

(1998) 04 PAT CK 0035
In the Patna High Court
Case No : Civil Revision No. 1484 of 1996

Radha Rajak @ Radhika Raja and Others	APPELLANT
Vs	
Balmiki Devi and Others	RESPONDENT

Date of Decision : 15-04-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1998 Patna 175 : (1998) 3 BLJR 1654 : (1999) 1 CivCC 121

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : Roy Shivji Nath and Indrajeet Singh, for the Appellant; Bimlendu Mishra, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—Heard learned counsel for the parties.

2. This revision application is directed against the order dated 19-7-1996 passed by the Munsif. Banks, in Execution Case No. 11 of 1993 whereby in purported exercise of jurisdiction u/s 47 of the Code of Civil Procedure, the petitioner was directed to deliver possession of the suit land to the defendant-Decree Holder.

3. It appears that the plaintiffs-petitioners filed Title Suit No. 47 of 1971 against the defendants-Opposite Parties for declaration of title and confirmation/recovery of possession. Further relief for removal of encroachment was also claimed. The suit was dismissed by the learned Munsif holding that the plaintiffs-petitioners are not in lawful possession of the suit property. The judgment and decree of the trial Court was confirmed by the first appellate Court and also by this Court in Second Appeal No. 354 of 1991. Since the suit was dismissed with costs, a decree was prepared for realisation of costs from the plaintiffs. The defendants-Decree holders filed execution case being Execution Case No. 11 of 1993 and claimed recovery of the suit property besides costs awarded in the decree-in the said execution case, the defendants-Decree holders filed an application praying

to the Executing Court for passing an appropriate order for demolition of structures and for recovery of possession of the suit property. It is stated in the said petition that during the pendency of the suit, the plaintiffs-Judgment-debtors obtained an order of injunction whereby the defendants-Decree Holders were restrained from going over the suit land. It is alleged that after the order of injunction was passed by the Court below, the plaintiffs-Judgment-debtors constructed buildings and other structures in the suit premises without obtaining any permission from the Court and further that the plaintiffs also developed boundary wall towards northern side of the suit land. The said application was opposed by the plaintiffs-petitioners by denying and disputing the allegations made by the Decree holders and stated that there is no decree for removal of structures or for recovery of possession and, therefore, the application filed by the defendant is illegal and mala fide. The Court below after hearing the parties allowed the application filed by the defendant-Decree holders and directed the plaintiffs-Judgment-debtors to vacate the suit land within two months.

4. I have gone through the impugned order passed by the court below. The impugned order passed by the Court below appears to be based on conjecture and surmises, for example, in one place the Court below held as under:

"In the instant case, no doubt, the judgment-debtor has lost his case and according to the judgment he has not any right, title and possession over the suit land but it seems that during the trial he encroached the suit land. Thus, it is clear that the D. Hr. is entitled to get recovery of possession over the suit land otherwise the decree will be fruitless for him. To my mind, in the circumstances of present case, order of delivery of possession in favour of D. Hr cannot be said beyond the scope of Section 47 C. P. C. Because if delivery of possession was not given to the decree holder, he will have to file a fresh suit-only to get recovery of possession of the suit land from the judgment debtor."

It further appears that the court below without considering the factual position and without giving any finding and reasoning directed the plaintiffs to vacate the suit land within two months.

5. Admittedly, the suit for declaration of title and possession filed by the plaintiffs was dismissed with costs of Rs. 73/-. Accordingly, a decree for only cost recoverable from the plaintiff by the defendant has been prepared. There is nothing in the decree in favour of the defendant with regard to removal of encroachment or demolition of building in any mandatory form. The Court which passed the judgment and decree has not come to any finding with regard to the alleged mischief done by the plaintiff after injunction order was passed during the pendency of the suit. Learned counsel for the Decree holders has not brought to my notice anything to show that before the judgment and decree was passed, the defendant made prayer to the Court for passing a mandatory injunction against the plaintiff for removal of encroachment or for demolition of building allegedly constructed by the plaintiff. The decree passed by the Court below after the suit was dismissed is only for recovery of costs. It is well settled that a

decree which merely declares the rights of the parties and has not directed any act to be done is incapable of being executed and only a separate suit, and not an application u/s 47 of the Civil Procedure Code, will lie to impose the right so declared. It is equally well settled that the question whether the decree is capable or incapable of execution is pre-eminently one coming under the provision of Section 47 of the Civil Procedure Code. The question as to executability of decree can be decided by the executing Court only and not by the Court passing the decree. At the same time the executing Court has to execute the decree as it is and it cannot go behind the decree. It appears that the Court below has not correctly understood the scope and object of Section 47 of the Code. Evidently, there is no decree for recovery of possession or restitution of possession of the property in suit in favour of the defendant-Decree holder, rather by the said decree the plaintiffs suit was dismissed with costs. The relief claimed by the Decree holder from the executing Court in the execution proceeding is not a question relating to execution, discharge and satisfaction of the decree within the meaning of Section 47 of the Code. In that view of the matter, the Court below exceeded in the exercise of its jurisdiction so vested in it by law. The impugned order, therefore, cannot be sustained in law.

6. In the result, this revision petition is allowed and the impugned order passed by the Court below in the execution case for eviction of the plaintiff and for recovery of possession is hereby set aside.