

(2013) 02 GAU CK 0025

Gauhati High Court (Shillong Bench)

Case No: CRP No. 46 (SH) of 2012

Sudhir Ranjan Chanda

APPELLANT

Vs

Uma Dutta

RESPONDENT

Date of Decision: Feb. 19, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 21, Order 21 Rule 29, Order 9 Rule 4
- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 51

Citation: (2013) 4 GLT 177

Hon'ble Judges: Prasanta Kumar Saikia, J

Bench: Single Bench

Advocate: K. Paul, for the Appellant; S. Jindal, for the Respondent

Judgement

Prasanta Kumar Saikia, J.

This proceeding under Article 227 or the Constitution of India has been initiated for staying the Title Execution case No. 1(H) of 2012, now, pending in the Court of Munsiff, Shillong all the disposal of the Title Suit No. 26 (H) of 2002 in the Court of Assistant District Judge, Shillong which was preferred by the judgment debtor in the Title Execution case No. 1 (H) of 2012. It may be mentioned that the Title Suit No. 26(H) 2002 was dismissed for default and a proceeding under Rule 4 of Order 9 of the CPC has already been initiated for restoration of the dismissed suit which is waiting disposal. It may also be noted that the decree holder in the Title Execution case No. 1(H) of 2012 was the plaintiff in Title Suit No. 25 (H) of 1997 and the judgement debtor therein, viz., the Title Execution case No. 1(H) of 2012, was the defendant in Title Suit No. 25 (H) of 1997 who, as plaintiff, instituted the Title Suit No. 26 (H) of 2002 in the Court of Assistant District Judge seeking various relief against the defendant therein who, as stated above, was none other than the decree holder in Title Execution case No. 1(H) of 2012.

2. The facts, as it appears from the application of this proceeding and which are necessary for disposal of the proceeding in hand are that the respondent, herein, as plaintiff, has filed a suit in the Court of Munsiff Shillong seeking declaration of his right, title and interest over the land described therein as well as for recovery of such property. The said suit was registered as Title Suit No. 25(H) 1997. The property, so involved in Title Suit 25(H) 1997, would be described here-in-after as suit property.

3. On being served with summons of the proceeding, the defendant therein, who is the petitioner in the present proceeding, contested the same having filed written statement. On the conclusion of trial, the learned Munsiff decreed the suit land vide the judgment and order dated 09.07.03. The said decree was challenged before the Court of District Judge, Shillong on preferring an appeal which was registered as RFA (TCA) No. 4 (H) 2009.

4. The learned 1st Appellate Court after hearing the arguments, so advanced by the learned counsel for the parties, dismissed the appeal vide judgment and order dated 14.05.04. Still being dissatisfied with the judgment, rendered by the learned District Judge, Shillong, the Appellant in RFA (TCA) No. 4(H) 2009, preferred 2nd appeal before this High Court which was registered as RSA No. 1 (SH) of 2004. However, the 2nd appeal too was dismissed by this Court vide judgment dated 28.09.09.

5. The matter was ultimately taken up to the Hon"ble Apex Court of the country by preferring a SLP before it which was registered as SLP (Civil) No. 35670/2009. However, the SLP was summarily dismissed vide order dated 6.01.10. Thereafter, the plaintiff in Title Suit 25(H) 1997 instituted an Execution Case in the Court of Munsiff which was registered as Title Execution No. 1 (SH) of 2012 seeking execution of the decree which was ultimately affirmed by the Apex Court of the country vide SLP(Civil) No. 35670/2009.

6. During the pendency of the Title Suit 25(H) 1997, the petitioner in this revision proceeding also filed a suit vide Title Suit No. 26 of 2002 against the respondent herein (Plaintiff in title Suit No. 25(H) 1997) seeking, amongst other things, a decree requiring the defendant therein to execute a sale deed and to register the same in accordance with law transferring the suit property aforesaid in favour of plaintiff in Title Suit No. 26 of 2002. But the said suit was dismissed for default on 22.10.10.

7. After the dismissal of T.S. No. 26 of 2002, a petition was filed under Order-9 Rule-4 read with Section 51 Cr.P.C. for restoration of the suit which was dismissed on 22.10.10 vide Misc. Case No. 93(H) of 2012 and same is, now, pending in the Court of Assistant District Judge, Shillong. It has been contended that there is every possibility of restoration of the Title Suit No. 26(H) of 2002 and on such restoration, there is huge prospect of said suit being decreed in favour of plaintiff therein.

8. It is also submitted that in the event of decreeing the suit aforesaid in favour of plaintiff of T of TS No. 26 (H) of 2002, the defendant, therein, who are decree-holder in Title Execution Case No. 1 of 2012 would be required to sell the suit property which is also the subject matter of Title Execution Case No. 1 of 2012 in favour of the plaintiff therein But then, if the Execution Case aforesaid is allowed to be carried to its logical conclusion, the plaintiff in Suit No. 26(H) of 2002 would have no means to satisfy the decree that may be passed in his favour and in that event, he would suffer irreparable loss.

9. According to the counsel for the petitioner, when two cases are pending before the Court or Courts, one by the decree holder seeking execution of decree and other by a judgment debtor who seeks some relief(s) against the decree-holder of the proceeding in which he is being arraigned as judgment debtor, then, once the former filed an" application under Order, 21 of Rule 29 of the CPC, the executing Court needs to stay the execution of the decree till the disposal off the suit instituted by the judgment-debtor against the decree holder.

10. In that connection, the learned counsel for the petitioner has drawn my attention to the Rule-21 of Order-21 of the CPC. He has also referred me to the decisions of Hon"ble Supreme Court in the case of Dinesh Prabhulal Barat & Anr. and Sai Palace Hotels (P)Ltd, & Ors. as well as Rekha Mukherjee Vs. Ashish Kumar Das and Another, and Rekha Mukherjee Vs. Ashis Kumar Das and Others, respectively. Above being the situation, having filed the present application, he urges this Court to stay the Title Execution case No. 1 of 2012 till the final disposal of Title Suit No. 26(H) of 2002.

11. The above prayer or for that matter the proposition of law, so canvassed before this Court by the learned counsel for the petitioner herein, was strongly objected to by the learned counsel for the respondent (Plaintiff in title Suit No. 25(H)1997). It has been argued that one of the most fundamental requirements of for invocation of the Rule 29 of Order-XXI CPC is that the proceeding instituted by the Decree- holder against the judgement debtor and the suit instituted by the judgement debtor against the decree holder must be in one and the same Court.

12. Unless this prime condition is fulfilled, die Execution Case, instituted by the decree holder cannot be stayed even if the subject matter in both the cases happens to be one and same. His further case was that even in cases which fulfil me requirement of the Rule 29 of Order-XXI of the CPC, invocation of aforesaid provision of law is not mandatory. Quite contrary to it, invocation of such a provision of law is optional. The use of word "May" in Rule- 29 Order- XXI of the CPC confirms more and more such a proposition.

13. Since the most leading condition, so specified in provision of law referred to above, is found conspicuously lacking in proceedings under consideration, since the cases, above, are pending not in one Court as required under the Rule under

consideration and since those cases are pending in 2 (two) different Courts with totally different pecuniary jurisdictions, it is totally beyond the competence of this Court to grant the prayer, made in this proceeding by the petitioner of this proceeding.

14. To bring home his point, the learned counsel for the respondent has rendered me to the decision of Hon"ble Supreme Court in the case of Shaukat Hussain alias Ali Akram and Others Vs. Smt. Bhuneshwari Devi (Dead) by Lrs. and Others, . The relevant part of the decision so relied on by the learned counsel for the respondent is reproduced below:--

And then we have Rule 29 which deals with a different situation. The rule is as follows:

Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. That is a condition under which the Court in which the suit is pending may stay the execution before it. If that was the only condition, Mr. Chagla would be right in his contention, because admittedly there was a proceeding in execution by the decree-holder against the judgment-debtor in the Court of Munsiff 1st Gaya and there was also a suit at the instance of the judgment-debtor against the decree-holder in that Court. But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such Court. The words "such Court" are important. "Such Court" means in the context of that rule the Court in which the suit is pending. In other words, the suit must be one not only pending in that Court but also one against the holder of a decree of that Court. That appears to be the plain meaning of the rule.

15. To fortify his position, more and more, he also relies on the decision Hon"ble Patan High Court in the case of Ram Nath Sah Vs. Kali Prasad Singh, . The relevant part of the judgment is reproduced below:--

5. Order 21, Rule 29 of the Code deals with stay of the execution pending suit between the decree holder and the judgment debtor. It says that "where suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until pending suit has been decided." From perusal of the said Rule it is obvious that there should be two proceedings in one

Court i.e. execution proceeding at the instance of the decree holder and other a suit at the instance of the judgment debtor against the decree holder. In the instant case, the suit for eviction was filed by the plaintiff-opposite party before the Munsiff Court, which was decreed and the decree was upheld up to the Apex Court. The petitioner filed the suit for specific performance of contract against the opposite party before the Sub-Judge, Gopalganj which was decreed and first appeal against such decree is pending before this Court. Obviously, in both the suits the Courts was not the same. Eviction suit was before the Munsiff Court and the suit for specific performance of contract was before the Sub-Judge. In the case of Shaukat Hussain alias Ali Akram and Others Vs. Smt. Bhuneshwari Devi (Dead) by Lrs. and Others, the Apex Court held that for application of Order 21 Rule 29 of the Code there should be two simultaneous proceedings in one Court i.e. a proceeding in execution of the decree of that Court started at the instance of the decree holder against the judgment debtor and a suit at the instance of the same judgment debtor against the holder of the decree of that Court. Similarly, in the case of Sri Krishna Singh Vs. Mathura Ahir and Others, it has been held that the power to stay has to be exercised with great care and only in special cases, the Court which has passed the decree alone has power to stay its execution under Order 21, Rule 29 of the Code. If the execution case is transferred from the competent Court to another Court, the transferee Court will cease to have the jurisdiction.

16. I have very carefully considered the submissions, advanced by the learned counsel for the parties, having regard to the provision of law, involved as well as decisions, relied by the parties. On making such an exercise, I have found that decisions, relied on by the learned counsel for the respondent, herein, have clearly and succinctly laid down the law vis-à-vis matter under consideration.

17. The law, so laid down, clearly establishes that unless the suit filed by the judgment debtor against the decree-holder and the Title Execution Case, instituted by decree-holder against such plaintiff/judgment debtor, are pending in one and same Court, the provisions, so incorporated in Rule-29 of Order XXI of the CPC, cannot be invoked even if subject matter in both the proceeding are found to be one and same. In view of above, I respectfully agree with the proposition of law, so enunciated through the decisions, aforementioned, on the matter under consideration.

18. Coming back to our case, I have found that the case initiated by respondent of this proceeding against the petitioner seeking execution of decree is admittedly pending in the Court of Munsiff. But the suit filed by the petitioner herein seeking a decree requiring the defendant therein (who is respondent herein) seeking various reliefs including a decree requiring the present respondent, to sell out the suit property in his favour was filed in the Court of Assistant District Judge, Shillong.

19. Since the cases aforesaid are/were pending in two Courts with pecuniary and territorial jurisdictions different altogether, I am constrained to hold that in view of

requirement of Order-XXI Rule- 29, as clarified by the judgments aforementioned, this Court cannot pass any order staying the operation Execution case No. 1(H) of 2012 till the disposal of the Suit No. 26(H) of 2002, as prayed for by the petitioner of the present proceeding.

20. In this connection, it may be stated that the learned counsel for petitioner too has relied on the decisions of the Hon"ble Supreme Court, rendered in the case of Dinesh Prabhulal Barat (supra) and Ashish Kuman Das (supra) in support of his contentions. But the decisions, so relied on by the learned counsel for the petitioner, do not give any idea as to the facts and circumstances in which such decisions were rendered.

21. Therefore, it cannot be said that by the aforesaid decisions, the Hon"ble Supreme Court has laid down any law on the point under consideration which is not in tune with the law laid down in the case of Shaukut Husaain (supra). Being so, I am of the considered view that above decisions could no way advance the plea of the petitioner, he has canvassed before this Court in the proceeding under consideration.

22. The learned counsel for the respondent has submitted that since the judgment of the Munsiff Court has ultimately affirmed by Supreme Court since it summarily dismissed the SLP (Civil) No. 35670/2009, the judgment of the Trial Court became ultimately the judgment of Hon"ble Supreme Court in view of doctrine of merger of judgment of inferior Court with the superior Court. Being so, it is beyond the competent of this Court to stay the execution of decree which is in fact a decree granted by Hon"ble Supreme Court.

23. In that connection, the learned counsel for respondent herein has referred me to the decision rendered by Hon"ble Supreme Court in the case of Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, . The relevant part is reproduced:

15. In cases where the decree of the trial Court is carried in appeal and the appellate Court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the trial Court. In Jowad Hussain vs. Gendan Singh & Ors., (1) the, Privy Council while holding that the limitation of three years within "which an application for a, final decree must be made runs from the date of the decree of the appellate Court, quoted with approval the statement of law contained in the judgment of a learned judge of the Allahabad High Court to the following effect: "When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause". (2) The Privy Council also adopted the statement contained in a judgment of Tudball J. to this effect: "When the Munsiff passed the decree it was open to the plaintiff or the: defendant to accept that decree or to appeal. If an appeal is preferred" the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

Thus, when the decree of the Court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council the decree capable of execution is the decree of the Privy Council. (3) In that case the decree passed by a District Judge in 1887 awarded "future mesne profit" to the plaintiff. That decree was reversed by the High Court but was confirmed by the Privy Council on May 11, 1895. When the matter came back in execution proceedings the Privy Council held that the decree which the Courts had to execute was the one passed by it in 1895 and since by that decree the District Judge's decree was confirmed, the decree of 1895 clearly carried the mesne profits up to its own date.

24. Since I have already held that the execution case, instituted by the decree holder in the Court Munsiff, Shillong, cannot be stayed for one very important conditions, incorporated in Rule- 29 Order-XXI of the CPC, being found conspicuously lacking in the proceedings aforesaid, the proceeding praying for a direction to stay the execution proceeding aforementioned till the disposal of the T.S. No. 26 (H) of 2002 is already found to be unsustainable in law. That being the position, I am not inclined to probe the contention if this proceeding is not maintainable in view of doctrine of merger of judgment of interior Court with the judgment of superior Court

25. In the compacts of the discussion made herein before, I find no force in the prayer, made in this proceeding and same is accordingly rejected.

26. It may be noted here that the respondent herein as being plaintiff got the decree, he prayed for in a suit which he instituted way back in 1997. However, he has to wait almost 14 years from the time of filing his suit to put the decree, he obtained, in the process of execution. Therefore, the legal battle which the respondent/petitioner had initiated as early as 1997 needs to be drawn to a close at the earliest.

27. Therefore, before I part with record, I would like to mention that the learned Executing Court will keep all these in mind while dealing with the execution proceeding in question. With the above observations, this proceeding is disposed of. No cost.