

(1999) 1 GLT 39

Gauhati High Court (Agartala Bench)

Case No: Civil Revision No. 43 of 1995

Gajendra Kr. Dhar

APPELLANT

Vs

Nani Gopal Ghosh and
Others

RESPONDENT

Date of Decision: Dec. 7, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 35, Order 21 Rule 97, Order 21 Rule 97(1), Order 21 Rule 99, Order 9 Rule 13
- Limitation Act, 1963 - Article 136

Citation: (1999) 1 GLT 39

Hon'ble Judges: D.N. Chowdhury, J

Bench: Single Bench

Advocate: A.K. Bhowmik, I. Chakraborty and T.K. Deb, for the Appellant; D.K. Biswas, for the Respondent

Judgement

D.N. Chowdhury, J.

This revision petition has arisen out of and is directed against the judgment and order dated 21.9.95, passed by the learned Asstt. Dist. Judge, North Tripura, Kailashahar in case No. Misc. 8 of 1995 arising out of case No. Execution (T) 1/94. The aforesaid order dated 21.9.95, was passed on an application which was submitted by the Petitioner, Gajendra Kr. Dhar, before the Asstt. District Judge, North Tripura, Kailasahar u/s 47 r/w Section 151 CPC questioning the executability of the decree passed by the learned Munsiff, North Tripura, Kailashahar in Title SuitNo.81/62.

2. Mr. A.K. Bhowmik, learned senior counsel appearing on behalf of the Petitioner, Gajendra Kumar Dhar, in this proceeding questioned the competence of the learned Executing Court for entertaining the execution proceeding which was per se time barred. Mr. Bhowmik, the learned Senior Counsel, after pointing to the schedule the plaint as well as that of the decree, submitted that in the absence of cadestral Survey, Khatian Number,

Plot Number and Holding Number of the suit land, it would not be possible to identify the decretal land and on that count alone, the decree became unexecutable. Mr. A.K. Bhowmik, the learned senior counsel appearing on behalf of the Petitioner, in support of his case placed reliance on the decisions of the Supreme Court in the case of [Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another](#), reported in AIR 1994 Gau 44 ; and in Shanti Debi Nai v. Harikrishna Nathani reported in 1996 (2) GLJ 9.

3. Mr. D.K. Biswas, learned Counsel appearing on behalf of the opposite parties, firstly, questioned the legitimacy of the claim of the Petitioner on the ground that the Petitioner claims his right on the basis of the alleged purchase of the land by a registered Sale Deed dated 26.2.72, i.e., six years after the judgment and decree as passed in Title Suit No. 81/62. Mr. Biswas, the learned Counsel further submitted that at any rate whether the execution proceeding was within time was not to be adjudicated for the first time in a Civil Revision, more so, when the point was not raised before the learned Executing Court. Whether the execution proceeding is within time or not is a question of fact as well as law and, therefore, the Petitioner cannot be allowed to agitate those issues at the belated stage, submitted Mr. Biswas. The learned Counsel for the opposite parties also pointed out that the schedule of the land was clear and specific. The lands shown in the decree are covered by natural boundaries and, therefore, question of difficulty in identification of the lands cannot arise. Since the Executing Court at all relevant time, was acting within its jurisdiction and in accordance with law, question of interesting u/s 115 CPC does not arise, submitted Mr. Biswas.

4. For resolving the controversy between the parties, the facts those are to be noted, are that Title Suit No. 81 of 1962 was instituted by the predecessors-in-interest of the Decree Holders/Opposite parties for declaration of title, khas possession and mesne profits with respect to two Kanis of land situated under village, Mouza and Tehsil-Fatikroy. In the said suit, the Defendants entered appearance and were granted several adjournments to file Written Statement. The Trial Court finally ordered the Defendants to submit their written statement on payment of cost by 30.11.65, failing which the Suit would be taken-up for exparte hearing. When the Suit was taken-up on 30.11.65, the Defendants neither did appear in the Court nor did pay the cost. The Plaintiffs on the other hand appeared with evidence and the Suit was proceeded with and an exparte decree was passed against the Defendants. The Defendants in the Suit submitted a petition on 21.12.65 under Order IX Rule 13 CPC for setting aside the exparte decree and for restoration of the original Suit. The learned Court below recorded evidence of the witnesses and thereafter, dismissed the Restoration petition by its order dated 31.8.66 passed in Misc. Case No. 89/65. The Defendants preferred an appeal before the Subordinate Judge, Tripura, Agartala which was registered and numbered as case No. 21 (Misc Appeal) of 1966. By an order dated 12.9.67, the above appeal was dismissed on contest upholding the order passed by the learned Munsiff on 31.8.66, dismissing the application under Order IX Rule 13 Code of Civil Procedure. The Defendants thereafter went-up by way of a revision application under Paragraph 34 of the Tripura (Courts) Order 1950 which was registered and

numbered as Civil Revision No. 52/67. By an order dated 7.2.70, the Civil Revision was dismissed. Thereafter the decree holder submitted an application for execution of the decree before the learned Munsiff, North Tripura, Kailashahar on 31.3.81, which was registered and numbered as case No. Exe(T) 3/81. The judgment-debtor in the aforesaid case submitted its objection u/s 47 CPC which was registered and numbered as a separate Misc case bearing No. 16/82. The learned Munsiff, Kailashahar by his order dated 30.6.83, rejected the aforesaid objection application and disposed the Misc. Case No. 16/82 arising out of Exe(T) 3/81. Similarly, by an order dated 2.1.82, the learned Munsiff disposed the Misc. case No. 14/81, the objection application filed by judgment-debtors Nos. 2, 3, 4 and 5 on 30.6.81, on contest. In the aforesaid application, the judgment debtors raised the issue that the decree was vague and not executable as it did not carry the exact boundary, which was not accepted by the Executing Court.

5. From the executing proceeding, it appears that at the instance of the decree holder, a Survey Commission was appointed to demarcate the decretal land of the suit at the time of delivery of Khas possession. From the records, it appears that the Survey Commissioner appointed by the Court on 25.8.89 (incidentally the second Survey Commissioner) was reported to be bed-ridden and the decree-holder accordingly prayed for appointing another Survey Commissioner. By an order dated 16.8.89, the learned Munsiff ordered for issuing a letter to the SDO(Civil) with a request to inform the Court whether the SDO was in a position to spare any other Surveyor. The record further shows that the SDO agreed to spare a Surveyor and accordingly, the Court directed the Decree-Holder to deposit the expenses of the Surveyor. The Decree-Holder on 13.2.90, sought for assistance of five armed and two lady Constables along with an S.I. for taking delivery of Khas possession of the decretal land and the Court accordingly, ordered the Decree Holder to deposit the necessary expenses for the same fixing 26th February, 1990. The order dated 26.2.90, passed by the Court reads as follows:

D.H. has filed two copies of Challans, one showing deposit of one day's salary of five armed Constables, two lady Constables & one ASI. The second copy of challan shows that one day's salary of the Surveyor, SDO's office has also been deposited in the Treasury.

Write a letter to the S.P(N) with copy to O/C, KLS P/S requesting him to depute one S.I., five armed Constables & two lady Constables to assist the Nazir in delivering the Khas possession on the date & place to be intimated by the Nazir to the O.C. KLS/P.S. Also write a letter to the S.D.O. (Civil) KLS requesting him to depute his surveyor for the aforesaid purpose on the date and place to be intimated by the Nazir to the Surveyor directly.

Send the copies of the aforesaid letters to the Nazir.

The D.H. is to file the fresh writ of Khas possession within 9.3.90. On filing the writ, issue the same after checking.

To 28.4.90 for E.R.

6. On 28.3.90, the present Petitioner, Gajendra Kumar Dhar, submitted an objection petition u/s 47 read with Section 151 CPC challenging the executability of the decree passed in Title Suit No. 81/62. By another application, the Petitioner prayed for staying execution of the decree till disposal of the objection petition. The learned Executing Court accordingly, registered a separate Misc. case bearing No. Misc. Case No. 12/90 and stayed the execution proceeding on 28.3.90. The learned Executing Court finally heard the matter on 29.11.91 and reserved 9.12.91 for orders. By order dated 9.12.91, the learned Executing Court passed the following order:

Both, sides are represented by their respective Id lawyers.

I have gone through the ruling [Marudanayagam Pillai Vs. P.K. Venkataswami Naidu and Others](#), cited by the Id. lawyer of the Petitioner. The fact and circumstances of that case is totally different from the one in hand. The Petitioner of this case is a purchaser from the judgment debtor. Hence, he merely steps into the shoes of the jdr. His rights are not more than the rights the jdr had. The questions raised by the Petitioner in his petn dt. 28.11.91 can not be raised at this stage. Allowing the petn filed by the Petitioner will mean reopening the case which is not within the scope of Section 47 Code of Civil Procedure. At this stage, what can be seen by appointing a Survey Commissioner is whether the decretal land is ascertainable? If so, which one is that land? Decree holders have already prayed for appointment of a Survey Commissioner who is to accompany the Nazir to identify the decretal land at the time of execution. However, since the Petitioner has prayed for local investigation and as his engaged lawyer has also fervently pressed the petn. the prayer of local investigation is allowed but to the extent stated above.

Shri Amulya Kr Dutta, Survey knowing Commissioner of Dharmanagar is hereby appointed the Survey Commissioner for the purpose of this case who will go to the decretal land after issuing notices to both sides. He will ascertain the decretal land with reference to the decree. The decretal land should be clearly identified. He will also relay the decree and will file his report with map and filed book.

An amount of Rs. 175/- will be deposited by the Petitioner to the Nazir, D.J's Court, Kailashahar as the fee of the Survey Commissioner and the receipt to that effect will be filed on the next date. Send a copy of this paragraph of the order to the Nazir aforesaid for information.

Issue the writ on filing the receipt by the Petitioner.

To 18.1.92 for filing receipt of S/Commissioner's fee.

7. The execution proceeding proceeded and the Survey Commissioner filed his report with his map and the Field Book. The Survey Commissioner also returned the documents used in local investigation which will appear from the order dated 26.3.92 passed in Misc.

case No. 12/90. After hearing both the parties and also on hearing the respective objections of the parties, by order dated 20.2.94, the learned Munsiff accepted the report of the Survey Commissioner to the extent contained in the direction given in the writ of delivery. On 7.2.94, the learned Munsiff heard both the parties and reserved his order. The case was, however, transferred to the Court of the learned Asstt. District Judge, North Tripura, Kailashahar, and the same was numbered as Misc. Case No. 2/94 before the Asstt. Dist. Judge. Finally by an order dated 15.6.95, the learned Asstt. District Judge dismissed the Misc. case for non-prosecution.

8. The Petitioner thereafter filed another application u/s 47 read with Section 151 CPC before the Asstt. District Judge challenging the executability of the decree raising the issues those were raised earlier. The Petitioner amongst others also prayed for setting aside the order dated 15.6.95, passed by the learned Asstt. District Judge in Misc. Case No. 2/94. The matter was finally disposed by the learned Asstt. District Judge by its order dated 21.9.95 passed in Misc. Case No. 8/95. Hence this revision petition.

9. Twelve years is the prescribed period for the execution of a decrees other than those granting mandatory injunction as enjoined in Article 136 of the Limitation Act, 1963 and the period begins to run when the decree or the order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment of delivery in respect of which execution is sought, takes place; provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. Article 136 of the Limitation Act covers all cases in respect of execution of decrees except a decree granting mandatory injunction or order of any Civil Court. The prescribed period of limitation is twelve years and it will start, in the case of a decree or order, when it becomes enforceable.

10. From the facts narrated above, it is apparently clear that the decree became enforceable after dismissal of the Civil Revision on 7.2.70, by the order of the Judicial Commissioner. Prior to it, there was an embargo for execution of decree in view of the order of the Court. On the facts and circumstances of the case, therefore, the contention of Mr. A.K. Bhowmik, the learned Senior counsel appearing on behalf of the Petitioner, on the point of limitation, cannot be sustained and accepted.

11. The schedule of the lands are duly described in the plaint along with the boundary. The boundaries are shown-the boundarymen and their lands are shown in addition to some of the portions of the lands being bounded by roads as well as ponds. The land was already surveyed by the Survey Commissioner who was appointed and sent to the decretal land to identify the same. Before the executing Court, the Petitioner contended that the land of the Petitioner was situated outside the decretal land. The learned Asstt. District Judge, therefore, rightly held that the judgment-Debtor has nothing to worry about the execution of the decree so much so that the bailiff will only execute the decree on the basis of the decree alone. Before the executing Court earlier, steps were taken for

identification of the land through the Surveyor by local investigation. Therefore, the question of want of identification of the land need not detain us. The case of Brahmdeo Chaudhury (supra) has no bearing in this proceeding. That was a case pertaining to the locus of a stranger to a decree to offer his resistance before getting actually dispossessed. Basically, that was a case of interpretation of Order XXI Rules 97 and 99 of the Code of Civil Procedure. In the above case, the Appellant who claimed to be stranger was occupying the decretal premises in his own right and offered his resistance to the execution of the decree before getting actually dispossessed against the judgment-debtor qua such property and prayed before the Executing Court to adjudicate upon his resistance and obstruction. The Executing Court negated the prayer of the Appellant by holding that such stranger to the decree who has to put forward his obstruction against execution of the decree has his only remedy under Order XXI Rule 99 CPC after his obstruction is first removed and he is dispossessed from the premises. The High Court concurred with the view of the Executing Court. The Supreme Court while adjudicating the case of the stranger, held that the controversy of the stranger is required to be adjudicated and the Executing Court is bound to adjudicate upon the matter before re-issue of warrant with Police assistance. The Supreme Court clarified the law with the following observations:

It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claims any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it even if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. Provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts to execute the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such obstructionist is only Order XXI, Rule 97 Sub-rule (1) and he cannot by-pass such obstruction and insist on issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and

circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession

....

The view that claim of stranger obstructionist would be considered after he has lost possession to decree-holder would result in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder.

12. The decision in *Mustt Kitabjan Bibi (supra)*'s case also has no application to the case in hand on the facts and circumstances. In the above case, the decretal land could not be located in terms of the decree and order of delivery of possession and in those circumstances, the High Court ordered that the Executing Court could not go behind the decree and order delivery of possession of a different land. As regards the applicability of the decision in *Shanti Debi (supra)*'s case, in view of the discussions made in *Brahmdeo (supra)*'s case, in similar vein, the aforesaid decision also has no bearing in the present case.

13. For the foregoing reasons, there is no merit in this revision petition and accordingly, the same is dismissed. On the facts and circumstances of the case, there shall, however, be no order as to costs.