

(2020) 08 MP CK 0174

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 5342 Of 2019

Vidhyashankar Vajpayee

APPELLANT

Vs

Harveer Singh & Ors.

RESPONDENT

Date of Decision : 25-08-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151
Constitution Of India, 1950 — Article 227

Citation : (2020) 08 MP CK 0174

Hon'ble Judges : G. S. Ahluwalia, J

Bench : Single Bench

Advocate : N.K. Gupta, R.S. Gupta, D.D. Bansal

Final Decision : Allowed

Judgement

This Miscellaneous Petition under Article 227 of the Constitution of India has been filed against the order dated 6.7.2019 and 24.8.2019 passed by Third Civil Judge, Class-I, Guna in Execution Case No.139A/2001 by which the Executing Court has held that although a beam of the house has been constructed by encroaching upon the disputed lane in question, but if the said beam is removed, then the entire house may collapse. Further, since the disputed lane belongs to the Municipal Council, Guna, therefore, the Municipal Council, Guna shall be at liberty to deal with the matter of removing the encroachment.

It is the case of the petitioner that he had filed a suit for permanent injunction against the respondents. Although there was a temporary injunction but during the currency of the injunction order, the respondents raised a construction thereby encroaching upon the lane in question. The said civil suit was decided by the Court of 4th Civil Judge, Guna in Civil Suit No.139-A/2001 by judgment and decree dated 22.9.2001 by holding that the respondents have encroached upon the disputed lane, therefore, they should remove their construction and a permanent injunction was also issued against them that they shall neither obstruct the lane nor shall carry out any construction either by themselves or

through their agents. The judgment and decree passed by the Trial Court was put to challenge by the respondents by filing Civil Appeal No.55A/2002 which was dismissed by the Court of Third Additional District Judge (Fast Track Court), Guna by judgment and decree dated 21.7.2004. A Second Appeal No.558/2004 was filed by the respondents which was dismissed by the High Court by order dated 10.7.2009.

During the course of arguments of Second Appeal, it was submitted by the counsel for the respondents that since the respondents have encroached upon the disputed lane, therefore, the plaintiff may be awarded some compensation.

The said contention made by the counsel for the respondents was not accepted by this Court which was considered in paragraph 17 and 18 of the judgment and it was held that since the construction was raised during the currency of temporary injunction order, therefore, no leniency can be shown by awarding compensation to the plaintiff.

It appears that thereafter, the petitioner initiated the execution proceedings for removal of encroachment. In the execution proceedings, the respondents filed an application that as per the Commissioner's report, the encroachment still exists on 9 cm. and as the decree is to remove the same which would cause irreparable loss to the respondents therefore, once again an offer of payment of compensation for the said 9 cm. of piece of land was made. The said application was rejected by the Executing Court by order dated 5.11.2011 which was put to challenge by the respondents by filing W.P.No.7802/2011. This Court by order dated 24.9.2012 dismissed the writ petition by holding that the Executing Court cannot go beyond the decree and since the plaintiff has fought a long drawn battle in the corridors of the Court, therefore, he cannot be deprived from the fruits of the litigation on flimsy grounds and petition was dismissed with cost of Rs.10,000/-.

The order passed by this Court in W.P.No.7802/2011 was challenged before the Supreme Court which was registered as SLP (Civil) No.330/2013 and was dismissed by order dated 6.1.2014.

It appears that the respondents once again filed an application under Section 151 of CPC before the Executing Court for the similar relief and surprisingly the Executing Court by ignoring the judgments and decrees passed by the Courts as well as the earlier order dated 5.11.2011 passed by the Executing Court itself coupled with the fact that the said order was affirmed by this Court by order dated 24.9.2012 passed in W.P. No.7802/2011 as well as the order passed by the Supreme Court in SLP (Civil) No.330/2013 passed on 6.1.2014, entertained the application filed by the respondents and by the impugned order has held that the lane belongs to the Municipal Council, Guna and if the encroachment on 9 cm. Of land is removed, then it would cause irreparable loss to the respondents, because the entire building of the respondents may collapse due to removal of beam, therefore, held that since, the land belongs to the Municipal Council, Guna

and if it so desires, may remove the encroachment and closed the execution proceedings.

Challenging the order passed by the Executing Court, it is submitted by the counsel for the petitioner that the Executing Court has not only traveled beyond the decree but has also ignored the order dated 5.11.2011 passed by the Executing Court itself as well as the order dated 24.9.2012 passed by this Court in W.P.No.7802/2011 as well as the order dated 6.1.2014 passed by the Supreme Court in SLP (Civil) No.330/2013.

Per contra, it is submitted by the counsel for the respondents that a single petition has been filed against two different orders passed by the Executing Court and thus it is not maintainable. Secondly, in order to do complete justice, the Executing Court has rightly interfered in the matter. In support of this contention, the Counsel for the respondents has relied upon the judgment passed by the Supreme Court in the case of Smt. Nai Bahu vs. Lala Ramnarayan and others reported in AIR 1978 SC 22 . It is further submitted that the Executing Court has relied upon certain documents which have not been filed along with writ petition, therefore, the petition filed by the petitioner under Article 227 of the Constitution of India is not a complete one and hence it is liable to be dismissed on that ground.

Considered the submissions made by the counsel for the parties.

It is really an unfortunate case where the Executing Court has traveled beyond its own powers and has gone to the extent of nullifying the effect of the order dated 5.11.2011 passed by the Executing Court itself as well as the order dated 24.9.2012 passed by this Court in W.P.No.7802/2011 as well as the order dated 6.1.2014 passed by the Supreme Court in SLP (Civil) No.330/2013.

The petitioner had filed a suit for permanent injunction and during the currency of the temporary injunction, the respondents raised a construction by encroaching upon certain piece of disputed lane. The said construction which was raised by the respondents during the currency of the temporary injunction cannot be said to be a bonafide action on their part and in fact the construction was made knowing fully well that there was a temporary injunction order against them. The suit filed by the petitioner was decreed by judgment and decree dated 22.9.2001 passed by 4th Civil Judge, Guna in Civil Suit No.139A/2001. It appears that the suit was filed in the year 1991 and still we are at the stage of execution of the decree.

Be that whatever it may.

A decree was passed against the respondents for removal of their encroachment as well as not to make any further construction over the disputed lane either by themselves or through their agents. The appeal filed against the said judgment and decree passed by the Trial Court was dismissed by judgment and decree dated 21.7.2004 passed by the Third Additional District Judge (Fast Track Court),

Guna and the judgments and decrees passed by the Courts below were affirmed by this Court by order dated 10.7.2009 passed in Second Appeal No.558/2004.

Thereafter eleven long years have passed but still the decree is waiting for its execution.

Disturbing facts are that after the dismissal of the Second Appeal, including the contention of the respondents that they are ready to compensate the petitioner, the respondents once again filed an application under Section 151 of CPC before the Executing Court raising the same grounds which were raised before this Court in Second Appeal No.558/2004 and pleaded that in case if the encroachment which still exists on 9 cm. of lane is removed, then it would cause irreparable loss to the respondents because their entire house may collapse, therefore, they may be permitted to pay compensation to the plaintiff for the said 9 cm. piece of the land. The said objection was rejected by the Executing Court which was challenged by the respondents by filing W.P.No.7802/2011 which was dismissed by order dated 24.9.2012 with a cost of Rs.10,000/- and the SLP (Civil) No.330/2013 was also dismissed by the Supreme Court by order dated 6.1.2014. Unfortunately, further period of six years have passed and by ignoring all the above mentioned facts, the Executing Court has adopted a new method which is completely unknown to the well settled principle of law.

The Supreme Court in the case of Prahlad Singh v. Sukhdev Singh, reported in (1987) 1 SCC 727 has held as under :

.....That the decision given by a court at an earlier stage of a case is binding at a later stage is well settled, though interlocutory judgments are open for adjudication by an Appellate Authority in an appeal against the final judgment. In Satyadhyam Ghosal v. Deorajin Debi this Court said:

"The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reargue the matter again at a subsequent stage of the same proceedings.".....

The Supreme Court in the case of Ishwar Dutt v. Collector (LA) reported in (2005) 7 SCC 190 has held as under :

14.....The principle of res judicata, as is well known, would apply in different proceedings arising out of the same cause of action but would also apply in different stages of the same proceedings.....

Thus, it is clear that the principle of res judicata applies to the interlocutory orders passed in the same proceedings. Once the application for similar prayer was rejected by the Executing Court itself by order dated 5.11.2011 which was affirmed by this Court by order dated 24.9.2012, it is clear that the order dated 5.11.2011 passed by the Executing Court had merged in the order dated 24.9.2012 passed by this Court in W.P.No.7802/2011. Further, the order dated

24.9.2012 passed by this Court in W.P.No.7802/2011 was affirmed by the Supreme Court in SLP (Civil) No.330/2013, therefore, the Executing Court had no jurisdiction to entertain a fresh application on behalf of the respondents for the similar relief as the order dated 5.11.2011 passed by the Court which was affirmed by this Court by order dated 24.9.2012 and by the Supreme Court in SLP (Civil) No.330/2013 was binding on the Executing Court. Thus the impugned orders passed by the Executing Court are liable to be set aside only on this ground.

Further, it is well established principle of law that the Executing Court cannot travel beyond the decree.

The Supreme Court in the case of Oil and Natural Gas Corporation Limited vs. Modern Construction and Company reported in 2014(1) SCC 648 has held as under:-

18. There can also be no quarrel with the settled legal proposition that the executing court cannot go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. (Vide Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises, Dhurandhar Prasad Singh v. Jai Prakash University, Rajasthan Financial Corpn. v. Man Industrial Corpn. Ltd., Balvant N. Viswamitra v. Yadav Sadashiv Mule and Kanwar Singh Saini v. High Court of Delhi.)

If the contention raised by the respondents in Second Appeal No.558/2004 is seen, then it is clear that while arguing the said second appeal, it was contended by the counsel for the respondents that they are ready to pay compensation for the area which has been encroached upon by the respondents because in case if the encroachment is removed, then it would result in irreparable loss to the respondents as the entire building may collapse.

The said contention raised by the counsel for the respondents was negated by this Court in paragraphs 17 and 18 of the order dated 10.7.2009 passed in Second Appeal No.558/2004 which read as under:-

17. Shri K.N. Gupta, learned senior counsel further contended that since construction is already complete, plaintiff may be awarded some compensation. This Court directed plaintiff/respondent's counsel to find out feasibility of such offer. It is stated by him that the disputed lane was meant for flow of waste water as well as rain water of plaintiff's house and was also meant for air and light from that direction. Construction by defendants was made at the time when ex-parte temporary injunction was granted. It came into the knowledge of defendants immediately on the next day and thereafter they continued with the construction in defiance of the order of temporary injunction without observing respect for Court's order. It is not a case where defendants made construction without knowledge of restraint order. On the contrary, if compensation is allowed in such cases, this Court is afraid that wrong message would be conveyed that restraint order of the Court may be easily violated and valuable rights like that of

air, light and flow of water may be brought to an end by illegal and unauthorized construction in forcible manner.

18. Defendant No.5 though stated to have made Pacca construction of her house, she has not placed on record the sanction/permission for construction. It may be because authority concerned would not have permitted her to make construction on the disputed lane. This being so, this Court does not find the case in hand to be fit one for substituting the impugned judgment by awarding amount of compensation.

Further, a specific decree was passed to remove the encroachment. No discretion was given to the Executing Court to go beyond decree or to decide any controversy arising out of the decree.

So far as the judgment passed by the Supreme Court in the case of Smt. Nai Bahu (Supra) is concerned, the principle laid down in the said judgment is not applicable to the facts of the case.

The contention of the respondents was already considered by this Court in Second Appeal No.558/2004 as well as by order dated 24.9.2012 passed in W.P.No.7802/2011 which was affirmed by the Supreme Court in SLP (Civil) No.330/2013.

So far as the contention of the counsel for the respondents that a single petition has been filed against two different orders of the Executing Court, i.e. 6.7.2019 and 24.8.2019 and one writ petition against two orders is not maintainable, therefore, it should be dismissed is concerned, this Court is of the considered opinion that the objection raised by the counsel for the respondents is liable to be rejected. By order dated 6.7.2019, the Executing Court had called a report from the Zila Nazir after mentioning the facts and by order dated 24.8.2019 the Executing Court has closed the execution proceedings, therefore, the order dated 24.8.2019 is the final order which is based on the report submitted by Nazir in the light of order dated 6.7.2019. Further, the petitioner can file a single writ petition against two orders by making payment of an additional set of Court fee. In the light of the objection raised by the counsel for the respondents, the petitioner is directed to pay an additional set of Court fee. However, the petition cannot be dismissed only on the ground that this petition has been filed against two different orders because even if challenge to the order dated 6.7.2019 is ignored, still the petition would be maintainable against the order dated 24.8.2019.

It is next contended by the counsel for the respondents that in an application which has been filed for urgent hearing of this writ petition, no reasons have been assigned by the counsel for the petitioner for out of turn hearing and, therefore, the application for urgent hearing should be rejected and this case should be taken up for hearing in due course.

The submissions made by the counsel for the respondents is a glaring example of

delaying tactic because the second appeal was dismissed in the year 2009. The application filed by the respondents under Section 151 of CPC before the Executing Court was dismissed by order dated 5.11.2011, the W.P.No.7802/2011 which was filed against the order dated 5.11.2011 was dismissed by order dated 24.9.2012 and the SLP (Civil) No.330/2013 against the order passed by the writ Court was dismissed on 6.1.2014 and still the execution is pending for the removal of encroachment. More than 06 years have passed after the dismissal of the SLP but the respondents have successfully avoided execution of judgment and decree. Thus the attempt of the counsel for the respondents that this matter should be heard in due course is nothing but an attempt to further prolong the execution of the decree which cannot be appreciated and accordingly, the objection with regard to the application for urgent hearing filed by the petitioner is rejected.

So far as the contention of the counsel for the respondents that the petitioner has not filed all the documents which were taken into consideration by the Executing Court is concerned, the said objection is liable to be rejected. It appears that in order to come to a conclusion that the respondents have encroached upon 9 cm. of disputed lane, the said Court had considered certain documents and came to a conclusion that one beam of the house of the respondents is situated over 9 cm. of land which is a part of disputed lane. The petitioner has not challenged this finding that the beam in question is standing on an area measuring 9 cm. on the disputed lane. Once this finding has not been challenged, then there was no question for the petitioner to file all the documents which were placed before the Executing Court. Furthermore, the respondents could have placed those documents on record. Since this Court has already come to a conclusion that the documents which were taken into consideration by the Executing Court were not necessary for adjudication of this writ petition, therefore, third objection is dismissed.

Under these circumstances, the Executing Court could not have dare to travel beyond the decree as well as could not have dare to review its own order dated 5.11.2011 which was affirmed up to the Supreme Court.

Accordingly, this Court is of the considered opinion that the orders dated 6.7.2019 and 24.8.2019 passed by Third Civil Judge, Class-I, Guna in Execution Case No.139A/2001 are bad in law and cannot be given the stamp of approval.

Ex Consequenti, the orders dated 6.7.2019 and 24.8.2019 passed by Third Civil Judge, Class-I, Guna in Execution Case No.139A/2001 are hereby set aside.

The Executing Court is directed to execute the decree within a period of one month from today without entertaining any further application from the respondents. The Executing Court is further directed to submit the report to the Principal Registrar of this Court with regard to the execution and satisfaction of the decree after removal of the beam which is standing on the disputed 9 cm. of disputed land.

The parties are directed to appear before the Executing Court on 3.9.2020. No further notice by the Executing Court for the appearance of the respondents would be necessary. Since the respondents have successfully avoided the execution of the decree by filing successive similar applications in spite of rejection of the first application by order dated 5.11.2011 which has already been upheld up to the Supreme Court, therefore, this writ petition is allowed with a cost of Rs.25,000/- to be deposited by the respondents with the Registry of this Court within a period of one month from today. Out of which, Rs.10,000/- shall be payable to the petitioner.

Copy of this Order be sent to the District Judge, Guna for information as well as to the Executing Court for information and compliance.

It is made clear that in the light of the order dated 14-8-2020 passed by the Supreme Court in the case of Ankit Maheshwari @ Chintoo Vs. State of M.P. in Miscellaneous Application No.1338/2020 in S.L.P. (Cri) No.11315/2020, the execution proceedings shall not be adjourned due to the suspension of normal Court functioning in the wake of covid 19 pandemic