
(2005) 05 GAU CK 0028

Gauhati High Court

Case No: None

Monoranjan Dutta

APPELLANT

Vs

Narayan Dhar

RESPONDENT

Date of Decision: May 2, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151, 152, 47

Citation: (2007) 2 GLR 593 : (2006) 4 GLT 160

Hon'ble Judges: H.N. Sharma, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

H.N. Sarma, J.

The challenge made in this revision petition is an order passed in Execution Case No. 20/2001 dated 18.3.2002 by the learned Civil Judge (Junior Division) No. 1, Jorhat, by which an application filed by the petitioner/judgment-debtor objecting the execution of the decree has been rejected. In challenging the said order, the petitioner has also incidentally questioned the original judgment and decree passed by the learned Civil Judge, Junior Division No. 1, Jorhat dated 7.9.2000 passed in T.S. No. 13/95 by which the suit of the plaintiff/respondent was decreed ex parte.

2. I have heard Mr. D.C. Mahanta, learned senior counsel assisted by Ms. P. Bhattacharya, learned Counsel for the petitioner/judgment-debtor and also heard Mr. K.K. Nandi, learned Counsel for the decree holder/ opposite party. Also perused the materials available on record.

3. For the purpose of disposal of the revision petition, a brief of the relevant may be stated as follows:

The plaintiff filing of this revision petition, inter alia, are that the plaintiff filed the T.S. No. 13/95 in the court of the learned Civil Judge, Junior Division No. 1, Jorhat

praying for removal of air pollution and noxious atmosphere by demolishing the cowshed of the defendant and permanent injunction. It is the pleaded case for the plaintiff that the defendant/petitioner has constructed a cowshed towards the northern side of the plaintiff's land contiguous to his boundary and as a result of accumulation of cow dung, cow urine and garbages, the area has been polluted. That apart the water of the ring well located contiguous to the boundary wall of the plaintiff has also been polluted and contaminated. Narrating the nuisance that has been caused, the plaintiff has prayed for the following reliefs in the suit.

(1) For removal of air pollution and noxious atmosphere by demolishing the cowshed of the defendant and by clearing the present collection of cow dung, urine and garbages from the present site.

(2) For permanent injunction to restrain the defendant from keeping cows and from collecting and throwing cow dung, cow urine and garbages near the plaintiff's residence and Ring well and at the present site.

(3) To grant a temporary injunction pending disposal of the suit in the same matter as prayed in connection with the permanent injunction.

(4) Cost of the suit.

(5) Any other relief or reliefs to which the plaintiff is found entitled injustice and equity.

4. It may be noted here that the plaintiff has not given any separate schedule describing the said cowshed in the plaint in terms of the Order 7, Rule 3 of the CPC. Summons of the suit having been served upon the sole plaintiff/petitioner he contested the suit by filing the written statement. Apart from taking usual defences, it is also pleaded that on the basis of the complaint lodged by the brother of the plaintiff, a direction was issued by the town committee to remove the cowshed to a different place and accordingly, the defendant has shifted the cowshed six feet away from the southern boundary wall and there is a drain to flush out the excretory products, by the side of the boundary wall. After filing of the written statement and contesting the suit for some time the defendant defaulted and consequently, the suit was proceeded against him ex parte.

5. The learned trial court after considering materials available on record including the local inspection report, ext.1, of the site decreed the suit of the plaintiff on 7.9.2000, when the aforesaid decree was put on execution by filing the Title Execution Case No. 20/2001, the judgment debtor/petitioner filed, an application u/s 151 of the CPC alleging, inter alia, that the plaint contains no description and schedule of the property as required under Order 7, Rule 3 has been given the suit property is unidentifiable and on that count challenged the executing of the decree u/s 47 CPC by the judgment-debtor/ decree holder vide order dated 18.3.2002 the executing court rejected the said prayer of the petitioner/defendant.

6. Mr. Mahanta, learned senior counsel referring to Order 7, Rule 3 submits that providing description of the suit property in the plaint, where the subject-matter of the suit is immovable property is a requirement of law and the plaintiff having conveniently omitted to provide such description, the decree is not an executable one, in the absence of such description. It is further submitted that in passing an ex parte decree, the learned trial court fell into obvious error in not considering this aspect of the matter and has illegally passed the impugned decree requiring interference by this court even at this stage of execution.

Refuting the same, Mr. Nandi, learned Counsel for the decree holder/ opposite party submits that the application filed u/s 151 of the CPC raising said contention before the executing court is not maintainable under law and the judgment and decree has been attained its finality in the absence of any challenge made by the defendant/ petitioner and the validity of the decree cannot be questioned at this stage of execution. It is further submitted that in the event, there arises some differences in the execution for identification of the suit land, it is the duty of the executing court to satisfy it and for that purpose, the validity of the decree can not be assailed.

7. In support of his contention, Mr. Mahanta has relied on the decisions reported in 1995 (1) GLT 276 : 1993 (1) GLR 92 and 1993 (1) SCC 133. Mr. Nandi, on the other hand, has referred to the following decisions rendered by the Apex Court as well as by this court reported in 2003 (3) SCC 643 :2002 (2) GLT 279 and [Nirmal Traders Vs. Union of India \(UOI\) and Others](#),

8. I have considered the rival submission projected by both the parties, perused their respective pleadings and the materials available on record.

9. Now let me consider the validity of the first limb of argument raised by Mr. Mahanta regarding non compliance of Order 7, Rule 3 CPC. Order 7, Rule 3 provides that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

10. Admittedly, in the instant case, no such boundary or number of the record of settlement or survey is provided by the plaintiff in the plaint. Now the question is to whether the provisions of Order 7, Rule 3 is to be interpreted as a mandatory one, non-compliance of which would-be fatal to the validity of the decree. Order 7, Rule 3 has been amended by the High Court by adding certain portion at the end of the Rule like that of the amendment made by the Calcutta High Court, which reads as follows:

and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures.

In fact the said amendment of the Rule was originally made by the Calcutta High Court and the same is continuing even after creation of the Gauhati High Court, covering as of Calcutta High Court.

11. The Apex Court in the case of [Bhavan Vaja and Others Vs. Solanki Hanuji Khodaji Mansang and Another](#), has, inter alia, held that for construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court, often has to ascertain the circumstances under which those words came to be used. It is further held by the Apex Court that that is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it.

12. The Apex Court further in the case of [V. Mohini Giri Vs. Union of India \(UOI\)](#), has held as follows:

17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect, in the court record caused by overlooking of provisions contained in Order 7, Rule 3 and Order 20, Rule 3 of the CPC is capable of being cured. After all, a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merit of the case, it may be corrected u/s 152 of the CPC by the court, which passed the decree by supplying the omission. Alternatively, the exact description of decreetal property may be ascertained by the Executing Court in a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent court should not, as far as practicable be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the C.P.C.

13. A reading of Order 7, Rule 3 (as amended by High Court), it is clear that where the subject-matter of the suit is immovable property, although, it is provided that the plaint shall contain a description of the property. The basic requirement of the rule is that the plaint shall contain the description of the suit property, which is sufficient to identify it by giving the description and in that event, it may not be necessary in all cases for providing a boundary or numbers in a record of settlement or survey, which is left to the option of the party. The said amendment provides that in case any area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey with or without, at the option of the party. Thus, Order 7, Rule 3 as amended by the High Court the option is left with the party whether such description is to be provided or not. The rule also does not provide the consequence of such omission and in terms of the decision in Pratibha Singh (supra) the decree, even if it lacks description of the

decreetal property, the said defect can be cured at the executing stage by filing necessary application. Thus, it is abundantly clear that for failure on the part of omission to give a description of the suit property by giving boundaries, etc., in the plaint is not fatal that can be cured at a later stage. Thus, providing those descriptions are only optional to the plaintiff and not obligatory one.

14. The epithets "obligatory" and "permissive" are applied to enabling statutes according to the person affected by such statute have or have not an option as to doing the thing, which the statute deals with. If there is no option, the Statute is called "obligatory" but if there is, it is called "permissive".

The epithets imperative and mandatory are used as reference both to enabling Acts and the statute, which create duties. A statute which creates duty is called "imperative" if it is not optional whether that duty to be performed or not and the same term applies to Acts imposing a condition satisfaction whereof is essential of validity of the Acts or document as to which it is imposed.

[Ref : Craies on Statute Law, 7th edn. P.62]

Applying to the said test, in the conspectus of the decision of the Apex Court referred to above, and the provision Order 7, Rule 3 of the CPC (as amended by the High Court) there leaves no manner of doubt that the said provision is optional or non-obligatory or mandatory, strict, non-compliance of which will not invalid, the decree passed by the trial court.

15. In the instant case, the main objection of the judgment-debtor/ petitioner is that the suit property has not been properly identified by giving necessary descriptions of boundaries in the plaint at various paragraphs, but the defence has not taken any plea made that the suit land is not identifiable, even though it was open for the defendant to ask for better particular/discovery as per the provisions of Order 11 of the CPC that right has also not been exercised by the defendant/ petitioner. The pleadings of the parties disclose that there is no dispute as to the identity of cowshed in question. Consequently, on the aforesaid situation, the objection raised by the judgment-debtor is not sustainable and the same stands rejected.

16. There is yet another aspect of the matter that the suit was decreed as per the judgment and order dated 7.9.2000 and the plaintiff has not challenged the same in any higher court by filing appeal. Although the said decree is an ex parte one, the defendant/petitioner could have challenged the same by filing regular appeal or could have filed an application under Order 9, Rule 3 of the CPC to set aside the same. Further the petitioner could have also filed an objection u/s 47, CPC provided that he could make out a case. These are the three parallel provisions under the CPC to challenge the said decree, but instead of taking such action the petitioner has obliquely challenged the decree in thy revision petition, which is not permitted by law. The references of the cases made by Mr. Mahanta, in this connection, is not applicable to the facts and circumstances of the present case.

17. As in this case, the defendant/petitioner was provided with full opportunities by the learned trial court to contest this suit. Finally Mr. Mahanta has submitted that the impugned decree passed by this court there is a variation of the judgment and decree and the decree is not drawn up as per the judgment. For this purpose, the judgment-debtor is always at liberty to approach the trial court for amendment of the decree under the provisions of the Section 152 of the CPC if so advised, and if such a case is made. Mr. Mahanta has further submitted that he may be given liberty to approach the learned trial court below by filing necessary application for setting aside the ex parte decree and/or to file a regular application. Such right of approach to the court is always available to the defendant/judgment-debtor/petitioner in the Statute itself for which no express permission is required from this court.

18. In view of the aforesaid discussion, I do not find any merit in this revision petition and hence, the same stands dismissed subject to the observations made hereinabove.

19. Earlier interim order dated 18.6.2002 passed by this court stands vacated.