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Basudeo and Another Vs. the Ivth Additional District Judge, Jhansi and Others

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Court : Allahabad

Decided On : Feb-04-1997

Reported in : AIR1997All288

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(2) and 47 - Order 41, Rule 27

Appeal No. : Civil Misc. Writ Petn. No. 21763 of 1995

Appellant : Basudeo and Another

Respondent : The Ivth Additional District Judge, Jhansi and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : Pradeep Chandra, Adv

Judgement :

ORDER

1. In the connected second appeal No. 45 of 1994. originally order of stay was granted. But subsequently the same was not extended. Ultimately at the moment no stay order is operating in support of the said second appeal. The execution

arising out of the decree which was subject matter of second appeal was sought to be proceeded with by the decree-holder. The judgment-debtor had filed an objection in the said execution proceeding which was rejected by the executing court by order dated 3-4-1995. A revision was then preferred, being Civil Revision No. S4 of 1995. The said revision also stood rejected by order dated 29-7-1995. Against the said order the present writ petition No. 21763 of 1995 has been preferred. In the present writ petition an interim order was obtained on 11-8-1995 to the extent that until further orders the petitioners shall not be evicted from the accommodation in dispute. The said interim order has been sought to be affected by means of present application dated 24-8-1996.

2. The learned counsel for the respondents vehemently pressed the said application. The learned counsel for the petitioner on the other hand opposed the said application. The hearing of the application for vacating the interim order, in fact, would decide the merit of the writ petition itself. Accordingly, both the learned counsel for the parties addressed the Court on merit of the writ petition itself.

3. The learned counsel for the petitioners contend that the revisional Court did not decide the objection on merit. It had only proceeded on the basis that since the second appeal stood dismissed and though restored but there being no interim order there was no bar in proceeding with the execution proceeding. According to the learned counsel for the petitioners, the order passed by the revisional court suffers from failure to exercise the jurisdiction vested in it. Inasmuch as the revisional court did not decide the objection raised by the judgment-debtor on its merit. He secondly contends that the executing court also avoided to decide the objection on the ground that the executing court does not have jurisdiction to decide such an objection. On these two grounds he contends that the orders impugned are bad and are liable to be set aside.

4. The learned counsel for the respondents on the other hand contends that the learned executing court had found that the objection was frivolous and was being raised for the purposes of delaying the execution he further contends that objection sought to be raised, in fact, amounts to raising fresh issue on the basis of fresh pleading, which never finds place either in the written statement or at any point of

time to have been raised by the petitioner herein. There was no material before the Court below with regard to the objection now sought to be raised. According to him the executing Court cannot go behind the decree. A decision on the said point would amount to going behind the decree, the objection raised cannot be raised in the application filed under S. 47, CPC. He also points out that the objection which was sought to be raised does not find place in any of the grounds taken in the writ petition. He has also not made any application under Order 41, Rule 27 of the Code of Civil Procedure in the second appeal so as to bring those facts on record. On these grounds he contends that the interim order cannot be sustained and the writ petition also cannot be maintained.

5. After having heard the learned counsel for the parties it appears that in the writ petition no grounds have been taken with regard to the objection sought to be raised in the application under S. 47 of the Code of Civil Procedure. No mention of the ground sought to be raised in the application under S. 47 finds mention in any of the grounds mentioned in the second appeal, the record whereof was placed before this court and which have been perused by me. It is admitted position. The objection which has been sought to be raised has very fairly been acknowledged by the learned counsel for the petitioner that the same has never been raised either in the suit or in the appeal before the lower appellate Court or in the second appeal. Neither he had filed any application under Order 41, Rule 27 of the Code of Civil Procedure in the Second Appeal nor he has amended his written statement or had made any application for amendment of the written statement at any stage. However, he sought to defend his case on the ground that this fact was not known to the petitioner earlier.

6. The allegation raised is that the decree-holder had purchased the property from one Ganeshi Bai widow of the original owner. Whereas at present it is being contended in the application under S. 47 that the original owner's wife was Rajabeti and there was no lady in the name of Ganeshi Bai and Ganeshi Bai was never the widow of the original owner. Therefore, the decree holder is not entitled to execute the decree.

7. Section 47 of the Code of Civil Procedure provides as follows :

'47. Questions to be determined by the Court executing decree :

(t) All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit -

(2)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section be determined by the Court.'

8. The scope of 'all questions' referred to in S. 47 is limited to the execution discharge or satisfaction of the decree if raised. The expression 'party' includes the purchaser of property in execution. The question whether one is a representative of one or the other of the party is also a question so included. It further includes the question of delivery of such property to such purchaser or his representative.

9. Executing Court cannot go behind the decree is a well settled principle of law. The executing Court is not invested with the right to determine controversial questions which are the basis of the decree to be executed. It cannot go into such question and act as a trial Court.

10. The power of the executing court travels only to the extent of interpreting the decree or to identify the property. Even for the purpose of identifying the property or interpreting the decree it cannot take additional evidence. It was so held in the case of *Lalmuni v. Shiv Shanker*, AIR 1980 Patna 184 and *Bisweshwar Bhutia v. Udia Sthree* (1994) 1 All LJ 297 (Orissa) when a new right is claimed, which requires adjudication of a right in the property and thus indirectly seeking to avoid the decree passed, is in effect an adjudication leading to go behind the decree. In the case of *Sarwan Lal v. Kanti Prasad*, AIR 1986 All 1 it was held that the objection to executability of decree which boils down to challenging the maintainability of suit cannot be taken before the executing court. A mixed question of law and fact cannot be raised for the first time in execution case *Bhaurao v.*

Savitribai, AIR 1991 Bombay 55 at p. 59 Objection tending to show that the decree is erroneous cannot be raised under S. 47, CPC Mehfuj Hussain v. Kiran Bano (1993) 2 Civ LJ 456(Madh Pra). In V. D. Modi v. R. Rarrman, AIR 1970 SC 1475 the Apex Court held that the general rule is that an Execufing court cannot go behind the decree. It must take the decree as il is and must proceed to execute il. It cannot entertain an objection that-the decree is incorrect in law or facts. In Addison Pains v. Sant Ram (7) il was held that S. 47 does not entitle the Court to investigage into thequeslion of validity of the decree when on the face of it there is nothing illegal in it.

11. Such an objection as in the present case which was never taken either in the written statement or at any stage of the suit or appeal goes to the root of the decree itself namely if such objection is allowed in that event the decree has to be altered. The same would amount to questioning the validity of the decree altogether on new facts raised for the first time requiring adjudication of a new right in the property seeking to avoid execution. It would amount to going behind the decree. It would mean entertaining objection that the decree is incorrect in law or fact. It is not an objection relating to the interpretation of the decree. It is not a case of identifying the propeny. It is acase of investigation of the title to the properly adjudicated in the suit. It would bequestioning the validity of the decree opening a new front of defence to the passing of the decree; a defence never raised.

12. A question which could have been raised as a defence in the suit cannot be raised after the decree is passed. Decree isdefined in S. 2(2) of the Code of Civil Procedure, to mean, 'the formal expression of an adjudication which, so far as regards the court expressing it conclusively determines the rights of the panics with regard to all or any of the matters in controversy in the suit.....'.Once it is so determined and expressed formally in decree, setting up of a new case or right for investigation in execution thereof would amount to going behind the decree. The objection raised in the present case cannot be decided without taking fresh evidence which is otherwise impermissible in execution.

13. In the facts and circumstances of the case therefore, the objection raised does not come within the scope of S. 47, CPC. The finding of the learned Cpuhl's below therefore, cannot be said to suffer from any infirmity, illegality or irregularity or illegal exercise of jurisdiction.

14. The writ petition, therefore, fails and is accordingly dismissed. There will, however, be no order as to costs.

15. Petition dismissed.

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