

(2003) 03 OHC CK 0026
In the Orissa High Court
Case No : C.R. No"s. 294 of 1999

Special Land Acquisition Officer

APPELLANT

Vs

Dilip Kumar Mishra

RESPONDENT

Date of Decision : 26-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 22(2), Order 21 Rule 30, Order 21 Rule 52, Order 21 Rule 54
Land Acquisition Act, 1894 — Section 18

Citation : (2003) 03 OHC CK 0026

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : N. Panda, S.K. Patnaik, S.K. Acharya, M.K. Badu, P.K. Sahu, S.P. Mishra, S. Dash, S. Mishra and B.P. Mishra, for the Respondent

Final Decision : Allowed

Judgement

P.K. Tripathy, J.—Heard.

2. Though the Petitioner is the same in both the Civil Revisions, the opposite parties are different. In both the cases the opposite parties are being represented by Sri S.P. Misra, learned Counsel. Same question of law is involved in both the revisions. Thus, on the request of learned Addl. Govt. Advocate and no objection from the opposite parties, both the civil revisions are heard analogously and disposed of by this common order.

3. The opposite party in Civil Revision No. 296 of 1999 is the decree-holder in Execution Case No. 16 of 1999 and the opposite party in Civil Revision No. 294 of 1999 is the decree-holder in Execution Case No. 1 of 1999, both the execution cases were filed in the Court of Civil Judge (Sr. Division), Angul for realisation of the amount awarded in their favour as per the common award passed by the Civil Judge (Sr. Division) Angul on August 13, 1998 in L.A. Misc. Case No. 29 of 1992 and L.A. Misc. Case No. 34 of 1993 respectively.

4. It appears from the certified copy of the award that Opposite party members as the loser of the land in land acquisition proceeding claimed for higher compensation and because of that reference u/s 18 of the Land Acquisition Act, 1894 (in short "the Act") was made and the Civil Judge (Sr. Division) adjudicated the same. It appears from the certified copy of the award that in favour of the Opposite party in Civil Revision No. 296 of 1999, learned Civil Judge awarded a sum of Rs. 2,82,340/- out of which Rs. 1,75,240/- was the price of Ac. 4.83 decimals of land, Rs. 75,000/- was towards the house, wall and well and Rs. 32,100/- for trees. Similarly, learned Civil Judge (Sr. Division) made an award of Rs. 1,21,680/- towards the price of Ac. 3.38 decimals of land in favour of the opposite party in Civil Revision No. 294 of 1999.

5. That award was passed on 13.8.1998. The operative portion of that reads as hereunder:

All the Misc. cases are allowed on contest and the claimants are entitled to higher compensation.

(1) In L.A. Misc. Case No. 36 of 1993 Rs. 1,72,440/- for Ac. 4.79 decimals of land and Rs. 61,900/- for acquired trees.

(2) In L.A. Misc. Case No. 34 of 1993, Rs. 1,21,680/- for Ac. 3.38 decimals of land.

(3) In L.A. Misc. Case No. 29 of 1992, Rs. 1,75,240/- for Ac. 4.83 decimals of land, Rs. 75,000/- house, wall and well and Rs. 32, 100/- for acquired trees.

besides the rates as aforesaid, the claimants are also entitled to the statutory benefits of solatium " 30% additional compensation " 12% and interest " 9% for one year with effect from the date of delivery of possession and " 15% for the rest period till the compensation is paid. The compensation amount already paid be deducted. Send a copy of this judgment to the concerned L.A. Zone Officer for information and necessary action.

6. A few days less than nine months from the date of the aforesaid award i.e., on 6.5.1999 the aforesaid two Execution petitions were filed by the said opposite party. The case was posted to 22.6.1999 for office note. On 11.5.1999 on the application of the decree-holder (opposite party) each of the execution cases was advanced, their applications to dispense with show-cause notice was allowed and order of attachment was passed. In that respect, the opposite party members advanced the plea that service of show-cause notice would result in delay and in the absence of receipt of notice in appeal against the impugned award and non-payment of the decretal dues so long they felt that the judgment-debtor (Petitioner) was avoiding to pay the awarded amount. It be noted that such application were not supported by an affidavit of the decree-holders or any person duly authorised by them. After hearing the decree-holders, learned Civil Judge (Senior Division) allowed the applications on the ground that-

(i) the award was passed on 13.8.1998 and no step was taken by the judgment-

debtor to make payment of the decretal dues nor preferred any appeal;

(ii) the Civil Judge (Sr. Division) apprehended that issue of notice will cause unreasonable delay in execution, and

(iii) the judgment-debtor may withdraw the money from the account.

7. It may be noted here that in the applications filed by the decree-holders in each of the cases, they had neither stated or asserted that issue of notice will cause unreasonable delay nor they had averred that judgment-debtor may withdraw the amount from the account. Fact remains that Special Land Acquisition Officer, NALCO, Angul is a gazetted officer and he is the judgment-debtor. The prayer for attachment was made of the accounts of Collector, Angul in the State Bank of India, Angul Main Branch, accounts of Collector in Dhenkanal Gramya Bank, Angul and account of Land Acquisition Officer in the Bank of Baroda, Angul. Petitioner feels aggrieved by that order and has preferred the aforesaid two revisions as against similar orders passed in Execution Case Nos. 16 and 17 of 1999.

8. Learned Addl. Govt. Advocate argues that when the provision of law under Order XXI Rule 22 of the Code of Civil Procedure, 1908 (in short "The Code") provides for issue of notice of show cause, under the given facts and circumstances grant of exemption from issue of show-cause notice by learned Civil Judge (Sr. Division) in an execution proceeding against a public authority amounts to arbitrary, unjust and improper exercise of jurisdiction by abusively utilising the provision of law and therefore the impugned order of attachment is illegal and liable to be set aside. In support of his contention, learned Addl. Govt. Advocate relies on the case of Satyanarain Bajoria and another Vs. Ramnarain Tibrewal and another, .

9. Learned Counsel for the opposite party, on the other hand, while not disputing to the aforesaid criticism to the conduct of the Civil Judge (Sr. Division) however, argues that the acts and omissions of the Civil Judge does not amount to an illegality but it is an irregularity. He further argues that since the decretal dues have already been paid from the attached account in Execution Case No. 17 of 1999 and after attachment of the account of Collector in Dhenkanal Gramya Bank in connection with Execution Case No. 16 of 1999 the Branch Manager of the said Bank intimated to the executing Court that no such account of Collector is there in that Bank, therefore the Civil revisions have become infructuous.

Mr. S.P. Misra, learned Counsel appearing for the opposite parties further argues that according to the Orissa Amendment, Rule 22(3) of Order XXI makes it explicitly clear that execution of a decree shall not be invalid solely by reason of omission to issue or failure to serve a notice under Sub-rule (1) or failure to record reasons where such notice is dispensed with under Sub-rule (2), unless the judgment-debtor has sustained substantial injury thereby. According to him mere passing of an order of attachment of amount in these cases has not resulted in any substantial injury and because of that also the impugned order is

not liable to be set aside. He further argued that since the First Appeal are pending and stay orders have already been passed the matters relating to execution of the award shall be determined in accordance with the determination of compensation and therefore no useful purpose will be served by interfering with the impugned orders.

10. Two first Appeals as against the impugned awards have been listed for hearing in this Court and as per the separate order they have been adjourned. On perusal of the records of those F.A. Nos. 64 and 65 of 1999, this Court finds that appeals against the impugned awards were filed on 9.2.1999 and on 30.6.1999, orders were passed for stay of the aforesaid two execution proceedings.

11. So far as the State of Orissa is concerned, Order XXI Rule 22 read as hereunder:

22. Notice to show cause against execution in certain cases-

(1) Where an application for execution is made in writing under Rule 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed why the decree should not be executed.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Proceedings held in execution of a decree shall not be invalid solely by reason of any omission to issue or failure to serve a notice under Sub-rule (1) or to record reasons where such notice is dispensed with under Sub-rule (2) unless the judgment-debtor has sustained substantial injury thereby.

12. It appears from the above quoted provision in Sub-rule (1) that issue of show-cause notice is the rule. The provision in Sub-rule (2) provides exception to the aforesaid principle relating to issue of show cause notice. Such exemption can be granted if the Court is satisfied about existence of the circumstances enumerated in Sub-rule (2). In other words, if the executing Court from any material provided to it by the decree-holder considers that issue of show-cause notice would cause unreasonable delay or it would defeat the ends of justice, then only such exemption can be granted relating to issue of show-cause notice. So far as the above quoted Sub-rule (3) is concerned, it does not protect an intentional, deliberate or mischievous action in omitting to issue notice or failure to serve a notice or failure to record reasons for dispensing with service of such notice. On the other hand, on a consistent reading of the entire provision in Order 21, Rule 22 of the Code it can be visualised that an accidental omission to issue a notice to show cause shall not be regarded as in illegality. Similarly, when a notice is issued but without verifying relating to its proper service, the further

proceeding is undertaken that amounts to an irregularity. Similarly, for dispensing with issue of show cause notice without recording the reason thereof will not amount to an illegality if good grounds in that respect exists on record. In such case the aforesaid omission and failure relating to dispensing with issue and service of notice shall not be regarded as an illegality unless from such act of omission or defect it is made out that the judgment-debtor thereby sustained a substantial injury. In the case of Satyanarayan (supra) taking note of suppression of notices at all relevant stage of the execution proceeding, the Apex Court have been pleased to hold that:

...It is true that now it has been specifically clarified by the explanation to Rule 90 of Order 21 of the Code that "the mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this Rule". But if the judgment-debtor is kept totally ignorant of the execution proceedings right from the date of execution application till sale, it cannot be merely called a mere irregularity in attachment and thus of no consequence....

(Quoted from paragraph-17)

Relating to consequence of non-service of notice in proper manner their Lordships have been pleased to observe that:

18. The facts of the case show that the lower appellate Court totally missed the points which were required to be determined and merely by assuming that even if notice under Order 21 Rule 54 of the Code is not served, by virtue of explanation to Rule 90 of Order 21 of the Code it is not a material irregularity or illegality to auction sale. The lower appellate Court totally misunderstood the importance and efficacy of notices being served in execution proceedings under Order 21 Rule 22; Order 21 Rule 54 (1-A) notice for settlement of terms of proclamation in the presence of the judgment-debtor which led to the finding recorded by it and the finding on fact in the circumstances, is totally vitiated.

The Apex Court have further been pleased to observed that:

...It will be noticed that it was a case of typical money lender who has evil-eye to grab the property of the judgment-debtor somehow or the other. He allows the first application for execution to be dismissed; waits for practically three years to file Anr. execution application claiming a sum of Rs. 350/- only; sees to it that judgment-debtor is kept ignorant of the proceedings in Court; obtains permission to himself buy the property; gets the property sold for recovery of petty amount of Rs. 649.45 paise and buys the property himself. This again is a typical illustration of fraudulent conduct of decree-holder. In such cases the Court will even presume loss and substantial injury to the judgment debtor....

(Quoted from paragraph-15)

13. Keeping in view the provision of law (as quoted above) the discussion already made of the fact and on the position of law and the view expressed by the Apex Court in the above quoted decision, if the merit of the impugned orders shall be

assessed, then it is seen that in the cases at hand the decree-holder did not advance any reason to substantiate the requirement of law under Order XXI Rule 22(2) of the Code that if show-cause notice would be issued then that would cause unreasonable delay or would defeat the ends of justice. Learned Civil Judge also did not assign any reason or the circumstances from which he could conceive about existence of such circumstances so as to dispense with issue of show-cause notice. The Judgment-debtor is not an individual but a public authority. His liability is not personal but it is purely official. The Special Land Acquisition Officer is represented through the State Counsel who is the Government Pleader or an Addl. Govt. Pleader appointed for the cases against the State at that station. The Office of the Special Land Acquisition Officer situates within the vicinity of the township and a notice could have been served within less than an hour if that would have been issued through a special messenger. Therefore, in this case there does not exist any circumstance to satisfy the requirement of law that there would have been unreasonable delay in service of notice. Similarly, there is no reasonable circumstance to infer that service of notice on the judgment-debtor would have defeated the end of justice. The judgment-debtor as a public authority could not have withdrawn the money and fled away with it at his pleasure. In the application filed by the decree-holder there was no such allegation against the judgment-debtor and therefore, learned Civil Judge could not have made an inference about such apprehended objectionable conduct on the part of the judgment-debtor. The district Collector was not made a party to the execution proceeding. If for satisfaction of the amount to be paid by the State to the decree-holder it is necessary that the properties and the assets at the disposal of the Collector was to be attached, then the decree-holder should have shown to the Court that the public authority appearing as judgment-debtor and the properties available with him are not sufficient to satisfy the decree. All these aspects were ignored to be visualised by learned Civil Judge for reasons best known to him while passing the impugned order illegally and arbitrarily so as to humiliate the judgment-debtor and the district Collector by executing an order of attachment of the accounts standing in their names. Apart from that, if at all the Civil Judge was desirous of taking any action so as to safeguard the interest of the decree-holder relating to payment of money under the award, then he could have taken recourse to the provision in Order XXI Rule 52 of the Code instead of issuing a notice of attachment under Chapter XXI, Rule 30 of the Code.

14. While issuing the order of attachment the Court below should have also been careful that attachment of the accounts is made only to the extent of liability of the judgment-debtor so far as that particular Execution Proceeding is concerned. In that respect the decree-holders were to give the particulars of the Bank Account Numbers because the public officers, for different purposes keep different accounts for public utility. Above all, when the funds are being provided to the Collector or to the Special Land Acquisition Collector to be used for different public purposes viz., developmental work, meeting expenditure of

emergency nature, providing reliefs etc., therefore a Court should not be whimsical, careless, perverted or sadistic to act according to the whim of the decree-holders for making attachment of such accounts meant for public purposes. The aforesaid findings and observations are not suggestive of a principle that such accounts cannot or should not be attached. On the other hand this Court finds that the provision of law does not forbid attachment of such account. All that this Court intend to state that, such order should be passed with due consideration of facts and circumstances and on acting according to law and procedure.

15. It may be noted here that if a notice to show-cause would have been issued to the judgment-debtor or the Government Pleader would have been directed to receive the notice on behalf of the State, then perhaps it could have been brought to the notice of the executing Court that First Appeals had already been filed and the judgment-debtor could have taken steps to move for stay of the Execution Proceeding. The judgment-debtors were not only deprived or bringing such necessary facts to the notice of the executing Court but also they were denied an opportunity to move for stay of the Execution Proceeding before the orders of attachment were passed. As noted above, the public officers were allowed to be humiliated by attaching the public funds. As observed by the Apex Court, the aforesaid circumstances are sufficient to make a valid inference that the judgment-debtor in this case has sustained substantial injury because of the impugned orders.

16. Learned Additional Government Advocate states that payment of money has already been made by the Bank on the direction of the Court so far as Execution Case No. 17 of the 1999 is concerned. The aforesaid manner of realisation also appears to be highly irregular. Be that as it may, if so legally advised, the judgment-debtor may take appropriate steps for restitution and if any such application shall be moved then it is for the concerned Court to consider the same. In that respect this Court expresses no opinion.

17. Because of the above discussion, findings and observations, this Court sets aside the impugned orders and allows both the Civil Revisions. Parties are directed to bear their down cost. Hearing-fee is assessed at contested scale.

Send bank the L.C. Rs. of Execution cases to the Court below.