

Md. SerajuddIn Vs. Md. Abdul Khalique

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Court : Guwahati

Decided On : May-11-2004

Judge : S.K. Kar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 20, Rule 6A;
Gauhati High Court Civil Rules and Orders, 2002 - Rule 138

Appeal No. : W.P. (C) No. 361 of 2004

Appellant : Md. Serajuddin

Respondent : Md. Abdul Khalique

Advocate for Def. : T. Nandakumar, Sr. Counsel

Advocate for Pet/Ap. : Ng. Premkumar, Adv.

Judgement :

S.K. Kar, J.

1. This is a confused petition, if I may speak so, presented by the petitioner desperately intending to seek relief as per provisions of Articles 226, 227, 300-A, 14, 21 along with Sections 115 and 151 of the C.P.C. etc.

2. This petition is directed against the orders dated 18-3-2004 & 6-4-2004 of Civil Judge, Sr. Division No. 1, Manipur East, passed respectively in Execution Case

No. 30/2003 and Judl. Misc. Case No. 9 of 2004 arising out of the execution proceeding.

3. The petitioner, Md. Siraj Uddin states that present respondent Md. Abdul Khaliq presented suit O.S. No. 67/1986/14/1987/7/1989/122/1990/83/1990 against him praying for redemption of the suit land (land pertaining to patta No. 181 of Imphal Municipality covered by Dag No. 15/2284 measuring .062 acres) in connection with a registered mortgage deed dated 17-1-1984 by paying Rs. 90,000/- and also for restoring possession of the suit land. Suit was decreed by learned Sub-Judge No. 1, Manipur East, vide his judgment and decree dated 20-7-1994. An appeal against the judgment and decree, registered as first Civil Appeal No. 1 of 1995 was presented before the Imphal Bench of the Gauhati High Court against the judgment of the Civil Judge aforesaid and the Hon'ble High Court was pleased to dismiss the appeal by order dated 8-8-2003 modifying the decree of the lower Court.

4. That the respondent herein thereafter instituted execution proceedings Case No. 30/2003 before the learned Civil Judge, Sr. Divn. No. 1, Manipur East, under Order XXI, Rule 11 (2) of CPC without filing any genuine copy of decree dated 8-8-2003. That the aforesaid proceedings was instituted for execution of the preliminary decree and not for final decree. That the decree which the respondent wanted to execute was not prepared according to law and necessary notice was not given to the present petitioner/ judgment-debtor, directly or through his counsel to submit his objections, if any. That the decree aforesaid was signed by the Assistant Registrar of the High Court on 15-12-2003 after a lapse of about 3-4 months from the date of judgment which was dated 8-8-2003 and accordingly decree was not maintainable and it was prepared in violation of Rule 138 of the Gauhati High Court Civil Rules and Orders (effective from 14-6-2002). That as per the information of the petitioner Assistant Registrar-I was not at all competent to sign the decree for which it is violative of Rule 60/61 of the Gauhati High Court Rules and orders.

5. That on receipt of the copy of execution petition the present petitioner prayed for dismissal of the execution proceedings filing application on 16-2-2004 on the

ground that final decree has not been drawn up as per the direction of the High Court and valuation of the structure erected by the present petitioner upon the suit land was not assessed. But the application was, however, rejected by the impugned order dated 18-3-2004.

6. That, the petitioner, therefore, presented another application on 18-3-2004 which was registered as Misc. Case No. 9/ 2004 Under Section 47 of the CPC praying for dismissal of the execution proceedings on the ground that the execution petition has not enclosed genuine copy of the decree passed by any competent person and the decree was not in accordance with law. This petition was also illegally rejected by the learned Civil Judge, by the impugned order dated 6-4-2004.

7. That being aggrieved by the order passed by the learned Civil Judge/Sr. Divn., the petitioner moved a petition for transfer of the case before the learned District Judge, Manipur East, which was allowed and case was transferred to Civil Judge/Sr. Divn. No. II by order dated 14-4-2004. On transfer, the execution proceedings was re-numbered as execution Case No. 3/2004.

8. The respondent in the meantime appeared in this case through a caveat.

9. I have heard learned counsel for the petitioner/judgment-debtor as well as learned counsel appearing for respondent/ decree-holder.

10. Shorn of the lengthy arguments, what has contended on behalf of the petitioner is that execution proceedings under Order XXI, Rule 11, CPC must be filed for execution of final decree and not for that of a preliminary decree and according to law present execution proceeding is illegal. That the lower Court ought to have proceeded to pass final decree as per provision of Order XXXIV, Rule 7, CPC before proceeding with the execution, and that no genuine decree has been enclosed with the application for execution. That the Court below has failed to exercise jurisdiction vested on it vide Under Section 47, CPC and impugned orders were illegal, arbitrary, perverse etc. In support of his contention learned counsel have referred to the Court several citations, most of which, in my opinion, are not relevant at all.

11. Learned counsel appearing for respondent, by referring to several citations of the Supreme Court as well as High Courts, contended that there is no law that the preliminary decree cannot be executed without preparing final decree. That even if there is any defect or irregularity in preparation of the decree that, by itself, can never be fatal and as per provisions of Order XX, Rule 6A, CPC the operative part of the judgment can be treated as a decree vis-a-vis the definition of decree given in Section 2(2) of the CPC. That the order passed by the executing Court is in accordance with law and there is no infirmity in these orders. That matter which relates to execution proceedings cannot be agitated before the High Court by invoking the extraordinary jurisdiction of the Court under Article 226 or 227 of the Constitution.

12. That, Under Section 122 of C.P.C. High Courts may make rules regulating their procedures and procedure of civil Courts, subject to superintendence of High Courts may by such rules annul, alter, add to all or any of the rules in the 1st Schedule. That under Rule 60 (1), Chapter V of Gauhati High Court Rules, the registrar or when so authorized the Deputy Registrar or the Asstt. Registrar having first dated the decree as of the day when the judgment was delivered, shall sign it and seal it with the seal of the Court and the Asstt. Registrar of the Gauhati High Court is authorized to sign the decree vide Order No. 7 of 1972, Imphal, the 26th April, 1972 of the Gauhati High Court, Imphal Bench.

13. That, at best it appears that the petition may be treated as a revision petition under Section 115 of C.P.C. and in so far the merit is concerned, even treating it as a revision petition, there is nothing.

14. That, it will be pertinent to mention that the judgment of the Civil Judge after being confirmed by the High Court in First Appeal No. 1/95 by the judgment dated 8-8-2003 and Special leave petition to appeal, being No. 20183 of 2003, moved before the Supreme Court being dismissed by the Hon'ble Supreme Court vide order dated 10-11-2003, there is no cause to agitate at all and if allowed to continue there will be no end of litigation.

15. I have given my anxious considerations to the contentions raised by the petitioner and the objections registered by the respondent/decreed-holder. In his

initial objection-application dated 16-12-2004 before the learned Civil Judge, the present petitioner/judgment-debtor had never recorded any challenge to the genuineness of the decree but stated firstly, that decree-holder ought to have taken into account of the money payable to the judgment-debtor due to improvement of the suit land and secondly, that decree being a preliminary decree such decree cannot be executed. In his next application 18-3-2004 Under Section 47, of C.P.C. the present petitioner for the first time raised an objection that on perusal of the decree it appeared to him that the decree was not the decree passed by High Court and on his enquiry it revealed that there was no decree passed in F.A. No. 1/95 by High Court. So, here also the genuineness of the decree in question (relied upon by the decree-holder and put into execution) was put into a direct challenge. It appears that the petitioner has come with such a contention only before this Court for the first time. Thus, consistency of the stand is not adhered to by the petitioner. The challenge to the decree as 'fictitious' finds a mention only in impugned order dated 6-4-2004 (Judl. Misc. Case No. 9/2004) passed by the executing Court.

16. Be that as it may. on perusal of the impugned order dated 18-3-2004, I find the order is an innocent order asking the judgment-debtor to furnish reasonable/appropriate account of the amounts he incurred in the improvements of the suit land failing which the Court would have no option but to ascertain the same but itself in order to go for preparation of the final decree. This is perfectly in compliance of the direction given by the appellate Court, and needed for preparing the final decree. I fail to understand how the petitioner was aggrieved by such a logical order, which appears to be not prejudicial to either of the parties. However, the second impugned order dated 6-4-2004 passed in Judl. Misc. Case No. 9/2003 has stated as follows :-

'As to the question of having any irregularity in the decree, if it is felt so by the Judgment Debtor, this Court is not the appropriate Judicial Forum for agitating the said matter.

The presumptions juris is treat the decree exists.'

I would agree that this order may invite an occasion for agitating the matter before the High Court to invoke the revisional jurisdiction in consonance with the law cited in AIR 2003 SC 3044 (Paras 34/38) which says that amendment of Section 115 of C.P.C. w.e.f. 1-7-2002 cannot and does not affect in any manner the jurisdiction of High Court under Article 226/227 of Constitution subject to rule of self discipline and practice as settled by law Courts. And in the context Court precisely held :-

'Thus the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience and practical wisdom of the judge.'

17. Law given by (2003) 4 SCC 675 : (AIR 2003 SC 1386) is the same and states that there is no limit of power of High Court under Section 482 and Article 226/227 of the Constitution but it is necessary to exercise utmost care and caution, while invoking such powers. Law in (2002) 2 SCC 475 : (AIR 2002 SC 808) given by a three member Bench of Hon'ble apex Court says that in execution proceeding Under Section Order XXI. Rules 10, 11.'(2) and Sections 47/151 of C.P.C., it is not permissible to go beyond the order which was passed in writ petition which has no relevancy here.

18. What constitutes a final decree has been dealt with and discussed in AIR 1995 SC 1211 in the context of Section 2(9) of Bombay Stamp Act (1958) and Limitation Act (9 of 1908) Article 182. I quote (Para 12):-

'In this behalf, it is necessary to note that Section 2(a) of the Bombay Stamp Act, 1958, as amended by the local Act, provides that a decree of civil Court is required to be stamped as per Article 46 in Schedule I. Section 34 thereof lays down that 'no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped'. Therefore, executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20, Rule 18(2). After final decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s)', it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw up a final decree

and then to engross it on stamped paper(s) of required value. These two acts together constitute final decree, crystallizing the rights of the parties in terms of the preliminary decree. Till then, there is no executable decree as envisaged in Order 20, Rule 18 (2), attracting residuary Article 182 of the old Limitation Act.'

This has nothing to do with the redemption suit before us. It only stated on facts the Conditions under which a preliminary decree was not executable.

19. In AIR 1963 SC 992, it was held that preliminary decree is a 'final decision' of the Court irrespective of the fact whether it is executable or not before passing of the final decree. The Court says (Para 6) :-

'A decision is said to be final when, as far as the Court rendering it is concerned. it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the Court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing the decree.'

20. Other citations referred are not relevant and hence not discussed.

21. It appears that main grounds to challenge the execution of the preliminary decree are that it was drawn after 3/4 months of the judgment and not signed by proper person and cannot be executed without final decree being drawn, etc. Rule 138 of Civil Rules and Orders of Gauhati High Court (effective from 14-6-2002) was referred to me. It provides decree is to be prepared within 7 days from the date of receipt of the case record. Equally, Order XX, Rule 6-A also says that decree is to be prepared within 15 days from the date of pronouncement of the judgment. Order XXXIV, Rules 7 (1) (c) and 8 speak about the method and manners of preparing respectively the preliminary and final decree in mortgage suits. However, these activities are the ministerial works to be done by the office attached to the Courts and are mainly administrative in nature. It has nothing to do with the merit of the decision of the Court. Here the judgment of the civil judge has attained finality being confirmed upto the Hon'ble Apex Court and the judgment-debtor has no escape but to obey the decree, else it will be to be executed as per law. The legal meaning of execution is 'process of carrying into effect the directions in a decree or judgment'. The simple meaning of execution is also 'the fulfillment, completion or perfecting of anything, or carrying it into operation and effect. Therefore, without formal decree also a judgment may be carried into effect. It will not be out of place to refresh our memory about the relevant part of the definition of decree given in Section 2(2) of C.P.C. I quote :-

'(2) 'decree' means formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.....

Explanation : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.'

So decree is nothing but 'formal expression of an adjudication' and it is a settled proposition of law that 'form' can neither supersede nor prioritize 'substance'. Defect in drawing up a decree, in my opinion, is a curable irregularity and it can no way disturb the judgment of the Court. There is nothing in Order XX of C.P.C: to

say that delayed drawing up of decree will have any adverse effect on its validity. If the judgment remains the decree too, and delay in preparation of decree has nothing to do with the merit of the adjudication.

22. Coming next to the question of signing the decree by Asstt. Registrar of the Court, it has been pointed out by learned counsel for the respondent that under Rule 60 (1), Chapter V of the Gauhati High Court Rules, 'the Registrar or when so authorized the Deputy Registrar or the Asstt. Registrar having first dated the decree as of the day when the judgment was delivered, shall sign it and seal it with the seal of the Court and the Asstt. Registrar of the Gauhati High Court is authorized to sign the decree vide Order No. 7 of 1972, Imphal, the 26th April, 1972 of the Gauhati High Court, Imphal Bench'. The objection therefore, here is too technical, and unwarranted in addition of being frivolous in nature. It will be interesting to note here that when all attempts to resist the execution of decree proved abortive and plans went awry, petitioner/judgment-debtor caused the execution proceeding transferred from one Court to another.

23. Coming to last question about the execution of the decree in question, from the citations AIR 1963 SC 992 (supra) and AIR 1995 SC 1211 (supra), it will be seen that 'finality of decree' is one thing and 'its being executable or not' is another. It was held in AIR 1963 SC 992 (supra) quoted earlier as follows (at p. 995, para 6) :-

'No doubt, in suits which contemplate the making of two decrees a preliminary decree and final decree the decree which would be executable would be the final decree.'

The decree for which the present execution has been filed states, inter alia,

'.....Plaintiffs may make payment to the Court the mortgage money of Rs. 90,000/- (Rupees ninety thousand) only with any other money that may be payable due to improvement etc. of the mortgaged land. Defendant will receive the money so deposited or paid directly to him and simultaneously by regd. deed re-transfer the suit land free from the mortgage to plaintiff at his costs and restore the possession of plaintiff thereupon in accordance with law.'

Therefore, the executing Court will have to decide first whether the preliminary decree in question is severable from the final decree and can be executed independently. If not, then only after passing of the final decree it can be executed. Here, the initial order of the learned lower Court dated 18-3-2004 (impugned) appears to have proceeded in right direction to process passing of the final decree. But impugned order dated 6-4-2004 passed in Judl. Misc. Case No. 9 of 2004 created the confusion doubting the validity of the decree without recording appropriate grounds and as such it cannot be sustained. It appears that learned civil Judge did not answer the objection raised in the petition Under Section 47, C.P.C. that preliminary decree is inexecutable, leading to a case of failure to exercise jurisdiction vested in it. It is well-established the executing Court cannot go behind the decree but equally it is true and settled that executing Court has got power an jurisdiction Under Section 47 of C.P.C. to construe a decree in order to ascertain its precise meaning acting, however, within its well known limitations.

24. In the result, impugned order dated 6-4-2004 passed in Judl. Misc. Case No. 9 of 2004 is hereby set aside and matter is sent back to the learned civil Judge (Senior Division) to decide, after giving reasonable opportunities to the parties, whether the preliminary decree is executable or not and thereafter to proceed in the matter in accordance with law.

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