

(2013) 10 SHI CK 0044
In the High Court Of Himachal Pradesh
Case No : CMPMO No. 1 of 2013

Surinder Nath and Another	Vs	APPELLANT
Bihari Lal and Others		RESPONDENT

Date of Decision : 18-10-2013

Acts Referred:

Citation : (2013) 10 SHI CK 0044

Hon'ble Judges : Sanjay Karol, J

Bench : Single Bench

Advocate : G.D. Verma and Mr. B.C. Verma, for the Appellant; Bhupinder Gupta and Mr. Janesh Gupta, Advocate for Respondent No. 1 and Mr. Ramakant Sharma, Advocate for Respondents No. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Karol, J.—Shri Bakshi Ram owned several moveable and immoveable properties within the State of Himachal Pradesh. He died on 21.8.1978, leaving behind his sons, namely S/Shri Hem Raj, Sulekh Chand, Surinder Nath, Bihari Lal and wife Smt. Parsino Devi. On the basis of Will dated 10.8.1978, his estate stood bequeathed and mutated in favour of his legal heirs (parties to the lis), in equal share. Certain dispute arose between the legal heirs, as a result of which, Shri Sulekh Chand and Shri Surinder Nath (present petitioners) filed a suit for declaration, claiming joint ownership and possession of certain properties in District Hamirpur. The suit was decreed on 27.2.1988 in favour of the plaintiffs, by Sub Judge, Hamirpur. Shri Bihari Lal, who claimed exclusive possession of certain properties, preferred an appeal. However, during its pendency, on 27.3.1990, parties entered into an arbitration agreement and agreed to refer their disputes to the sole arbitrator.

2. On 23.5.1994, Arbitrator passed his award, Shri Bihari Lal preferred objections to the same, which were dismissed and award made Rule of the Court vide judgment dated 8.11.2005, of the District Judge, Hamirpur. Dissatisfied, Shri Bihari Lal preferred an appeal, which stood dismissed by this Court on 24.7.2006.

3. The matter, however, did not rest there. S/Shri Hem Raj, Sulekh Chand, Surinder Nath and Smt. Parsino Devi instituted a petition, seeking execution of award dated 23.5.1994, to which Shri Bihari Lal objected, which plea was also dismissed by the District Judge, Hamirpur, on 28.4.2010.

4. Same day, District Judge, Hamirpur, further passed the following order:

The objection petition filed by Shri Bihari Lal has been dismissed vide separate Order placed on the file.

Now a direction be issued to the Tehsildar, Hamirpur for carrying out the decree of this Court by putting the parties in possession of their respective shares as per the decree after identification. All the relevant papers will be sent to him by this Court under proper receipt. It is further clarified that if revenue record of any other Tehsil, apart from Hamirpur Tehsil, is required, the Tehsildar of the other Tehsil(s), if any, will assist the Tehsildar, Hamirpur, in execution of the decree qua the property situated in such different Tehsil.

The report be called for June 25, 2010.

5. Pursuant thereto, Tehsildar, Hamirpur, visited the spot and submitted his report dated 16.8.2010, with respect to which Shri Sulekh Chand and Shri Surinder Nath filed objections on 4.10.2010, which stand dismissed, in terms of impugned order dated 29.9.2012, passed by the District Judge, Hamirpur. Hence, the present petition.

6. Mr. G.D. Verma, learned Senior Advocate, for the objectors, has urged that (i) in executing the decree, the Local Commissioner exceeded jurisdiction and scope of work assigned to him, as it is a settled proposition of law that Court cannot go behind a decree, which error stands committed by the Local Commissioner; (ii) Local Commissioner did not execute the commission completely and fully, inasmuch as no site plan was prepared on the spot, clearly demarcating the area allocated to each of the parties; (iii) on account of jurisdictional error, entire execution proceedings stand vitiated. In terms of Section 37 of the Code of Civil Procedure, execution would lie before the trial Court and not the District Judge, being an appellate Court.

7. In support of his contentions, Mr. Verma referred to and relied upon the following decisions:

1. Ghantesher Ghosh Vs. Madan Mohan Ghosh and Others,
2. Ramankutty Vs. Avara,
3. Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others,
4. Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others,
5. Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others,

6. Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others,
7. V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar,
8. State Bank of Hyderabad Vs. Joint family of Mukundas Raja Bhagwandas and Sons and Others,
9. Raj Rani v. Smt. Jaswanti Devi and others, 1994(1) SLJ 664.

8. On the other hand, Mr. Bhupinder Gupta, learned Senior Advocate, supported the order on the ground that (i) in absence of any ambiguity with regard to identification of property, no Tatima (map) was required to be prepared; (ii) arrangement arrived at by the Local Commissioner was with the consent of the parties; (iii) present petitioners/objectors were paid money as compensation in lieu of reduction in actual size in their share of immoveable property; (iv) petitioners, as decree holders, themselves instituted execution proceedings before the District Judge, and as such, at such a belated stage and more so in these proceedings, cannot be allowed to raise the issue of jurisdictional error.

9. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the petition only merits rejection.

10. Part-2 of Code of Civil Procedure, 1908 deals with Execution. Section 37 provides that:-

37. Definition of Court which passed a decree.-The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Explanation:

The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.

11. Section 38 empowers the Court, which passed the decree, to execute the same.

12. Apex Court in *Ramankutty Gutan* (supra), had the occasion to deal with a case where an application was filed before the appellate Court, which had affirmed the decree passed by the trial Court. The Court observed:

7. Sri Nambiar, learned counsel appearing for the respondent, contended that the meaning of the word "same suit" in S. 28(1) of the Act should not be construed to be the original court in which the decree was made. Therefore, the application would lie for extension of time, or for rescinding the contract, only in the appellate court and not in the trial Court, that too on execution side. We find no force in the contention.

8. Section 37, C.P.C. enumerates that:

37. Definition of the court which passed a decree - The expression "Court passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include-

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

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Therefore, it is clear that the decree of the appellate court would be construed to be the decree passed by the Court of first instance. It is settled law that an appeal is a continuation of the suit. Therefore, where a decree for specific performance has been dismissed by the trial court, but decreed by the appellate court, it should be construed to be in the same suit. When the decree specifies the time for performance of the conditions of the decree, on its failure to deposit the money, S. 28(1) itself gives power to the court to extend the time on such terms as the court may allow to pay the purchase money or other sum which the court has ordered him to pay. In *K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar*, this court held that on an oral prayer made by the counsel for the plaintiff for permission to deposit the entire amount as directed by the trial Court this court directed the appellant to deposit the amount within six months from that date together with interest and other conditions mentioned therein. An application for extension of time for payment of balance consideration may be filed even in the court of first instance or in the appellate court in the same suit as the decree of the trial Court stands merged with that of the appellate court which decree is under execution. It is to be seen that the procedure is the hand-maid for Justice; and unless the procedure touches upon jurisdictional issue, it should be moulded to subserve substantial justice. Therefore, technicalities would not stand in the way to subserve substantive justice. Take a case where the decree is transferred for execution to a transferee executing court, then certainly the transferee court is not the original court and execution Court is not the "same court" within the meaning of S. 28 of the Act. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application

under S. 28 is maintainable in the same court.

13. In *Mahijibhai Mohanbhai Barot* (supra), the apex Court further observed:

27. Nor can we accept the argument that if an application under S. 144 of the CPC is an application for execution, it will be inconsistent with S. 38 of the Code. Under S. 144 an application can be filed only before the Court of the first instance whereas under S. 38 a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. But under S. 37 the expression "Court which passed a decree", or words to that effect, shall in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include, (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. It is, therefore, clear that the expression "Court which passed a decree" includes the Court of first instance where the decree to be executed has been passed in the exercise of appellate jurisdiction. A combined reading of Ss. 37 and 38 indicates that the Court of first instance is the Court which passed the decree within the meaning of S. 38, and, therefore, an application for execution of the decree can be filed therein. If the Court of first instance is deemed to be the Court which passed the decree, we do not see any difficulty in holding that the said Court can transfer the decree under S. 39 of the Code.

28. The contention that the determination of a question under S. 144 of the Code is included in the definition of a decree u/s 2(2) of the Code has also no relevance to the question before us. The said definition takes in both an order made under S. 47 and that made under S. 144 of the Code. The said two sections are included for the purpose of giving a right of appeal. If an execution application to which S. 47 applies does not cease to be an execution application by reason of the section being included in the definition of "decree", an execution application under S. 144. cannot likewise cease to be one for the reason that the said section is included in the definition of "decree".

14. It is not in dispute that by agreement, at the stage when appeal was pending before the District Judge, parties got appointed an Arbitrator. Award passed by the Arbitrator was made Rule of the Court vide order dated 8.11.2005 of the District Judge, Hamirpur. At no stage did the parties go before the Court, which passed the decree in the Civil Suit. Appeal, under provisions of Section 39 of the Arbitration Act, 1940, was preferred by Shri Bihari Lal before this Court, which also was dismissed on 24.7.2006. Under these circumstances, it cannot be said that the Court, which passed the decree, is the original Court, i.e. the Sub Judge, but in fact it is the District Judge, where award was also made Rule of the Court. Civil Suit and arbitration proceedings were separate and distinct. Parties also understood the same to be as such. Hence, contention with regard to

jurisdictional issue or error only merits rejection, more so for the reason that petitioners themselves had filed execution of the arbitral award before the District Judge.

15. It is seen that Local Commissioner, in his report, has categorically recorded that properties were partitioned on the spot, as per agreement arrived at by the parties. Statements of parties were also recorded and their signatures obtained. Significantly, it is not the pleaded case of the objectors, either here or before the Court below, of such consent having been obtained by coercion, fraud, threat or undue influence. In fact there is no grievance, in the present petition, that they had not consented before the Local Commissioner or that their signatures on the report were obtained, without the contents having been read over to them. Report of the Local Commissioner is dated 16.8.2010 and objections were filed only on 4.10.2010.

16. That apart, on the factual aspect, petitioners' main grievance is with regard to reduction of width of their shop and allotment of 20 square meters of land in excess of his share to Shri Hem Raj. Mr. Bhupinder Gupta, learned Senior Advocate, in a painstaking manner, has taken me through the record of the Local Commissioner, which clearly evidences the fact that for this shortfall, petitioners were compensated monetarily, apart from the fact that on the spot they had voluntarily agreed for such an arrangement.

17. Under these circumstances, it cannot be said that the judgment passed by the Court below, dealing with the objections, is illegal or erroneous, warranting interference by this Court. There is no ambiguity either in the award or in the agreement so arrived at by the parties on the spot. Share of the parties has neither been altered nor reduced by the Local Commissioner. It cannot be said that while executing the decree, with consent, Local Commissioner exceeded his jurisdiction by going behind the terms of the decree.

18. There is no dispute with regard to identification of the property. There is also no dispute that parties were put into respective portions of their share of property, as identified on the spot. Under these circumstances, non preparation of site plan pales into insignificance.

19. The judgments noticed supra, in my considered view, are totally inapplicable in the given facts.

20. It is settled proposition of law that it is the duty of Executing Court to give effect to the terms of the decree. It has no power to go beyond its terms. Though it has power to interpret the decree, it cannot make new decree for the parties under the guise of interpretation. {Jai Narain Ram Jundia (supra); V. Ramaswami Aiyengar (supra); and Joint Family of Mukund Dass Raja Bhagwandas (supra)}. Here, in the instant case, the facts are different. Parties themselves, at the time of execution, on the spot, agreed to partially modify the decree, as per prevalent circumstances. This was so done only to facilitate proper and complete execution of the award in a just, equitable and fair manner.

With the aforesaid observations, present petition is dismissed and disposed of, so also pending application(s), if any.