

(1990) 08 OHC CK 0028

In the Orissa High Court

Case No : Civil Revision No. 568 of 1989

Smt. Radhi Dei and Others

APPELLANT

Vs

Lalit Bihari Mohanty

RESPONDENT

Date of Decision : 03-08-1990

Acts Referred:

Citation : AIR 1991 Ori 36 : (1991) 71 CLT 17

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : M.N. Das and B.D. Pradhan, for the Appellant; A. Mukharjee, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—The question that falls for determination in this case is whether on the facts and in the circumstances of the case the executing Court can refuse to execute the decree holding that it is a nullity and it has become inexecutable.

2. Being unsuccessful in their attempt to challenge the validity and executability of the decree under execution, the petitioners filed this application u/s 115 of the CPC ("C.P.C." for short) assailing the order dated 12-4-89 of the Subordinate Judge, Bhadrak in Misc. Case No. 45 of 1987 rejecting the application filed by them u/s 47, C.P.C.

3. The relevant facts leading to the present proceeding may be stated thus : Original Suit No. 63-1 of 1971 was filed by the opposite party, Lalit Bihari Mohanty, against Parbati Bewa, Aparti Jana, Kartika Jena and some other for declaration of title and for recovery of possession of Ac. 0.10 decimals of land out of plot No. 406 under C.S. Khata No. 12 of Mouza Jagannathpur, on which, as stated by the petitioners, their residential house stands, The suit was decreed ex parte on 16-4-76 and the defendants were directed to be evicted from the suit land. Thereafter the plaintiff decree-holder levied Execution Case No. 2 of 1983

for recovery of possession of the suit land. Admittedly, the plaintiffs had intermediary interest in the suit land which was abolished under the provisions of the Orissa Estates Abolition Act, 1952. In the year 1962-63, on the application filed by the ex-intermediary (plaintiff) under Ss. 6, 7 and 8 of the Act, the land was settled with him by the Tahsildar subject to certain conditions regarding payment of Salami, arrear rent etc. The plaintiffs claimed title to the suit land on the basis of the said settlement in their favour. Subsequently, during the settlement operation it was noticed by the revenue authorities that the land was in possession of the predecessors-in-interest of the revision-petitioners and has been in their possession prior to the abolition of the intermediary interest and vesting of the estate in the State Government. Thereafter, a proceeding (R.F. No. 258 of 1984) was initiated by the Tahasildar in which both the decree-holder as well as the judgment-debtor were noticed, the matter was inquired into and it was held that the previous order settling the suit land with the ex-intermediary (plaintiffs) was invalid since no notice had been issued as mandatorily required under the provisions of the Act and since the condition mentioned in the order had not been complied with by the lessor. It was further held by the Tahasildar that the suit land had been in possession of the predecessors-in-interest of the revision-petitioners long prior to the vesting of the estate in the State Government. On these findings, the Tahasildar by order dated 10-11-86 directed that the petitioners shall be recognised as tenants in respect of the land and shall be entitled to pay rent for the same.

Thereafter, the petitioners filed the application u/s 47 of the C.P.C., challenging the executability of the decree of eviction on the grounds, inter alia, that, on account of the subsequent order of the Tahasildar annulling the settlement of the land with the plaintiffs the decree has been rendered inexecutable and the execution proceeding is liable to be dismissed. The learned Subordinate Judge by the impugned order rejected the application holding that the subsequent event does not affect the validity and executability of the decree. Hence, this revision petition by the judgment-debtors.

The answer to the question formulated earlier depends on determination of the point whether due to the subsequent development in the case the decree under execution is a nullity. In my view on the facts and circumstances of the case, the question is to be answered in the affirmative and the decree-holder is not entitled to execute the decree.

4. The position of law is well settled that ordinarily the executing Court is not entitled to go behind the decree and is not entitled to consider subsequent events to deny the decree-holder the right to execute the decree. But there are certain well recognised exceptions to this rule; one of them is that when the decree is a nullity or the decree-holder has lost the right to execute the decree on account of a subsequent change in law or some subsequent development then the executing Court can take note of change in the situation and can refuse to execute the decree on that basis.

5. In the present case, as noticed earlier, the decree-holder had intermediary interest in the suit land which had been abolished under provisions of the Act and the estate had vested in the State Government. In the year 1962-63, he had claimed title to the suit land on the basis of settlement of the land in his favour by the order of the Tahasildar holding that he was in khas possession of the land on the date of vesting and therefore was entitled to remain in possession of it on payment of salami/rent to the State Government. The suit was decreed ex parte against the defendants relying on the said settlement made by the Tahasildar. Subsequently the Tahasildar himself inquired into the matter and was convinced that the ex-intermediary was not in possession of the land on the date of vesting and indeed, the predecessors-in-interest of the petitioners were in possession of it prior to vesting of the estate. It was further held by the Tahasildar that the petitioners/their predecessors were tenants of the suit land and therefore they are entitled to continue as such even after vesting of the estate in the State Government. The order of the Tahasildar was not challenged by the decree-holder before the competent revenue authority. The factual position held by the Tahasildar was neither assailed before the executing Court nor before me during hearing of this case. It is therefore manifest that the settlement of the suit land with the decree-holder (the exintermediary) on the erroneous basis that he was in khas possession of the land by the date of vesting, was null and void. There is no controversy that settlement of the land which formed a part of the estate which vested in the State Government with the ex-intermediary was possible only if he was in khas possession of the land by the date of vesting. That basic requirements being absent in this case the settlement in favour of the decree-holder was invalid and no title vested in him on the basis of such invalid order and consequently the decree for eviction which was passed solely on the basis of the settlement of the land with the plaintiffs was also invalid and inoperative. This position gets reinforced from the fact that subsequently the very same authority (Tahsildar) acknowledged the mistake in the order previously passed by him and held that the petitioners (judgment-debtors) were entitled to remain in possession of the land.

6. From the foregoing discussions, it is clear that the decree under execution was a nullity on the date it was passed and has also been rendered inexecutable on account of the subsequent order passed by the Tahsildar accepting the claim of the judgment-debtors to remain in possession of the land as a result of which the decree-holder has lost his right to recover possession of the land from the judgment-debtors. The learned Subordinate Judge is therefore clearly in error in rejecting the application filed by the petitioners u/s 47 of the C.P.C.

7. To prop up, the above finding I may refer to a few decisions.

The apex Court in the case of Haji Sk. Subhan Vs. Madhura, considered the effect of vesting under the Madhya Pradesh Abolition of Proprietary Rights (Estates Mahals, Alienated Lands) Act, 1950 (M.P. Act 1 of 1951) on a decree for possession. In that case, the respondent before the Supreme Court had filed a

suit for possession of certain land including the fields in suit and based his claim on his proprietary right to recover possession. The suit was decreed and the decree was upheld by the High Court, it being held that the respondent was entitled to the fields in suit which were originally Khudkasht fields. Before the closing of the arguments in the appeal and the delivery of judgment, the M. P. Act 1 of 1951 came into force. This fact was not brought to the notice of the High Court. The respondent decree-holder filed execution application for the recovery of costs and delivery of possession. The appellant paid up the costs, but filed an objection to the application for delivery of possession on the ground that the respondent decree-holder had no right to dispossess the appellant judgment-debtor, as the respondent had lost his proprietary rights to the fields and the appellant had acquired rights to occupy them under the M. P. Act 1 of 1951 subsequent to the conformation of the decree for possession by the High Court. The Court held that the provisions of Sections 3(1) and (2) were sufficient to divest the respondent of his proprietary right over the lands. u/s 3(2) he could not acquire any right in his favour subsequent to the vesting of the estate on the notified date and therefore the respondent did not acquire the right to possess the land under the decree in his favour. The Court further held that any rights which accrued to the proprietor under a decree by virtue of his proprietary right would not, under the scheme of the Act prevail over the statutory consequences following the vesting of the proprietary rights in the State and would be lost to the proprietor, one such right was the right of the proprietor under a decree to obtain possession over certain land; such a decree for recovery of possession was the result of the recognition of the proprietor's right of possession as proprietor over that land as against the claim of the judgment-debtor to retain possession of that land; the proprietary rights vested in the State and as a consequence of it the proprietor's right under the decree to obtain possession also vested in the State, even though the State got right to the possession of the land under other provisions of the Act as well.

Regarding executability of the decree, the Court observed that the principle that the Executing Court could not question the decree and had to execute it as it stood, had no operation in the facts of the case. The objection of the appellant was not with respect to the invalidity of the decree or with respect to the decree being wrong; his objection was based on the effect of the provisions of the Act which had deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the respondent had obtained the right to remain in possession of it. In these circumstances, the executing Court could refuse to execute the decree holding that it had become inexecutable on account of the change in law and its effect.

The Apex Court in the Case of Laxmi and Co. Vs. Dr. Anant R. Deshpande and Another, , considering the question whether the Court can take notice of subsequent events observed thus :--

"It is true that the Court can take notice of subsequent events. These cases are

where the Court finds that because of altered circumstances like devolution of interest it is necessary to shorten litigation. Where the original relief has become inappropriate by subsequent events, the Court can take notice of such changes. If the Court finds that the judgment of the Court cannot be carried into effect because of change of circumstances the Court takes notice of the same. If the Court finds that the matter is no longer in controversy the Court also takes notice of such event. If the property which is the subject-matter of suit is no longer available the Court will take notice of such event. The Court takes notice of subsequent events to shorten litigation, to preserve rights of both the parties and to subserve the ends of justice."

This Court in the case of Debraj Tuli v. Smt. Simla Nepak, reported in (1973) 1 CWR 670, observed that it is well settled that after vesting, the intermediary lost his right to sue for recovery of possession and his right, if any, has to be worked out under the appropriate provisions of the Act. Considering the applicability of the principles that the executing Court cannot go behind the decree, this Court held, that if the Court passing the decree lacked inherent jurisdiction the executing Court can refuse to execute the decree on the ground that it is a nullity.

Referring to the decision of the Supreme Court in the case of Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, , this Court held that in view of the legal effect of vesting, the original title under which the suit for eviction and for recovery of possession was filed, lapsed by reason of vesting of the estate and the quondam proprietors acquired a different character of right under the deemed settlement and until that settlement is accepted by the Estates Abolition Collector finally, it is impossible for the civil court to pass a decree for eviction on the basis of the original title, which is no longer available to the plaintiff. Obviously, therefore, the decree passed in the civil suit is without jurisdiction and a nullity.

8. From the principles laid down in the decisions noted above the conclusion is inescapable that in view of the decision of the revenue authority (Tahsildar) in R.F. Case No. 258 of 1984 the decree passed by the learned Subordinate Judge being without jurisdiction is a nullity, it has become inexecutable in the altered situation and therefore the executing Court can refuse to execute the said decree.

9. In the result, the revision petition is allowed, the order of the learned Subordinate Judge rejecting the petitioners' application u/s 47, C.P.C. is set aside and the learned Subordinate Judge is directed to pass necessary order dismissing the execution case. Parties will bear their respective cost of this proceeding.