

(1989) 09 CAL CK 0034
In the Calcutta High Court
Case No : C.O. No. 1820 of 1983

Sm. Lichubala Biswas and others

APPELLANT

Vs

Jindar Mondal and others

RESPONDENT

Date of Decision : 18-09-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, Order 6 Rule 17, 37, 47

Citation : AIR 1990 Cal 151

Hon'ble Judges : Sudhanshu Sekahar Ganguly, J

Bench : Single Bench

Advocate : S.P. Roy Chowdhury, for the Appellant; Mrinmoy Bagchi, for the Respondent

Judgement

1. The facts of this case may be started with the following genealogical table :--

Mohar Ali Iman Ali = Sundari 4 annas pro-dfdt. 4

Rahima

Maijjuddin

Sabera

8 annas = Amena

4 annas

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Jindar Jalis Nilmani Jahura

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It appears that Mohar All and Iman Ali were the sixteen annas owners of the

disputed properties. Mohar Ali died a bachelor and Iman died leaving his widow Sundari, but no child. Eventually Iman's heirs became the owners of the disputed properties as per shares mentioned below :--

1. Sundari = 0 -- 4 annas

2. Sabera = 0 -- 4 annas

3. Amena, Jindar, Jalil, Nilmani & Jahura = 0 -- 8 annas

1 -- 0 -- 0

Admittedly during the communal disturbances of 1950, all the aboveentioned heirs of Iman Ali left the village and went away to the other side of the border. Sundari, so it appears, sold her interest in the disputed lands to pro-dfdt. Nos. 5 to 8 and delivered possession to them. The facts up to this stage are admitted by both the sides more or less.

The aforementioned heirs of Iman Ali instituted Title Suit No. 296 of 1962 in the First Court of the Munsif at Krishnanagar through one Madar Mondal, who held a power of attorney from them dated 7th May, 1962 to sue or to be sued on their behalf, for declaration of their title to the disputed land and for an order of permanent injunction restraining the principal defendants Nos.1 to 3 disturbing with their possession therein through Madar Mondal. The defence was that the defendants Nos. 1 to 3 had been possessing the suit lands since 1950 and delivering shares of the produce to the heirs of Iman Ali, Thereafter on the strength of a power of attorney executed by Jindar and Jalil on 12th Sept., 1961 authorising the defendant No. 3 Upen, to sell their eight annas shares in the disputed properties on their behalf, the said Upen sold the disputed properties in eight annas shares to the defendants Nos. 1 and 2 by a Kobala dated 1st Nov., 1962 who have been possessing the said properties by an amicable partition with the pro-dfdt. Nos. 5 to 8, for a period exceeding twelve years thus extinguishing the fight of the plaintiffs to recover the possession of disputed properties, if any. The defence also challenged Madar's right to file and continue with the suit, since Amena had died on 18th Nov., 1962 and Jalil -- a minor on the date of the execution of the power of attorney -- had attained majority on the date the suit was filed,

2. The learned Munsif found the following:--

1. Amena was not alive and Jatil who was a minor and represented in the power of attorney by Jindar, attained majority and was made plaintiff No. 7 at his own prayer, and, therefore, Mandar's right to sue on the strength of the power of attorney based as it was on the authority given by Amena and on behalf of Jalil blood terminated. So the suit was not maintainable.

2. In view of the sale effected by Upen Biswas, defendant No. 3 in favour of the defendants Nos. 1 and 2 on the strength of the power of attorney executed in his favour by jinder and Jalil and the sale effected by Sundari in favour of Pro-dfdt.

Nos. 5 to 8, the plaintiffs have no subsisting interest in the suit lands.

3. The defendants Nos. 1 and 2 and pro-dfdt. Nos. 5 to 8 have been possessing the suit lands and not Madar on behalf of the plaintiffs as claimed.

Finding, therefore, that the plaintiffs have no title or possession in the suit-land, the learned Munsif dismissed the suit. The plaintiff preferred an appeal being T.A. No. 15 of 1969 in the Court of the Additional Subordinate Judge, Nadia. The learned Assistant District Judge who heard the appeal found as follows :--

1. Amena was alive and so the power of attorney executed by Amena and others in favour of Madar had not become inoperative.

2. Genuineness of the power of attorney llegendly executed by Jindar and Jalil in favour of the defendant.No. 3 has not been proved. The sale deed executed by the defendant No. 3 in favour of defendants Nos. 1 and 2 also, therefore, loses its force.

3. The plaintiffs together, therefore, have twelve annas shares in the suit lands and the-remaining four annas shares in the same were sold by Sundari to pro-dfdt. Nos. 5 to 8 The plaintiffs are entitled to get a decree declaring their said shares in the suit lands.

4. Since the plaintiffs were dispossessed from the suit lands during the pendency of the suit they are also entitled to recover their possession therein in respect of their shares therein.

The learned Judge did not consider the effect of attainment of majority by Jalil on the power of attorney executed in favour of Madar. The defendants Nos. 1 to 3 came up before this Court in second appeal, being S. A. No. 445 of 1971.

3. All the points urged by the defendants Nos. 1 to 3 before the two Courts below were also urged on their behalf before the Hon''ble Judge who heard the second appeal. Being of the view, however, that the decisions of the learned Subordinate Judge were all decisions on fact and further that they were not perverse, the Hon''ble Judge refused to interfere with them and dismissed the appeal. Thereafter the plaintiffs put the decree to execution for recovery of possession of the suit lands after evicting the defendants therefrom, for recovery of costs etc. The defendants Nos. 1 to 3 filed an objection to it under S. 47 of the Civil P. C.

In this petition under S. 47 the petitioners raised several objections against the execution case, I need not detail them here since the learned Munsif did not go into them at all and he rejected the petition on the ground that as the Executing Court he had no right to go behind the decree. Hence this revisional application.

4. Before me the learned Advocate for the petitioner has taken three points. His first point is that since the judgment of Lower Court has merged in the decree of the High Court the execution petition which seeks to execute the decree should have been amended. In view of the decision in Baburam Lal and Another Vs. Debdas Lala, where it was held that where the appeal is dismissed the execution

petition for executing the Trial Court's decree becomes an application for execution of the Appeal Court's decree, I am of the view that there is not much merit in this point of objection. In this case the appeal was allowed by the learned Subordinate Judge and the appeal from his judgment and decree was dismissed by this Court. In that view of the matter the execution petition may be taken to be an application for execution of this Court's decree.

5. It is pointed out next that though Jalil figured as one of the plaintiffs in the suit as it was originally filed by Madar Mondal on behalf of all the plaintiffs, he after attaining majority got his name removed from the side of the plaintiffs and got himself added as one of the pro forma defendants. Subsequently, so it appears, he again got himself added as a plaintiff to the suit though he never appeared as a witness in it to press for his share in the disputed property. It is urged that in that view of the matter the share that Jalil had in the disputed property could never pass to the other plaintiffs and that without ascertaining what was that share and what would be its fate the decree passed in this case cannot be considered as executable.

6. It seems that the petitioners have some grievance about the manner in which their case regarding Jalil has been dealt with. It seems even from the execution petition which is sought to be executed in this case that Jalil is not one of the decree-holders on whose behalf the execution petition has been filed by Madar Mondal. Jalil has been described as defendant No. 9 in this petition. Obviously he has or had a share in the disputed property. The point was specifically raised from the side of the petitioners before the learned Subordinate Judge. It was specifically pointed before him that in view of the attainment of majority by Jalil the Power of Attorney held by Madar Mondal which was executed on Jalil's behalf during his minority by Jindar could not cover his interest and that Madar Mondal could not sue also on his behalf. The point was not considered by the learned Subordinate Judge at all. The point was also raised before this Court but this Court refused to enter into the question on the ground that this was a question of fact. The petitioner's grievance on this score does not appear, therefore, to be unfounded. But I do not see what can be done in this regard in this proceeding since that will definitely amount to interfering with the decree as passed by the learned Subordinate Judge and as confirmed by this Court. The petitioners may seek their relief in this regard in some other proceeding provided that is permissible under the law.

7. It is urged next that the decree as it stands at present and sought to be executed is not executable. In the execution petition, so it appears, all the plots in dispute have been described in a schedule. The respondents pray that they be delivered possession of the said plots on eviction of the petitioners therefrom. What is wanted, therefore, is that the respondents be put in possession of the entire disputed property by evicting therefrom the defendants who are in possession thereof at present. It is urged that in view of the fact that the learned Subordinate Judge found that the respondents had only 12 annas interest in the

disputed property, they could not be given possession of the entire disputed property. It is urged relying upon Joy Gopal Singha and Others Vs. Probodh Chandra Bhattacharjee and Others, , that the decree passed by the learned Subordinate Judge should be interpreted as a decree for joint possession with whoever is in possession of disputed property and that the respondents may file a partition suit to have their 12 annas shares therein demarcated from the disputed lands and get possession thereof.

8. The learned Advocate for the respondents urges that this cannot be done since that will be interfering with the decree as it stands. He cites Sunder Dass Vs. Ram Prakash, and V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar, and urges that the Executing Court has no power to go behind the decree or its terms and further that it cannot make a new decree for the parties under the guise of interpretation. He urges that what the petitioners want is to change the decree for delivery of possession to a decree for joint possession.

9. The law, certainly, is very well settled that the duty of an Executing Court is to give effect to the terms of a decree and that it has no power to go behind the decree or its terms. But would the Executing Court insist upon executing the decree even where the decree has been passed by a Court without having the jurisdiction to pass it or the decree violates the mandatory provisions of law or where its terms are vague or confusing or its directions are incomplete? It is laid down in Topanmal Chhotamal Vs. Kundomal Gangaram and Others, that where the decree is ambiguous the duty of the Executing Court is entitled to look into the pleadings and judgment. It is laid down in Bhavan Vaja and Others Vs. Solanki Hanuji Khodaji Mansang and Another, , that the Executing Court is under a duty to construe the decree and to find out the true effect of the decree and for doing that, in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading up to the decree.

It is also well settled that questions relating to the execution, discharge and satisfaction of a decree include the question of executability of the decree itself and further that where the decree is a void decree being passed by a Court without jurisdiction or where it is passed in violation of mandatory provisions of law, the duty lies on the Executing Court to decide the question if the executability of the decree has been specifically challenged on those grounds under S. 47 of the Civil P. C.: AIR 1976 Gau 54; Umaprasad Pal and Others Vs. Mrityunjay Pal and Others, : Sunder Dass Vs. Ram Prakash, .

The law in this regard seems to be, therefore, that though ordinarily an Executing Court cannot go behind the decree or the terms thereof, in certain cases such as where the terms of decree are vague, indefinite or ambiguous, or where the decree is a void one being passed by a Court without jurisdiction or where it is passed in violation of mandatory provisions of law it is permissible for the Executing Court -- having regard to the facts established in the suit and the relevant provisions of the law -- to interpret the terms of the decree to bring out their true meaning and import -- and their true effect according to law. While

interpreting the decree in such a case it will be permissible for the Executing Court to look into the pleadings, judgments and all the proceedings of the suit.

10. In the case at hand the relevant portion of the decree runs as follows :--

"The plaintiffs" twelve annas share in the suit property is hereby declared. The plaintiffs do recover khas possession after evicting the defendants Nos. 1 to 3 therefrom."

On the basis of this term of the decree the respondents prayed as per their execution petition that they be given possession of the disputed property to its full sixteen annas shares evicting the present petitioners therefrom. The learned Advocate for the respondents argues that since the decree has awarded khas possession of the disputed property to respondents the Executing Court should deliver khas possession of the entire disputed property to the respondents and the fact that they have only twelve annas share in the disputed property is not something which should enter into the consideration of the Executing Court at all. Did the learned Subordinate Judge really award possession of the entire disputed property to the respondents? In this context the following line appearing in the last paragraph of the judgment delivered by the learned Subordinate Judge strikes one as very relevant :---

"The result, therefore, is that the plaintiffs are reasonably entitled to get the suit decreed to the extent of 12 annas share in the suit property and they are also entitled to recover possession in respect of their share from the contesting defendant/respondents after evicting therefrom."

From the above it becomes quite clear that the learned Subordinate Judge held the respondents entitled to recover possession of the disputed property only to the extent of their twelve annas share therein. The decree for recovery of possession of the disputed land should, therefore, be interpreted to mean recovery of possession of twelve annas shares therein.

11. Admittedly the respondents are out of possession of the disputed property. How can they be given possession of twelve annas shares therein? It is in this context that the law as laid down in Joy Gopal Singha and Others Vs. Probodh Chandra Bhattacharjee and Others, becomes very relevant. It is clearly and unequivocally laid down there that a co-sharer by himself cannot get against a trespasser a decree for ejectment from the whole of the land, but only can get a decree for joint possession to the extent of his share and he has to work out his further rights by means of a suit for partition. In the context of the peculiar facts of the case and the law as enunciated in Joy Gopal's case (supra) the decree for possession passed by the learned Subordinate Judge in favour of the respondents should, therefore, be interpreted to be a decree for joint possession in the suit-land in respect of their twelve annas shares therein. The learned Munsif should, therefore, proceed to deliver only symbolical possession to the respondents in respect of their twelve annas shares in the disputed property.

The impugned order passed by the learned Munsif, 1st Court, Krishnanagar in Misc. Case No. 20 of 1983 do stand modified accordingly and the Execution Case do proceed in the manner indicated above.

The Rule is disposed of accordingly.

12. Order accordingly.