
(2011) 02 P&H CK 0303
In the Punjab And Haryana At Chandigarh
Case No : CR No. 236 of 2011 (O and M)

Vijay Kumar LR of deceased Vijay Kumar	APPELLANT
Vs	
Kiran and Others	RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105, Order 21 Rule 106, Order 9 Rule 8, Order 9 Rule 9, 115

Citation : (2011) 3 CivCC 145 : (2011) 162 PLR 745 : (2011) 5 RCR(Civil) 678

Hon'ble Judges : Ram Chand Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ram Chand Gupta, J.—The present revision petition has been filed u/s 115 of CPC (for brevity "the Code") against the order dated 18.12.2010 passed by learned Civil Judge (Sr. Divn.), Shaheed Bhagat Singh Nagar vide which execution petition filed by the Respondents-decree-holders, which was earlier dismissed vide order dated 2.2.2008 was ordered to be restored to its original number.

2. I have heard learned Counsel for the parties and have gone through the whole record carefully including the impugned order passed by learned executing court.

3. It has been contended by learned Counsel for the Petitioner that learned executing court was having no power to restore the execution petition, which was already dismissed in default, though Respondents-decree-holders could file a fresh execution petition. He has also placed reliance upon the judgments delivered in AIR 1937 337 (Oudh) and Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, .

4. On the other hand, it has been contended by learned Counsel for the Respondents-decree-holders that a decree was passed in their favour as far back as on 8.11.1988 and since then, they have been fighting for execution of the

decree. It is further contended that the objections filed by the present Petitioners-J Ds, have been dismissed by the executing court. Execution of the decree was stayed by this Court and during operation of stay, order dated 2.2.2008 was passed by learned executing court dismissing the execution petition. It is further contended that just after 6 days of passing the said order, he filed an application for restoration of the execution petition and however, the said application was also dismissed in default vide order 4.6.2010 (Annexure P-2). It is further contended that rather perusal of order Annexure P-2 shows that execution petition was dismissed in default under Order 9 Rule 8 of the Code by learned executing court.

5. It is further contended that learned executing court has only corrected the mistake made earlier while dismissing the execution petition itself despite the fact that there was stay from this Court in pending revision. It has also been contended that dismissal of the execution petition by the executing court in default can be at the most said to be under Order 21 Rule 105 of the Code and the remedy has been provided under Order 21 Rule 106 of the Code for getting the said execution petition restored and hence, it is contended that the executing court has legally and rightly exercised its power by restoring the execution petition. He has also placed reliance upon the judgments delivered in *Damodaran Pillai and Ors. v. South Indian Bank Ltd.* 2005 (3) CC C 530 *Smt. Vithabai G. Ghodake and Anr. v. The United Western Bank Ltd. and Ors.* 2003 (2) CCC 137 , *Deo Narayan Goala, (Deceased by L.R.) and Others Vs. Jagadish Pandit, , Arjun Prasad v. Smt. Ameer Jahan Begum* 2009(5) RCC 157, *Sri Dambarudhar Mohanta Vs. Mangulu Charan Naik and Others, and Bhanwar Lal v. Gopal* 1996 (1) C C C 564.

6. Admitted facts are that a decree for ejectment was passed in favour of the Respondents-decree-holders on 8.11.1988 and the same had become final as no appeal was filed against the said order. Execution petition was filed by the Respondents-decree-holders on 6.8.1997. Some objections were filed by the present Petitioner-judgment -debtor in the year 2003, which were dismissed by the executing court on 27.3.2006. The present Petitioner-judgment debtor filed a revision petition before this Court against the dismissal of the objections and during pendency of the said revision, execution of the decree was stayed vide order dated 8.5.2006. The said revision was dismissed by this Court vide order dated 19.4.2010. However, during the pendency of the revision petition before this Court, in which execution of the decree was stayed, the execution petition, which was already pending, was dismissed by learned executing court on 2.2.2008 by passing order Annexure P-1, which reads as under:

Inspite of calling the case number of times none has turned up either on behalf of the Decree holder or on behalf of the judgment Debtor throughout the court hours today. Otherwise also, in the Civil Revision No. 2424 of 2006, the execution proceedings had been stayed and nothing has been brought to the notice of the court that the stay order has since been vacated. Resultantly, when

none has turned up either on behalf of the Decree-Holder and Judgment-Debtor throughout the court hours today and in view of the stay of the execution of the decree, without prejudice to the rights of the Decree-Holder or any other person(s), entitled to seek the execution of the decree as and when warranted as per the provisions of law, the instant execution application is hereby dismissed. File be consigned to the Judicial Record Room, Nawanshahr.

7. Hence, perusal of the said order shows that the same should not have been dismissed by executing court, when there was stay from this Court regarding execution of the decree. The court instead of passing the order for dismissal of the execution petition should have adjourned the same sine die awaiting the order from this Court in the pending revision petition. However, an application for restoration of the same was filed by Respondent-decree holders after 6 days of dismissal order on 8.2.2008. Though, the same was also dismissed vide order dated 4.6.2010 Annexure P-2. Another application was filed on behalf of the Respondents-decree-holders on the very next day i.e. 5.6.2010, when the impugned order was passed, which reads as under:

Learned Counsel for the Decree-Holder has placed on record certified copy of the order of the Hon''ble High Court dated 19.4.2010 whereby CR No. 2424 of 2006 has been decided. Perusal of the file shows that the execution was ordered to be stayed in the said C.R. i.e. 2424 of 2006.

Vide order dated 19.5.2006, the execution proceedings were stayed in view of the orders of the Hon''ble High Court dated 8.5.2006, that is in Civil Revision mentioned above. Thereafter, the file remained pending for awaiting orders of the Hon''ble High Court. Vide order dated 2.2.2008, learned Civil Judge (Sr. Division) had dismissed the execution application on the ground that none had turned up on behalf of the Decree-Holder or the Judgment-Debtor. However, the said order was passed without prejudice to the rights of the Decree-Holder or any other person entitled to seek the execution of the decree as and when warranted by law. Thereafter, the learned Counsel for the Decree Holder had filed an application for restoration of the decree, which was dismissed in default vide order dated 4.6.2010. Thereafter, another application for restoration of the application for restoration of the orders dated 4.6.2010 and of 2.2.2008 had been filed and reply to the restoration was filed.

Learned Counsel for the Judgment-Debtor has contended that the execution cannot be restrained because the order dated 2.2.2008 reveals that the same was not dismissed in default, rather the same was actually dismissed.

However, this contention of learned Counsel for the Judgment-Debtor is without any force because the said execution was not dismissed on merits. Moreover, the proceedings in the execution had been stayed by the Hon''ble High Court vide order dated 8.5.2006. Since the file was pending for awaiting orders of the Hon''ble High Court, my learned predecessor had dismissed the execution with the specific order as aforementioned. The Decree-Holder has been fighting since

8.11.1988, when the order for eviction was passed. The interests of justice is to be kept in mind and taking in view the totality of the facts and circumstances as discussed above, the execution application for restoration of application is allowed first and thereafter, application for restoration of execution is allowed and execution is ordered to be registered at its original number and is allowed to be proceeded further.

Vide order dated 29.5.2006, my learned Predecessor had ordered the warrants of possession be issued by breaking open the lock. Now, the warrants of possession be issued for 5.2.2011.

In view of the abovementioned order, in case the premises are locked, warrants of possession are ordered to be issued by breaking open the lock.

8. Hence, in view of these facts, it cannot be said that any illegal or material irregularity has been committed by learned executing court in passing the impugned order and that grave injustice or gross failure of justice has occasioned thereby, warranting interference by this Court.

9. The authorities cited by learned Counsel for the Petitioner are not applicable to the peculiar facts and circumstances of this case. In Ram Harakh and another's case (supra), an application u/s 47 Code of CPC was filed, wherein it was observed that provisions of Order 9 Rule 9 Code of CPC are not applicable to the execution proceedings, and in Shivashankar Prasad Shah and others' case (supra), it was observed that decree-holder is having right to file fresh execution petition, if earlier was dismissed in default.

10. However, there is specific provision under Order 21 Rule 106 of the Code for restoration of the execution petition dismissed in default under Order 21 Rule 105 of the Code. It has been so held in the aforementioned judgments relied upon by learned Counsel for the Respondents-decree holders.

11. Hence, there is no merit in the present revision petition. The same is, hereby, dismissed.