
(2015) 09 PAT CK 0081
In the Patna High Court
Case No : Civil Revision No. 580 of 2008

Ram Lakhan Sahni and Others	Vs	APPELLANT
Raghunath Sahni(Son) and Others		RESPONDENT

Date of Decision : 08-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 15, Order 21 Rule 35, 151, 47

Citation : (2016) 1 PLJR 568

Hon'ble Judges : Vijayendra Nath, J

Bench : Single Bench

Advocate : Sukumar Sinha, Senior Advocate and Avinash Kumar, for the Appellant; Sanjay Kumar Verma, Bijay Bihari Sinha, Advs., Y.C. Verma, and Premshila Pandey, Advocates for the Respondent

Final Decision : Allowed

Judgement

Vijayendra Nath, J—Heard the learned counsel for the parties.

2. The present revision application has been filed by the decree holder - petitioners against the order dated 31.01.2008 passed in Miscellaneous Case No. 07/194(arising out of the Execution Case No. 21/1985) by which the petition filed by the opposite parties 1st set under Section 47 C.P.C. has been allowed and the execution case has been dismissed as not maintainable.

3. The necessitous facts in the context of the present revision application is that the T.S. No. 197/1961 was filed by Thako Sahni and Smt. Surji Malahin for declaration of title and recovery of possession over the suit land against the defendant -opposite parties 1st in the present revision application. This suit was ultimately decreed and the title of the plaintiffs over only 10 dhur of land out of Plot No. 1 of Khata No. 22 was declared and the plaintiffs were further held entitled to recovery of possession over the said land.

4. One of the decree holders namely Thako Sahni (since deceased, through L.R.) filed Execution Case No. 21/1985 praying for delivery of possession over the land

according to the decree. In the execution petition, the delivery of possession through the process of the court was prayed over 10 dhur of land from south out of 1 katha of land of Plot No. 1 of Khata No. 22. From the perusal of the decree also it is manifest that there does not appear to be any consistency or discrepancy in the description of the land as above in the execution petition. It is also apparent from the execution petition that another decree holder namely Smt. Surji Malahin was impleaded as proforma party in the execution case with specific statement that no relief in the execution case had been sought against the said Smt. Surji Malahin.

5. The judgment debtor-opposite party 1st set filed Miscellaneous Case No. 07/1994 under Section 47 and Section 151 C.P.C. praying for dismissal of the execution case. It was stated inter alia in the petition that the execution case was not maintainable in absence of another decree holder Smt. Surji Malahin joining the prayer for execution of the decree for recovery of possession. It was also stated that in view of the judgment and decree of T.S. No. 75/1982 and in view of the admission made by the heirs of the decree holder Thako Sahni in the said suit, the execution case was not maintainable. It would be pertinent to mention here that the another decree holder Smt. Surji Malahin died during the pendency of the Miscellaneous Case No. 07/1994 and her heirs and legal representatives were substituted as opposite parties 10(A) to 10(G) in the Miscellaneous Case No. 07/1994. It further appears that the substituted heirs of the deceased decree holder Smt. Surji Malahin also filed their objection in the Miscellaneous Case No. 07/1994 wherein they supported the objection of the judgment debtor-opposite party 1st set for dismissal of the execution case. It was their case that the decree holder Thako Sahni had no right, title and interest in the suit land which exclusively belonged to Smt. Surji Malahin as her purchased land and it was also averred that the T.S. No. 197/1961 the decree of which was under execution was never filed by Smt. Surji Malahin. It was further their case that they had got possession over the entire land as decreed wherein their residential houses stood. The allegation of fraud and breach of faith and trust against the decree holder Thako Sahni in obtaining the decree was also made and ultimately the prayer was made to allow the Miscellaneous Case No. 07/1994 filed by the judgment debtor 1st set.

6. By the impugned order the learned court below has allowed the Miscellaneous Case No. 07/1994 and dismissed the Execution Case No. 21/1995 as not maintainable. It has been mainly held by the learned court below that in view of the provision of Order 21 Rule 15 C.P.C. the execution case is not maintainable as one of the joint decree holder has got possession over the entire land as decreed and there is nothing to be executed against the judgment debtor and the decree cannot be executed by one decree holder against another decree holder as the decree stood completely satisfied. It has been further held that the execution has been sought over 10 dhur land from south in 1 katha of Plot No. 1 of Khata No. 22 which is not in accordance with the decree passed by the trial court and the appellate court, and as such also the execution case is not

maintainable for a different land than that mentioned in the Schedule of the plaint.

7. In order to appreciate the rival submissions on behalf of the parties, it would be profitable here to take into notice the provision of Order 21 Rule 15 C.P.C.

"15. Application for execution by joint decree-holder.--(1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application."

8. From the fascicules of the provision, it is apparent from Rule 1 that it is in the nature of an enabling provision permitting the execution of the decree by one of the joint decree holders for the benefit of all decree holders and the only stipulated exception is in a case where a condition to the contrary has been imposed in the decree itself. This intention of the legislature is further emphasized by Rule 2 imposing a duty upon the court to pass appropriate order for protecting the interest of the decree holder who has not joined the prayer for execution. It is thus manifest that there is no legal requirement that all the decree holders must joint the execution case seeking the execution of the decree.

9. At this juncture, it would be seemly to take into notice the provision as contained in Order 21 Rule 35 Sub Rule 2 C.P.C.

"35. Decree for immovable property. (1) xxxxxxxxxxxx
xx
xx

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) xxx
xx
xx"

10. This provision clearly mandates that a decree for joint possession of immovable property can be executed only by delivery of symbolic possession. In the present case, it appears from the record that there were two plaintiffs namely Thako Sahni and Smt. Surji Malahin in the suit and the decree passed by the appellate court which has admittedly attained finality reads as follows:

".....It is ordered that the plaintiff's suit is decreed for 10 dhurs of land only out of Plot No. 1 Khata No. 22 and the judgment and decree of the lower court is affirmed with the modification that stated above. The title of the plaintiff over 10 dhurs of land is declared and the defendant-appellant is ordered to give vacant possession on 10 dhurs of land to the plaintiff out of Plot No. 1 as given in Schedule at the foot of the plaint within two months from the date of the decree, failing which the plaintiff would be entitled to get possession through the process of the court. The appeal stands dismissed with costs....."

11. It would be apt here to mention that earlier the suit was dismissed and the dismissal was affirmed in appeal also but in the second appeal filed before this Court by the plaintiffs the matter was remitted back to the trial court with certain observations. The judgment and decree, after remit, was passed by the trial court on 08.12.1978 and the suit was decreed with regard to 9 and 1/2 dhur of land of Plot No. 1. In appeal by the defendants, the decree of the trial court was affirmed with modification that in place of 9 and half dhur of land, the plaintiffs were held to be entitled to 10 dhur land out of Plot No. 1 of Khata No. 22. From the perusal of the paragraph-3 of the judgment of the trial court in the suit it is manifest that the dispute was with regard to 1 katha of land from south in Plot No. 1. It also does not appear from the judgment dated 10.08.1981 passed by the appellate court in appeal by the defendants that any objection with regard to the identity of the suit land had been ever raised. To the contrary, it appears that the appellate court after deliberation and analysis of the evidence and materials on record modified the area of the land to be decreed from 9 1/2 dhur to 10 dhur and held the plaintiffs to be entitled to the decree over the same. Moreover from the averments made in the petition under Section 47 C.P.C. filed by the judgment debtor-opposite party 1st set it also does not appear that any dispute with regard to the identity of the land under the execution has been raised. While passing the impugned order the executing court below has ignored the judgment and decree passed in the suit after the remand and has wrongly come to the conclusion that there is inconsistency and difference in the land under execution and the land under the decree, and that too in absence of any specific pleading in that regard. This conclusion is demonstrably contrary to the materials on record, erroneous and deserves to be overturned.

12. As mentioned earlier, the execution petitioner (one of the joint decree holders) has not claimed execution of the decree against another decree holder but has expressly impleaded the another decree holder only as proforma party to the execution proceeding. However, the said another decree holder has also supported the judgment debtor in his prayer for dismissal of the execution case claiming exclusive possession over the land under execution. The allegation of fraud in absence of title in the co-decree holder Thaku Sahni was also raised. Though the executing court has rightly refrained from entering into the allegation of fraud and dispute of title as raised by co-decree holder (heirs of Smt. Surji Malahin) but nonetheless it has come to the conclusion that in view of the specific case of the co-decree holder to have come in possession over the entire

land under execution, nothing remains to be executed against the judgment debtor. It is well settled that the dispute between the joint decree holders is foreign to the scope of Section 47 as laid down by the apex court in Jagdish Dutt and Another Vs. Dharam Pal and Others, AIR 1999 SC 1694 : (1999) 3 JT 49 : (1999) 2 SCALE 541 : (1999) 3 SCC 644 : (1999) 2 SCR 576 : (1999) 2 UJ 1158 : (1999) AIRSCW 1318 : (1999) 4 Supreme 19 and the prayer for the execution of the decree against the judgment debtor cannot be denied at the instance of the co-decree holder when it is not the case of the co-decree holder that the execution of the decree would prejudice his right and interest granted by the decree under execution. The claim of a decree holder against his joint decree holder over the property under the joint decree may be subject matter of another suit or proceeding but it cannot be adjudicated under the domain of the law governing the execution proceeding.

13. It is, thus, held that the claim of exclusive title and possession over the decretal land by the heirs of the co- decree holder Smt. Surji Malahin could not have been made the edifice to discard the right of execution of the decree by the joint decree holder against the judgment debtor-opposite party 1st set. Mr. Sukumar Sinha, the learned senior counsel for the petitioners is right in his submission that in place of dismissing the execution proceeding as not maintainable the executing court should have proceeded in the facts and circumstances of the case for execution of the decree in accordance with the provision of Rule 21 Rule 35 sub Rule 2 by affecting symbolic possession against the judgment debtor as it is not open to the judgment debtor to resist the execution of the decree by a joint decree holder on the ground that another decree holder is in possession over the entire property under execution and the judgment debtor is not in actual possession of the same nor it is open to another joint decree holder to resist the execution of the decree against the judgment debtor on the ground that he is in actual physical possession of the property under execution. This Court therefore, holds that the executing court below has committed error of jurisdiction in dismissing the execution case as not maintainable.

14. For the aforesaid reasons and discussions, this revision application is allowed and the impugned order is set aside. The Miscellaneous Case No. 07/1994 is accordingly, dismissed. The executing court below is directed to proceed with the execution case in accordance with law expeditiously. There shall be no order as to cost.