

Chhatia Palei and anr. Vs. Additional District Judge-cum-sessions Judge and ors.

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SooperKanoon Citation : sooperkanoon.com/531334

Court : Orissa

Decided On : Mar-06-2009

Reported in : 108(2009)CLT52; 2009(I)OLR983

Judge : I. Mahanty, J.

Appellant : Chhatia Palei and anr.

Respondent : Additional District Judge-cum-sessions Judge and ors.

Disposition : Application dismissed

Judgement :

I. Mahanty, J.

1. The petitioner in the present writ application has sought to challenge the Order dated 31.3.1998 passed by the District and Sessions Judge, Nayagarh in C.R. No. 36/11 of 1997 allowing the said revision and reversing the order dated 23.12.1996 passed in M.J.C. and No. 30/1996 under Section 47 of the Code of Civil Procedure arising out of Execution Proceeding No. 3 of 1994 by the Court of Civil Judge (Junior Division), Nayagarh who had allowed the objection of the petitioner under Section 47 C.P.C. and hold that the decree passed in O.S. No. 24 of 77, was in executable.

2. Learned Counsel for the petitioners has challenged the impugned order passed by the Addl. Dist. and Sessions Judge, Nayagarh on the following grounds:

(A) That the Execution Case is barred by limitation as envisaged under Article 136 of the Limitation Act.

(B) That the decree sought to be executed being purely for injunction, the relief of recovery of possession is beyond the scope of the executing Court.

(C) That the decree for permanent injunction is to be executed in the manner contemplated under Order 21 Rule 32 C.P.C. and delivery of possession cannot be given as provided under Order 21 Rule 35 C.P.C.

3. It is averred in the writ application that the property described in Schedule 'A' of the petition were sold by registered sale deed dated 9.2.1972 by one Hadibandhu Palei in favour of O.P. No. 3, namely, Dayanidhi Dash and in the sale deed it was stipulated that consideration would be paid at the time of endorsement of registration ticket in favour of the purchaser-O.P. No. 3 and from the date of payment, title will pass to the purchaser. It is alleged that payment of consideration was not made to the vendor and consequently, registration ticket was not endorsed in favour of the purchaser and it is claimed that as a consequence thereof, title to the Schedule 'A' property did not pass on to the purchaser Dayanidhi Dash (O.P. No. 3). Subsequently, the said sale deed dated 9.5.1972 was cancelled by the registered deed of cancellation dated 6.11.1974. It is further contended that as the sale deed in favour of Dayanidhi Dash was cancelled, the original owner and his successors in interest, continued to remain in possession of the 'A' Schedule land and converted those land to homestead land and raised residential houses thereon and lived there along with their family members. It is further contended that the petitioners continued to pay rent and have been obtaining necessary rent receipts in their names. The petitioners alleged that Sri Dayanidhi Dash (O.P. No. 3) taking advantage of the locality of the petitioners filed a suit for injunction against the petitioner No. 1 and opposite party No. 4 and others. The said suit, i.e. T.S. No. 24/77 was decreed on 31.3.1981. It is contended that it is this decree dated 31.3.1981 which is now sought to be executed. Therefore, Execution Case No. 3/1994 was filed on 13.9.1994. In the

said Execution Case, opposite party No. 3 (petitioner therein) sought to relief under Order 21 Rule 3 C.P.C. and also a delivery of possession under Order 21 Rule 35 C.P.C. and alleging that the judgment-debtors have re-entered possession of the dispute property on 16.8.1994. The present petitioners upon entering in the suit proceeding, filed objection contending, inter alia, that the Execution Case is not maintainable in law and the Executing Court allowed the said objection petition filed by the petitioners by executing the ground stated therein and come to hold that the decree was in executable. It is this order by the Executing Court which came to be reversed by the revisional Court under impugned Annexure-1 which is the subject matter of challenge in the present writ application on the ground noted hereinabove.

4. Mr. Mohapatra, learned Counsel for opposite party No. 3, on the other hand, submitted that the writ petitioners 1 and 2 and opposite party No. 4 (brother of petitioner No. 1) are judgment-debtors in decree dated 31.3.1981 passed in T.S. 24/77-1 wherein the present opposite party No. 3 Dayanidhi Dash was the plaintiff-decree holder. It is submitted that T.S. No. 24/77-I was filed with the prayer for issue of perpetual injunction against the defendants and restraining them from going over the suit land and creating disturbance in his possession of the plaintiff with respect to the said suit land. In the 4th paragraph of the decree dated 31.3.1981 in favour of the opposite party No. 3 has been held as follows:

In this suit, a Civil Court Commissioner was deputed on the petition of the plaintiff for local inspection of the suit land after giving due notice to the parties. The Commissioner inspected the land and submitted his report. In support of the suit, the said Commissioner has been examined as P.W.2 and his report dated 14.8.1978 marked as Ext.-8, clearly reveals that the plaintiff is the peaceful owner and possessor over the suit land. And therefore, the Civil Court in the judgment directed that the defendants are hereby permanently enjoined from going over the suit land and from creating any disturbance in the possession of the plaintiff.

Mr. Mohapatra submitted that opposite party No. 3 while being temporarily absence from his village, enabled the petitioners and opposite party No. 4 to trespass into the suit house and to forcibly take possession of the same on

16.8.1994. The opposite party No. 3, on his return to his village and on realizing the mischief created by the petitioners, opposite party No. 4 was compelled to file Execution Case No. 3/94 on 13.9.1994. Sri Mohapatra submitted that the petitioners and opposite party No. 4 did not appear in the suit proceeding inspite of the valid notice for which, a notice for delivery of possession was issued. But the process server could not serve the notice of delivery of possession since the petitioners and opposite party No. 4 threatened the process server with dire consequence and being armed with deadly weapon. His further allegation is that opposite party No. 3- Dayanidhi Dash filed MJC No. 11/1996 for sending police force along with the process server and while the said applicant was pending consideration, MJC No. 30/1996 was filed by the present petitioners and opposite party No. 4, before the executing Court claiming that the decree was inexecutable. The M.J.C. No. 30 of 1996 came to be allowed by an order dated 23.12.1996 on a finding that in the absence of a decree for delivery of possession, the possession cannot be delivered. The opposite party No. 3 challenged the aforesaid order before the Addl.District and Sessions Judge in C.R. No. 36/ 11 of 1997 and the same has come to be allowed by an order dated 31.3.1998 with direction to the executing Court to proceed with the execution proceeding. It is this revisional order which is now come to be challenged in the present writ application and it is alleged that the writ application contains wrong genealogy as well as incorrect facts.

5. So far as the grounds raised by the learned Counsel for the petitioners is concerned, Sri Mohapatra, learned Counsel appearing for the opposite party No. 3- Dayanadhi Dash, submitted that the proviso to Article 136 of the Limitation Act prescribes that 'an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject matter to any period of limitation.' It is further averred that the decree of injunction by a Civil Court of competent jurisdiction against the judgment and order of a Court restraining commission or wrongful omission and injunction is a judicial process, whereby a person is required to do or refer from bring a particular thing and injunction, may be a final remedy in a suit or premanentory and interlocutory while the suit is pending. A perpetual injunction as prescribed under Section 38(3) of the Specific Relief Act, 1963 having been granted in favour of the opposite party No. 3- Dayanidhi Dash by a Court of competent jurisdiction remains final and binding on

all parties. It is further contended that a decree of permanent/perpetual injunction can be executed if the judgment-debtor disturbs his possession and in the instant case, the petitioners and opposite party No. 4 have trespassed into the cuit property and continued with their illegal possession and since the decree passed by the civil Court has become final, the same was required to be obeyed and the obstruction created by the petitioners and opposite party No. 4 along with others was liable to be removed under Order 21 Rule 32 CPC. In this respect, learned Counsel for the opposite parties placed reliance on the judgment of this Court in the case of Gopal Barik v. Bhima Barik and another, : 1993(I)OLR139 and the next judgment of the Hon'ble Supreme Court in the case of Jai Dayal and Ors. v. Krishan Lal Garg and Anr., : AIR 1997 SC3765 . In conclusion, learned Counsel submitted that on a consideration of the aforesaid facts and law, opposite party No. 3 being a decree holder of enforceable decree passed by the competent civil Court, which has become final, cannot be ignored in law and must be enforced. In conclusion, it is submitted that the magnanimity of law and the decree of a Court cannot be permitted to be throttled by the violators who continue their illegal possession even after the revisional order passed by the learned Additional District and Sessions Judge and impugned in the present writ application.

6. In so far as the main ground of challenge is concerned i.e. as to whether the execution could be made on recovery of possession by a decree holder where a decree of permanent injunction has been granted, is no longer res integra and has been settled by this Court in the case of Gopal Barik {supra}. In the said case, the plaintiff apart from seeking other relief prayed for permanently restraining defendant from interfering with the possession. The suit was decreed in favour of the plaintiff and consequently, the defendant was permanently restrained.

Thereafter, the plaintiff-decree holder filed an execution petition seeking recovery of possession. Objection was raised by the defendant claiming that in view of the nature of the decree, i.e. decree of permanent injunction there was no scope for filing an execution petition and seeking recovery of possession. It was further contended that the Executing Court cannot go behind the decree and does not have the authority to effect recovery of possession. On the aforesaid pleading, it was held that where the plaintiff asserts that the defendant was disturbing

possession and prayed for recovery of possession and if it is found that he had been dispossessed, an Executing Court can interpret the decree to come to conclusion that the plaintiff not being in possession, the decree envisaged recovery of possession. Therefore, the question of recovery of possession by an Executing Court, does not amount to going behind the decree, but amounts to interpretation of the decree itself. It was further held that in order to avoid any technical difficulties and to protect a decree holder after obtaining the decree from enjoying the fruits of the decree, Code of Civil Procedure has been amended. It is only where the execution seeks some relief which was specifically refused or is inconsistent with the relief granted by the Civil Court, the Executing Court cannot go behind such a decree to execute the same.

Where the decree is not inconsistent with the relief sought to be executed and in fact, is in furtherance of the same, it would remain within the competence and domain of the Executing Court for interpreting such a decree. His Lordship of the Orissa High Court Mr. S.C. Mohapatra (as he the then was) further held that a judgment-debtor who is vanquished in the legal battle cannot be allowed to enjoy the property which Court on trial held that he was not entitled to. Therefore, it was concluded that, even a decree for permanent injunction can be executed where there was no necessity to interpret the decree and if the plaintiff on getting possession from the Court is either dispossessed or disturbed by the judgment debtor, a Decree Holder in a decree for permanent injunction can seek execution of such a decree and to that extent the Executing Court is within its competence to direct recovery of possession for a decree holder who has been dispossessed after a decree of permanent injunction has been passed.

The Hon'ble Supreme Court in the case of Jai Dayal and Ors. (supra) has come to hold that under Order 21 Rule 32 C.P.C. where a decree for perpetual injunction and mandatory injunction has been passed in a mandatory execution thereto, the Executing Court is competent to direct the removal of the obstruction and enforcing the perpetual injunction passed by the civil Court. In this case, the defendants took a defence under Section 22 of the Easements Act but this plea was turned down by the Hon'ble Supreme Court by holding that, they have allowed the perpetual injunction and mandatory injunction granted by the trial Court to

become final, it would be no defence for the respondent to plead that he had not obstructed the passage etc. or that as passed by the High Court, a part of the property in which the original shop was constructed, was not part of the property in the original suit. In other words, if a judgment-debtor had suffered the decree, no attempt to circumvent the perpetual injunction and mandatory injunction can be permitted. Non-compliance is a continuing disobedience entailing penal consequences and separate fresh suit, is barred under Section 49 of CPC and, therefore, the Hon'ble Supreme Court came to hold that it was competent for the Executing Court to effect recovery of the property in question even in a suit where mandatory injunction/perpetuity injunction have been granted.

7. In the light of the aforesaid discussion, I have no hesitation in holding that the writ application deserves to be dismissed and am of the view that none of the contentions raised in the application, are worthy of any further consideration and, therefore, the writ application stands dismissed. All interim orders stand vacated and Executing Court is directed to implement the direction of the Revisional Court forthwith preferably, within a period of three months from the date of receipt of copy of this judgment and for such purpose, if necessary, it shall be open for the trial Court to consider the necessity for issue notice to the local police administration to assist in effecting implementation of the directions of the Executing Court.