

(2015) 09 CAL CK 0072
In the Calcutta High Court

Case No : C.O. 3692 of 2014, 995, 1113, 3472, 3473, 3474, 3475 and 3476 of 2015

The Executive Engineer (A.I.) Jalpaiguri/Agri/Irrigation
Division

APPELLANT

Vs

Dhairyadhar Ghosh and Others

RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 26 Rule 9, Order 41 Rule 11, 151, 152

Citation : (2015) 09 CAL CK 0072

Hon'ble Judges : Harish Tandon, J.

Bench : Single Bench

Advocate : Rammohan Pal, for the Appellant; S.P. Roy Choudhury and Sourav Sen, for the Respondent

Judgement

Harish Tandon, J.—All these bunch of revisional applications are taken up together to avoid the prolixity of repetition of some facts as the orders impugned therein are passed in connection with the same execution proceedings.

2. A suit for declaration of title, permanent injunction and recovery of possession instituted by the plaintiff/opposite party being Title Suit No. 9 of 1990 stood dismissed vide judgment and decree dated July 17, 1999 by the learned Civil Judge (Junior Division), Siliguri, District Darjeeling.

3. The said judgment and decree was assailed before the learned District Judge, Darjeeling in O.C. Appeal No. 19 of 1999 which was subsequently transferred to the learned District Judge, Second Court at Siliguri. The Appellate Court set aside the decree and remanded the suit to the Trial Court for reconsideration as certain issues which are important and vital had not been addressed properly. The order of remand was assailed before the High Court in F.M.A. No. 1679 of 2003. Though the said appeal was admitted by the High Court under Order 41 Rule 11 of the Code of Civil Procedure but no express order of stay of the further

proceedings in the suit was passed. In absence of the specific order of stay, the Trial Court proceeded with the suit and again dismissed the same on August 24, 2006. The plaintiff/opposite party carried the said judgment and decree to the Appellate Court which was subsequently reversed on March 25, 2009. The Appellate Court not only declared the title of the plaintiff/opposite party but further passed an order for delivery of possession in respect of the suit premises within the stipulated period failing which the plaintiff/opposite party was allowed to execute the same. Since the possession was not delivered by the judgment debtor/petitioner, an execution case being No. 6 of 2009 was filed before the Civil Judge (Junior Division), Siliguri. Till 25th August, 2010 the executing Court was not proceeding with the execution case in absence of the original copy of the judgment and decree passed by the appellate Court. After recording that the execution is in order, the Court thereafter directed the decree holder/opposite party to take necessary steps. Subsequently, the executing Court directed the issuance of the writ of possession to the process server and fixed the date for submission of the report. An application under Section 151 of the Code of Civil Procedure read with Rule 208 of Civil Rules and Orders was taken out by the decree holder/opposite party and by order No. 19 dated 5th May, 2011, the Court even after recording that the bailiff has returned the writ of possession unexecuted did not accept the same as it does not contain the signature of independent witness. The Executing Court also declined to pass an order for police help and directed the issuance of the writ of possession afresh. The bailiff again could not execute the writ of possession and returned the same along with the report. On 22nd November, 2013, the decree holder/opposite party took out further application under Section 151 of the Code of Civil Procedure read with Rule 208 of the Civil Rules and Orders praying for execution of the writ of possession through police help. By order No. 38 of even date the executing Court allowed the said application directing the Deputy Commissioner of Police to furnish the cost of seven male and one lady constable along with one Sub-Inspector/Assistant Sub Inspector to give adequate protection to the bailiff in course of the execution of the writ of possession. The said order is now assailed by the judgment debtor/petitioner in C.O. No. 3472 of 2015.

4. The decree holder/opposite party subsequently prayed for an appointment of Amin which was eventually allowed by order No. 43 dated 28th January 2015. After depositing the cost, the Executing Court directed the Nazir to execute the decree by clearing the obstruction at the entrance of the suit land. On 14th March 2014, a report with sketch map of the land was received from the office of the BL & LRO where the said Amen was attached and the same was directed to be kept on record. A further application was taken out by the decree holder/opposite party for disconnection of the electricity so that the illegal structures standing on the suit premises can be demolished and/or removed with the help of police and Amin and the land of the decree holder/opposite party can be demarcated and/or identified for the purpose of execution.

5. Even an application under Order 21 Rule 97 of the Code of Civil Procedure was

allowed on 14th May, 2015. An objection to the said application was filed by the decree holder/petitioner on 23rd May 2014 which was fixed for hearing on 30th April, 2015. The Court after recording that the said application had already been disposed of treated the objection as an independent objection to the execution proceedings.

6. The basis of the objection was founded on the non-registration of a Judicial Misc. Case to an application under Order 21 Rule 97 of the Code of Civil Procedure which was not found sustainable as non registration of a separate case is mere irregularity and does not affect the decision of the executing Court. The said order dated 30th May, 2014 is assailed in C.O. 3472 of 2015 by the judgment debtor/petitioner. The judgment debtor/petitioner thereafter took several adjournments in the execution proceedings as they have challenged the order dated May 14, 2014 before this Court in C.O. 3692 of 2014.

7. It is pertinent to record that on the date of moving the said revisional application, this Court adjourned the matter for fortnight and directed the judgment debtor/petitioner to indicate how the decreetal premise shall be made over to the decree holder. On the next date this Court directed the executing Court to ensure that the bailiff took possession of the decreetal premises and made over the same to the decree holder in accordance with law. It was further observed that the executing Court having already allowed the police help should further ensure that the matter is reached to a logical conclusion.

8. The moment the order of this Court passed in C.O. 3692 of 2014 is brought to the notice of the executing Court, an application under Section 47 of the Code of Civil Procedure was taken out by the judgment debtor/petitioner being Misc Case No. 1 of 2015. In the said proceedings an application under order 26 Rule 9 of the Code of Civil Procedure was filed which stood rejected on February 5, 2015 and the said order is assailed in C.O. 3474 of 2015. At the time of final hearing of the said Misc. Case, the executing Court rejected the other objections raised therein but accepted the contention of judgment debtor/petitioner that there is a discrepancy in the boundary given in the application for execution and the sale deed of the decree holder/opposite party and further directed to clarify such position. The said order No. 5 dated. February 9, 2015 is assailed by both the parties in C.O. 995 of 2015 and C.O. No. 1113 of 2015. By order No. 76 dated. 23rd February, 2015 the executing Court observed that the boundary given in the application for execution of decree is correct and sufficient enough to identify the land of the decree holder. The said order is further challenged in C.O. 3475 of 2015. The judgment debtor/petitioner however took out an application under Section 151 of the Code of Civil Procedure for recalling an order dated 22nd November, 2013 and 14th May, 2014 which stood rejected vide order No. 77 dated 9th March, 2015 with categorical observation that since the matter is pending before the Hon''ble High Court, it would not be proper to recall the said order. The said order is now assailed in C.O. 3476 of 2015.

9. It is to place on record that the respective counsels of the parties have agreed

to take up all the revisional applications together so that the entire matter can be decided by this Court. This Court thereafter permitted the learned advocate of the respective parties to argue on all the revisional applications treating them as on the day's list.

10. Learned advocate for judgment debtor/petitioner submits that the decree as it stood is inexecutable inasmuch as the property is already vested and therefore no valid title could pass on the strength of the alleged sale deed in favour of the decree holder/opposite party. It is further submitted that the appeal filed by the decree holder/opposite party was subsequently dismissed for default and therefore there is no decree in the eye of law. Lastly it is submitted that the decree is incapable of execution as there is no description of the property and an application for correction of the decree having been rejected by the appellate Court, the execution case is liable to be rejected.

11. Mr. Roy Chowdhury, the learned senior advocate for the decree holder/opposite party submits that the appellate Court reversed the decree of dismissal and therefore that the decree of the Trial Court containing the description of the property is capable of execution and the objection put forward by the judgment debtor/petitioner in this regard is untenable. He strenuously submits that on the basis of the resistance offered to the bailiff, an application for police help was allowed and furthermore the objection to execution of the decree was rejected by the executing Court. He thus submits that the executing Court cannot reopen the decree having limited jurisdiction and therefore the contention of the petitioner that the suit land is a vested land is not tenable. He audaciously submits that all the subsequent revisional applications challenging the various orders passed in the executing proceedings is not entertainable after a considerable lapse of time more particularly after the steps are taken by the judgment debtor/petitioner before the executing court.

12. Having heard and considered the submissions of the respective counsels it is no longer *res integra* that the executing Court exercises the jurisdiction within the limited compass that is to say it can neither reopen the decree nor can travel beyond it. The judgment debtor/petitioner tried to raise a point that the appellate Court dismissed the said appeal and therefore the decree for dismissal passed by the Trial Court stood affirmed. The aforesaid point is factually wrong. The subsequent orders relied upon by the judgment debtor/petitioner were passed on an application under Section 152 of the Code of Civil Procedure filed by the decree holder/opposite party for correction of a typographical error and/or ministerial omission. The said application was dismissed by the appellate Court which does not lead to a proposition that the appeal itself was dismissed. Admittedly, there is a wrong recording by the appellate Court in the order dated 10th August, 2010 that the appeal is dismissed; in fact the appeal was allowed on 25.9.2009. Once the judgment and decree is passed by the appellate Court, it becomes *functus officio* except to the limited extent. Though the orders subsequent to the said judgment dated 25.9.2009 were passed on an application

under Section 152 of the Code but while dismissing the same, it is erroneously recorded that the appeal is dismissed. There was no appeal pending as on that date and therefore a party cannot be permitted to take advantage of the wrong recording of the order, which per se is erroneous. Furthermore, the judgment debtor/petitioner assailed the said judgment and decree passed by the appellate Court by filing the second appeal before this Court along with an application for condonation of delay which is still pending. The judgement debtor/petitioner cannot be permitted to approbate and reprobate at the same time on the basis of the wrong observations and/or wrong recording by the Court who lost sesin after passing the judgment. The record would reveal that the objection in the form of Section 47 as well as the objection under Order 21 Rule 97 of the Code could not yield the fruitful purposes enuring to the benefit of judgment debtor/petitioner inasmuch as the Court subsequently found that the so called discrepancy in the schedule of the property given in the tabular statement and the sale deed is not legally sustainable.

13. The conduct of the judgment debtor/petitioner, apparent from the record, sufficiently indicates that they are resorting to all provisions of law so that the decree is not executed. Furthermore, the executing Court was conscious about the extent of the land acquired by the decree holder/opposite party and appointed an Amin to assist the bailiff to execute the decree for recovery of possession. Even the report submitted by the Amen and received from office of the BL & LRO is also kept on record by the executing Court with an object to avoid excessive execution.

14. It is too late in a date to reopen a decree on the ground that the property comprised therein stood vested to the state. From the judgment of the appellate Court it is apparent that such objection was taken and there is a categorical observations that the judgment debtor/petitioner have miserably failed to prove the said fact. The plea of vesting having taken in the suit and decided against cannot be permitted to be reopened in an execution proceedings.

15. Though feebly it is submitted at the bar that Rule 208 of the Civil Rules and Orders requires recording of the satisfaction of the conditions laid down therein and having not done so the orders suffers from illegality and/or infirmity, there is no fetter on the part of the revisional Court to supply the reasons if the ultimate decision of the subordinate Court is found to be correct. The manner in which the Judgment debtor/petitioner proceeded with the execution proceeding makes patent that they will not allow the bailiff to recover the possession but to offer all resistance in recovering the possession. The bailiffs have returned the writ unexecuted and therefore it becomes necessary to order for police help.

16. The Court cannot remain a mute spectator but should see that its decree and order is respected and executed with full force. The judgment debtor who could not succeed in upsetting the judgment and decree should not be encouraged to prolong and delay the execution proceeding.

17. This Court therefore does not find any substance in the submissions of the judgment debtor.

18. All the revisional applications filed by the judgment debtor/petitioner stood dismissed.

19. Since the executing Court by a subsequent order observed that there is no discrepancy in the schedule of the property depicted in the tabular statement and the sale deed, the revisional application being C.O. 3776 of 2015 filed by the opposite party becomes infructuous.

20. The same is disposed of as such.

21. However, in the facts and circumstances, there shall be no order as to costs.