

(2011) 11 AHC CK 0147
In the Allahabad High Court
Case No : Writ - C No. - 67640 of 2011

Vibhuti (Now Deceased) and Another	Vs	APPELLANT
Jayantri (Now Deceased) and Others		RESPONDENT

Date of Decision : 25-11-2011

Acts Referred:

Citation : (2011) 11 AHC CK 0147

Hon'ble Judges : Abhinava Upadhyay, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon'ble Abhinava Upadhyay, J.—By means of this writ petition, the petitioner has challenged the order of the executing court by which the objection of the petitioner has been rejected.

2. A suit for permanent injunction was filed being suit No. 305 of 1988. The said suit was dismissed against which first appeal was filed being first appeal No. 96 of 2001. The first appeal was allowed holding that the petitioner is entitled to pathway. The aforesaid pathway as shown in the map which was numbered as No. 73Ga-2 was accepted and adopted and was treated to be the final map.

3. Challenging the order of the first appellate court, the petitioner filed second appeal before this Court but the second appeal has also been dismissed.

4. For executing the order of the appellate court dated 19.12.2008 an execution case was filed being the execution case No. 2 of 2009.

5. During the said execution proceedings an objection was raised by the petitioner that constructions have been raised by him over the property in question and since there is no order of demolition by the appellate court, therefore, the executing court cannot go beyond what has been directed by the appellate court and affirmed by the second appellate court, that is, High Court and direct demolition. The said objection has been rejected and the executing

court holding that although the said objection was raised by the petitioner before the appellate court but inspite of that the appellate court has passed the order injunctioning the petitioner from interfering in the passage as reflected in the map 73Ga-2 which has been affirmed by the High Court, therefore, such a objection cannot be sustained at this stage and rejected the objection.

6. Learned counsel for the petitioner has placed reliance upon the decisions of Hon"ble Supreme Court in the cases of State of M.P. Vs. Mangilal Sharma, and Gurdev Singh Vs. Narain Singh,

7. In the case of Mangilal Sharma (Supra), the declaration that was sought was to treat the plaintiff therein to be in continuous service. Before the executing court, the plaintiff also asked for arrears of salary which was allowed by the executing court upon which it was held that the executing court could not have directed for payment of salary when in the decree itself no such relief was granted.

8. In Mangilal Sharma (Supra), the Hon"ble Supreme Court further held that the suit was mere a declaratory suit and for the execution of the decree passed in a declaratory suit, the decree does not in term direct the judgment debtor to do or to refrain from doing any particular act or thing.

9. In the case of Gurdev Singh (supra) the facts were that an injunction was sought restraining the defendant therein from planting any tree on the land in question. Such an injunction was granted and certain trees already planted were being cut and, therefore, the question arose whether if in the decree, order for removal of the tree has not been made, executing court can still direct the removal of such trees.

10. The Hon"ble Supreme Court held that the decree holder cannot seek execution of decree by way of removal of trees and the same could also not be directed by executing court.

11. In Gur Dev Singh (Supra), for execution of the decree

restraining the defendant therein from planting any tree, cutting of tree was not necessary but in the case in hand for an unobstructed pathway, the demolition of construction is necessary.

12. Thus, the above cases relied upon by the learned counsel for the petitioner are clearly distinguishable and are not applicable to the facts of the present case.

13. The contention of the learned counsel for the petitioner is that there is no order of removal of the construction in the decree and, therefore, the executing court cannot be allowed to demolish the construction so raised.

14. The aforesaid submission of the learned counsel for the petitioner cannot be accepted as according to his own showing after the dismissal of the suit and before the order of the appellate court, he has raised certain construction but the court below has directed that the petitioner be injunctioned from interfering in any

manner on the passage as demonstrated in the map which has been affirmed by the High Court. Any illegal obstruction on the passage is necessarily required to be removed for execution of the decree in order to comply with the judgment.

15. I have considered the submissions made by the learned counsel for the petitioner as well as Sri Sanjay Kumar Pandey, counsel for the respondents. I see no error in the order which may merit any further consideration by this Court.

16. The writ petition is misconceived and is accordingly dismissed.