the petitioner of the fruits of the decree lawfully obtained in Title Suit No. 52/64.

13. The decree against the opposite party in Title Suit No. 52/64 was passed as a tenant under the petitioner. If really it was the case of the opposite party that the petitioner had no title to the suit land she could have easily agitated those matters in Title Suit No. 52/64 denying the tenancy and if the tenancy had been denied and not proved the plaintiff in Title Suit No. 52/64 could not have got a decree if the defendant therein had taken care to contest the suit. But the conduct of the opposite party as defendant in Title Suit No. 52/64 is such that she has only been trying to make abuse of the process of law by delaying tactics and she is found to have adopted the same thing in Title Suit No. 141/69 inasmuch as she first filed an application under Order 39 , Rules 1 and 2. Civil Procedure Code, which was rejected; then went on appeal which was also rejected and thereafter she has filed this application under Order 21, Rule 29, Civil Procedure Code. Considering the entire facts and circumstances of the case I find the opposite party has not been able to make out a just cause for stay of Title Execution Case No. 13/69.

14. The learned Munsiff in staying the Title Execution Case No. 13/69 did not properly apply his mind to the provisions of Rule 29 of Order 21 vis-a-vis the facts and circumstances of the case and failed to exercise the discretion under

Rule 29 judicially but has acted mechanically as a matter of course allowing the opposite party to abuse the process of law.

15. The discretion of the Court under Rule 29 cannot be exercised so as to allow a party to abuse the process of law. It is thus found that in passing the impugned order of stay the learned Munsiff failed to exercise his jurisdiction properly and judicially. Thus I find that there is substance in the second submission of the learned counsel for the petitioner.

16. In the circumstances the impugned order passed by the learned Munsiff is quashed. The petition is allowed and the Rule is made absolute. I, however, make no order as to costs.