

(2010) 09 RAJ CK 0017

In the Rajasthan High Court

Case No : Civil Revision Petition No. 171 of 2009

Smt. Yashodhara Ameta

APPELLANT

Vs

Vishnu Shanker Paliwal and Others

RESPONDENT

Date of Decision : 22-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8(4), Order 21 Rule 102, Order 21 Rule 58, Order 23 Rule 3B(2), 151
Evidence Act, 1872 — Section 115

Citation : AIR 2011 Raj 43 : (2011) 2 CivCC 730 : (2011) 1 RLW 379

Hon'ble Judges : Sangeet Lodha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sangeet Lodha, J.—This revision petition is directed against order dated 12.2.09 passed by the Additional Civil Judge (S.D.) No. 3, Udaipur in Civil Misc. Case No. 6/04 whereby an application preferred by the Petitioner raising objections u/s 47 read with Section 151 Code of CPC in Execution Case No. 7/04 raising objections against execution of the decree, stands rejected.

2. The relevant facts in nutshell are that Shri Vishnu Shanker and four others filed a suit for cancellation of sale deed dated 19.12.67 alleged to have been executed by one Shri Kundan Lal (since deceased) in favour of Ganesh Lal and Amba Lal. It was averred in the plaint that the disputed property belongs to Nandir Thakurji Charbhujia Ki Bari of Bada Paliwal Samaj and therefore, late Shri Kundan Lal had no right to sell it.

3. The suit was decreed by the trial Court in favour of the Plaintiffs vide judgment and decree dated 7.3.90. Aggrieved thereby two appeals were filed; one by Ganesh Lal & Amba Lal and another by legal representative of Kundan Lal, Shri Shiv Shanker.

4. During the pendency of the appeal, the parties in the appeal preferred by Shri

Ganesh Lal and Shri Amba Lal, entered into a compromise and submitted an application before the appellate court stating that the Appellants/Defendants have paid an amount of Rs. 28,000/- as compensation to the Respondents/Plaintiffs and therefore, the appeal may be allowed and the suit preferred by the Plaintiffs may be dismissed as withdrawn. The compromise arrived at was attested by the appellate Court. However, an application was preferred inter alia by the Respondent/Defendant Shiv Shanker S/o late Shri Kundan Lal and Ors., objecting the disposal of the appeal in terms of compromise so also withdrawal of the suit. That apart, during pendency of the appeal on 11.3.91, the court observed that the compromise arrived at between the parties cannot be attested without issuing notice in terms of Order 1 Rule 8(4), Code of CPC and accordingly, the Appellants therein were directed to get the notice published in the newspaper Prat Kaal.

5. Thereafter, the matter remained pending for publication of the notice. No steps were taken on behalf of the Appellants therein for publication of the notice and therefore, on 2.6.92 the court observed that no proceedings can be taken on the compromise arrived at and therefore, the same was ordered to be filed and the matter was posted for arguments on appeal.

6. On 2.5.94 the counsel appearing for the Appellants pleaded no instructions stating that since the Appellants have entered into compromise, they have not appeared in the matter. Noticing the statement made as aforesaid, vide order dated 5.7.94, the appellate Court dismissed the appeal for default in appearance.

7. The appeal preferred by L. Rs. of Kundan Lal, Shri Shiv Shanker also stands dismissed by the appellate Court on merits. However, it is stated that a second appeal preferred by Shiv Shanker being No. 112/95 is pending decision before this Court.

8. The decree holder Vishnu Shanker and Ors. filed an application for execution of the decree. The Petitioner herein who had purchased the property from Shri Ganesh Lal during the pendency of the appeal filed objection petition under Order XXI Rule 58 read with Section 151 Code of Civil Procedure, resisting the execution of the decree inter alia on the ground that the persons who have filed the execution proceedings are not the same persons, who had filed the original suit. The application was contested by the decree holders by filing reply thereto. The application was allowed by the trial Court vide order dated 8.5.97 holding that the applicants being the persons other than original decree holders, are not entitled to file the execution proceedings.

9. Aggrieved by order dated 8.5.97 the decree holders preferred a revision petition being 234/98 before this Court. After due consideration this Court opined that the Executing Court had no jurisdiction to pass the order holding execution proceedings itself not maintainable on an application preferred by the objector Smt. Yashodhara, the Petitioner herein. The court further observed that the provisions of Order XXI Rule 58 Code of CPC are not at all attracted to the fact

situation as alleged in the objection petition, or the facts as appeared from the record. Accordingly, vide order dated 18.11.03 while setting aside order dated 8.5.97 passed by the Executing Court, this Court directed the Executing Court to proceed with the execution proceeding in accordance with law after being satisfied about the bona fides of the person filing the execution application.

10. The SLP preferred by the Petitioner herein before the Hon''ble Supreme Court against order dated 18.11.03 passed by this Court also stands rejected by the Hon''ble Supreme Court vide order dated 15.4.08.

11. The original file of the execution proceedings restored by this Court was not traceable, therefore, the decree holders filed yet another application before the Executing Court for execution of the decree. The Petitioner herein filed objection petition therein u/s 47 read with Section 151 Code of CPC claiming that since the matter was compromised between the parties and the compromise has also been made basis of the order passed in the appeal and further, the amount of compensation having been accepted by the decree holders, the decree is not executable and therefore, the execution proceedings deserves to be dismissed as not maintainable. It was contended that the decree holders having accepted the amount of Rs. 28,000/- in terms of the compromise arrived at filed before the appellate Court, they cannot be permitted to get the decree executed by committing fraud. The Petitioner submitted that since, the decree stands satisfied and therefore, it has become in executable. The Petitioner also disputed the description and identity of the property stating that the property purchased by the objector and the property subject matter of the execution proceeding are different and since, the decree is silent about the property of the objector, the same is not executable against her. It was contended that the persons who have filed the application for execution of the decree, are not the decree holders.

12. The Executing Court has rejected the objection petition preferred by the Petitioner by the order impugned. Hence, this revision petition.

13. Learned Counsel for the Petitioner contended that once the matter has been compromised between the parties before the court and the decree holders accepted the amount of compensation in terms of the compromise arrived at, the decree stands merged in the compromise and becomes in executable moment the compromise is verified by the appellate Court. It is submitted that in view of the compromise arrived at, the judgment debtor Ganesh Lal in all bona fides believed that the decree stands satisfied and he has become absolute owner of the property in question. Learned Counsel submitted that unfortunately the appellate Court instead of accepting the appeal and setting aside the decree against Ganesh Lal, dismissed the same for non prosecution. Learned Counsel submitted that merely because certain technicalities of the law were not complied with, it cannot be said that the compromise was not entered into between the decree holders and the judgment debtors notwithstanding that the same was duly verified by the appellate court. Learned Counsel submitted that the Executing Court has seriously erred in not appreciating all these aspects of

the matter in correct perspective which has resulted in failure of justice. Learned Counsel submitted that the dismissal of the objection petition by the Executing Court while holding the decree to be executable is ex facie without jurisdiction. Learned Counsel submitted that the appellate Court has applied the principle of lie pence but has failed to appreciate that if a transfer is made with the consent of the Plaintiff then he cannot be permitted to take advantage of principle of lie pence. Learned Counsel submitted that the decree holder having accepted the amount the compensation in terms of the compromise arrive at, the principle of estoppel in terms of the provisions of Section 115 of the Evidence Act, comes in to play as the sale is effected on the basis of compromise duly verified by the appellate Court. Learned Counsel submitted that on the facts and the circumstances of the case, the execution application filed on behalf of the decree holders is nothing but abuse of process of the law and is fraud with the Petitioner. Learned Counsel submitted that the Executing Court has misread the proceedings of the appellate Court, subsequent to verification of the compromise on 11.12.90. Learned Counsel submitted that the decree holders cannot be permitted to take benefit of their own wrong. Learned Counsel further urged that the validity of the decree and its executability are two separate questions which are required to be gone into by the Executing Court and specific finding was required to be recorded as to whether in view of the subsequents events, the decree has become in executable. In support of his contentions, learned Counsel has relied upon decisions of the Hon"ble Supreme Court in the matters of AIR 2000 3611 (SC) and Haji Sk. Subhan Vs. Madhoroa,

14. On the other hand, learned Counsel for the Respondents submitted that this Court while deciding the revision petition preferred by the decree holders against the order dated 8.5.97 passed by the Executing Court noticing the facts as mentioned in the earlier objection petition has already held that the provisions of Order XXI Rule 58 are not at all attracted. Learned Counsel submitted that in view of the finding arrived at by this Court that the Petitioner, a transferee pendente lite is not entitled to resist the execution of the decree, he is precluded from raising fresh objections in a piecemeal manner at a subsequent stage even in the same execution proceedings. Learned Counsel submitted that the principle of res judicata applies to the execution proceedings as well therefore, the objection petition filed by the Petitioner was liable to be rejected as not maintainable being barred by principle of res judicata. In support of his contentions, learned Counsel has relied upon a decision of the Hon"ble Supreme Court in the matter of Prem Lata Agarwal Vs. Lakshman Prasad Gupta and Others, the decisions of this Court in the matters of Smt. Pushpa v. Ganpatsingh and Ors. AIR 1977 Raj 216 : 1977 RLW 207, Mahaveer Uchcha Prathmik Vidhyalaya v. Babu Lal 2000 AIHC 502 : RLW 2000(3) Raj. 1446, Ajay Singh and Ors. v. Rajasthan Civil Services Appellate Tribunal and Ors. RLW 2003(2) Raj. 1293 and the decision of the Bombay High Court in the matters of Ankush R. Naik v. Sujata Sanzgiry and Anr. 2009 AIHC 961 and Yamunabai Purushottam Deogirikar and Ors. v. Mathurabai Nilkanth Choudhari and Ors. 2010 AIHC 426.

Learned Counsel submitted that the question regarding the validity of the compromise and executability of the decree stands settled by the decision of this Court, against which the SLP preferred also stands rejected by the Hon"ble Supreme Court. Learned Counsel submitted that on failure on the part of the Appellants/judgment debtors to get the notice published in terms of provisions of Order XXIII Rule 3B(2) Code of Civil Procedure, vide order dated 2.6.92, the appellate Court specifically recorded that on account of non publication of the notice by the Appellant despite opportunities being granted, no proceedings can be taken upon the compromise and the same may be filed. In view of the matter, learned Counsel submitted that the question regarding the effect of the alleged compromise which has not been acted upon and no decree has been passed by the Court in terms thereof is not open to be raised by the Petitioner who is only a transferee pendente lite. Learned Counsel submitted that the transferee pendente lite has no independent right in property to resist, obstruct or object execution of the decree and therefore, he is not entitled to get his claim adjudicated. In this regard, learned Counsel has relied upon a decision of the Hon"ble Supreme Court in the matter of Usha Sinha v. Dina Ram and Ors. 2009 DNJ (SC) 337.

15. Replying the arguments of learned Counsel for the Respondents, learned Counsel for the Petitioner submitted that while deciding the earlier revision petition, the court has restored the execution proceedings and directed the executing court to proceed with the execution proceedings in accordance with law after being satisfied about bona fides of the persons filing the execution application. Learned Counsel submitted that other questions raised on behalf of the Petitioner-objector were not considered and decided and therefore, it cannot be said that the fresh objection petition filed by the Petitioner is barred by principle of res judicata. Learned Counsel submitted that admittedly, the Respondents/decreed holders have filed fresh execution application therefore, the fresh objection petition filed by the Petitioner objector u/s 47 of Code of CPC was maintainable. It is submitted by the learned Counsel that the substantive right of the Petitioner to get adjudicated his claim in terms of provisions of Section 47 of Code of CPC does not stand closed on account of objection petition filed under Order XXI Rule 58 being held not maintainable.

16. I have considered the rival submissions and perused the material available on record.

17. Admittedly, in the first objection petition filed by the Petitioner in execution case No. 24/95, the execution of the decree was resisted on two grounds; firstly, that the persons who have filed execution proceedings were not Plaintiffs in the original suit and therefore, cannot be treated to be decree holders and secondly, that the matter was settled between the parties during the pendency of the appeal and thereafter the property has been sold by the judgment debtors Ganesh Lal and Amba Lal in favour of the Petitioner-objector. The Executing Court arrived at the finding that the persons filing the execution application are

not the decree holders and, therefore, they are not entitled to get the decree executed. However, on revision petition being filed by the decree holders against the order passed by the Executing Court as aforesaid, this Court after due consideration arrived at the finding that on the application of the Petitioner herein, a transferee during the pendency of the appeal, the Executing Court had no jurisdiction to pass the order holding the execution itself not maintainable. While dealing with the question of maintainability of the objection petition filed and regarding the status of the decree after the alleged compromise before the appellate court, the Court observed:

All said and done, a look at the provisions of Order 21 Rule 58 Code of CPC would show that these provisions are not all attracted to the fact situation as alleged in the objection Petitioner, or to the facts as appeared from the record. Even, according to the objection petition, the applicant seek to contend that she is a transferee pendente lite from the Defendant. It was pointed out by the learned Counsel for the Petitioner that an appeal was filed against the decree dated 7.3.90 by the Defendant and therein this compromise referred to by the present objector Yashodhara was pressed into service, but since the suit was representative suit, which had been decreed, the appellate Court directed notice of the compromise to be published so as to inform the representatives, but then, the Defendant did not get the notice published and, therefore, in the order dated 2.6.95, it was positively directed that since the Defendant has not got the notices published, the compromise cannot be acted upon and should be simply filed without any consideration. Then thereafter, on 5.7.94, the appeal was dismissed.

The learned Counsel for the Petitioner placed before me for perusal the certified copy of the order sheets of the appellate file which establish the above facts.

In these circumstances, to say the least, the learned trial Court (executing court) rather had no jurisdiction to pass the impugned order holding that the execution itself is not maintainable, on the application of the objector Yashodhara.

18. Suffice it to say that considering the objection raised by the Petitioner/objector with reference to the compromise arrived at between the parties to the appeal and subsequent transfer by the judgment debtors Ganeshlal and Ambalal in favour of the Petitioner, this Court has categorically held that the objection petition filed by the Petitioner herein resisting the execution of the decree was not maintainable. Thus, the question with regard to the right of the Petitioner-objector, a transferee pendente lite to raise objection resisting the execution of the decree having been adjudicated by this Court vide order dated 18.11.03 as aforesaid, in Revision Petition No. 24/95 arising from the earlier objection petition filed by the Petitioner under the provisions of Order XXI Rule 58, merely because, now the objections have been filed by the Petitioner purportedly u/s 47 of the Code of Civil Procedure, the binding effect of the order dated 18.11.03 which has attained finality does not stand obliterated. The principle of res judicata does apply to the execution proceedings and therefore, the question with regard to the right of the Petitioner, a transferee pendente lite to resist the

execution of the decree having been adjudicated by this Court, the fresh objection petition filed by the Petitioner was apparently barred by the principle of *res judicata*.

19. Even after revival of the execution proceedings or on filing the fresh execution application, the Petitioner cannot be permitted to raise fresh objections which he had not incorporated in the earlier objection petition filed. It is settled law that person questioning the executability of the decree must raise all objections which are available to him at one and same time and thereafter, he would be precluded from raising fresh objection.

20. In *Smt. Pushpa's case (supra)*, this Court while considering this aspect of the matter, held:

From the foregoing discussion of the case law, the position of law which emerges is that the judgment debtor if he so desires must raise all objections to the executability of the decree which are available to him at one and the same time at appropriate stage and if he does not do so he is precluded from raising fresh objection in a piece-meal manner at a subsequent stage even in the same execution proceedings.

21. It is settled law that person purchasing the property from the judgment debtor during the pendency of the suit has no independent right to resist, obstruct or object the execution of the decree. Further, a transferee pendente lite is not entitled to get his claim adjudicated. In this regard, the provisions of Order XXI Rule 102 are self explanatory. Moreover, in *Usha Sinha's case (supra)*, the Hon''ble Supreme Court while dealing with the right of a transferee pendente lite to resist, obstruct or object execution of the decree, opined that the resistance at the instance of transferee of a judgment debtor during the pendency of the proceedings cannot be said to be resistance or obstruction in his own right and therefore, he is not entitled to get his claim adjudicated. The court opined that for invoking Rule 103, it is enough for the decree holder to show that the persons resisting the possession or offering obstruction is claiming his title to the property after the institution of the suit in which decree was passed and sought to be executed against the judgment debtor.

22. Thus, viewed from any angle, the objections filed by the Petitioner, who is a transferee pendente lite, resisting the execution of the decree were not maintainable.

23. The contention of the learned Counsel that once the matter has been compromised between the parties before the appellate court and the decree holders accepted the amount of compensation in terms of the compromise arrived at, the decree stands merged in the compromise and become inexecutable moment the compromise is verified by the appellate Court, is also devoid of any merit. Indisputably, the suit wherein the decree sought to be executed was passed was a representative suit and therefore, in view of the provisions of Order XXIII Rule 3B, no compromise could have been entered into

without leave of the court expressly recorded in the proceedings. That "apart, before granting such leave, the court is under an obligation to give notice in such manner as it may think fit to such persons, as may appear it to be interested in the suit. It is not in dispute that considering the requirement of law as aforesaid, vide order dated 11.3.91, the court directed for publication of the notice, however, the judgment debtors did not care to get the notice published, consequently, vide order dated 3.9.92, the appellate court specifically directed that since despite opportunities being granted, the Appellants did not care to get the notice published therefore, the compromise arrived at cannot be acted upon and accordingly, the same was ordered to be filed. In this view of the matter, the Petitioner, a transferee pendente lite does not acquire the better right than the transferor and cannot claim any right on the basis of alleged compromise which was refused to be acted upon by the court. Thus, the claim of the Petitioner that the decree stands satisfied in terms of the compromise and therefore, it has become inexecutable, is also absolutely baseless.

24. In view of the discussion above, the decisions cited by the learned Counsel for the Petitioner in support of the contention raised, noticed above, also do not help him in any manner.

25. For the aforementioned reasons, this Court is of the considered opinion that order impugned passed by the court below does not suffer from any infirmity, illegality, irregularity or jurisdictional error warranting interference by this Court in exercise of its revisional jurisdiction u/s 115 Code of Civil Procedure.

26. In the result, the revision petition fails, it is hereby dismissed.