(2003) 11 CAL CK 0005

Calcutta High Court

Case No: F.M.A. No. 1060 of 1996

Biswanath Banerjee		APPELLANT
	Vs	
Debendra Chandra Dolui and Others		RESPONDENT

Date of Decision: Nov. 24, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 26, Order 21 Rule 29, 11, 151, 47

Citation: (2004) 2 CHN 18

Hon'ble Judges: Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: Sudhis Dasgupta and Amal Krishna Saha, for the Appellant; Mrinmoy Bagchi and Jayanta Narayan Chatterjee, for the Respondent

Final Decision: Allowed

Judgement

D.K. Seth, J.

In a suit filed by judgment-debtor against the decree-holder, upon an application for injunction restraining the decree-holder from executing the decree passed in the earlier suit, the learned Court granted injunction restraining the appellant/decree-holder in the earlier suit from executing the decree (Tex No. 2 of 1981). This order is under challenge in this appeal. The Title Suit No. 56 of 1966 for eviction and recovery of possession on the ground of termination of the lease on efflux of time travelled through a long-drawn see-saw process up to the Apex Court and ultimately the decree for eviction stood affirmed. Apart from the present plaintiff-respondent, there were other judgment-debtors against whom the decree stood executed.

2. Mr. Sudhis Dasgupta, the learned Senior Counsel appearing for the appellant, raised a question that the interest of the judgment-debtor, if any, can be asserted only through the provisions contained in Section 47 of the CPC (CPC) in the

execution itself and not by a separate suit and that the attempt to establish a new right on the alleged independent and separate cause of action giving rise to fresh issues are mere camouflage and would not escape the mischief of res judicata if the foundation on which the subsequent suit was instituted appears to be the ground on which the plaintiff-respondent could have defended the earlier suit. According to Mr. Dasgupta, such defence was already taken and negatived as would be apparent from the records, particularly from the order dated 22nd June, 1995 passed in C.O. No. 2477 of 1994 by Mr. Justice Tarun Chatterjee (as His Lordship then was). Therefore, the injunction could not have been granted and the order should be set aside.

3. Mr. Mrinmoy Bagchi, the learned Counsel for the plaintiff-respondent, on the other hand, contends that once a decree has been partly executed and the rest has not been executed and the judgment-debtor have been allowed to remain in possession, then the decree becomes satisfied. Such decree can no more be executed. The second point he has urged is that the subsequent suit is based on altogether different cause of action and different grounds, which in no manner could be agitated in the earlier suit. As such the issues framed, to which our attention has been drawn, are all fresh issues and had never been decided between the parties in the earlier suit. Therefore, the principle of res judicata cannot be attracted in the present case. Thus, according to him, the question involved does not come within the purview of Section 47 so as to preclude the plaintiff-respondent from thrashing out its right through a separate suit. In the circumstances, he prays that the appeal be dismissed.

4. Both the learned Counsel had cited some decisions in support of their respective contentions to which we will be referring at appropriate stage.

5. A copy of the plaint was handed over to us by Mr. Dasgupta. Mr. Bagchi has not disputed the authenticity of the copy of the plaint produced by Mr. Dasgupta. We have gone through the plaint and examined the grounds on which the right is founded and relief is claimed. The suit property is admittedly is one and the same. The parties are also same. But the plaintiff-respondents are claiming interest through a lease executed in their favour and that the transfer of the property by their lessor in favour of the appellant was invalid and that the plaintiffs/respondents have independent right in respect of the suit property. The invalidity of the transfer of the interest of the plaintiffs'' lessor to the appellants was challenged on the ground that the annual rent was around Rs. 3,000/-, yet the property was transferred at a consideration of Rs. 200/- and that on the date of the transfer the appellant was a minor, who could neither accept the transfer nor could pay the consideration and, therefore, the transfer was incomplete, the illegal and thus, void. The Title Suit No. 56 of 1966 out of which the TEx No. 2 of 1981 arises was neither properly framed; nor the appellant had any right, title and interest in the suit property enabling him to file the suit; the decree passed was not a contested one;

and in essence an ex parte decree, on which relief was obtained in Title Suit No. 56 of 1966, were not proved through evidence; the judgment was passed on inadmissible evidence; one Ramesh Chakraborty had adduced evidence without proving his authority to adduce evidence; there was no reliable evidence; the plaintiff was not tendered for oral evidence on account whereof adverse presumption ought to have been drawn against him; the documents on which the learned Court had relied upon for decreeing the Title Suit No. 56 of 1966 were all inadmissible in evidence; the learned Court ought to have dismissed the said suit. It was further contended that before the Supreme Court the only issue that was involved was in respect of the thika tenancy of the plaintiffs, therefore, all other points are still open to be adjudicated; there can be no estoppel against statute in order to enable the plaintiffs to claim the relief sought for in the suit since the eviction suit by the appellant was not maintainable; there was a renewal or revival of the compromise reviving the relation after which no further notice was given and as such the Title Suit No. 56 of 1966 could not be decreed; the lease could not have been terminated without notice particularly when it was renewable by another period of 10 years and was so renewed; there was no notice according to law, which ought to have been for a period of six months. On these grounds, a declaration was asked for that the appellant had no right to institute the suit for eviction being T.S. No. 56 of 1966 and that the decree passed in the said title suit is void, illegal and inoperative and that the appellant had no right, title and interest in the suit property; neither the appellant had acquired any right, title and interest in the said property and that the lessor had no right to execute the alleged Sale Deed of an earlier leasehold property and that the transfer was illegal and void and that Nagendranath had no right, title and interest to transfer the same to the appellants. The judgment-debtor has prayed for further declaration that the plaintiffs had acquired valid, indefeasible right, title and interest in the suit property and for that he had also prayed for injunction restraining the appellant from executing the decree passed in Title Suit No. 56 of 1966 and for permanent injunction from disturbing the peaceful possession of the plaintiffs.

6. Thus, it appears that the entire foundation of the subsequent suit centers round the Title Suit No. 56 of 1966 and the decree obtained therein and its execution and not independent thereof.

7. Section 47 CPC enables a judgment-debtor to resist execution. All questions relating to execution are confined to the question as to whether the decree is binding or not; in other words whether it is executable, In order to show that the decree is not binding and inexecutable as against the person resisting it the judgment-debtor may take all or every objection that might be available to him. But such objection can be taken only u/s 47 and not by a separate suit. Therefore, if the execution of the decree passed in Title Suit No. 56 of 1966 is sought to be resisted, in that event, the remedy that might be available are within Section 47 and not by a separate suit. Legislature had intended to confine the issues within the same

proceedings without allowing the parties to draw up swords in further proceedings through separate suit. This intention is also expressly provided even in other provisions, namely, under Order 21 Rule 101 CPC. The stay of execution can be obtained under Order 21 Rule 26 or under Rule 29, as the case may be. The plaintiffs'' attempt to get the benefit of Order 21 Rule 26 and Order 21 Rule 29 appears to have been unsuccessful twice. Against the second rejection, a Civil Revision No. C.O.2477 of 1994 was moved before this Court. Chatterjee, J; (as His Lordship then was) had gone into details of the facts and had encompassed in a photographic description giving each particulars, which we refrain from repeating. In the said decision, it was observed by the learned Judge that:

"In order to stall the execution proceedings, the judgment-debtor had taken all sorts of delaying tactics so that the possession of the decretal premises is not allowed to be taken by the decree holder/opposite party. The original eviction suit was of the year 1966 and that too was a suit for eviction on the ground of expiry of lease of the judgment-debtors. The defence that they were thika tenants was negatived by all the Courts including the Hon''ble Supreme Court. After the decree was affirmed by the Hon''ble Supreme Court proceedings after proceedings were started by judgment-debtors or his agents to stall the execution proceeding. As stated herein earlier, similar applications under Order 21 Rule 26 and Order 21 Rule 29 of the CPC were rejected by the Executing Court. Against the Order or rejection of the petitioners under Order 21 Rule 26 and Rule 29 of the CPC filed by the judgment-debtor, the judgment-debtor/petitioner moved a revisional application in this Court and this Court in the Order passed in the said revisional application permitted the judgment-debtor/petitioner to file the fresh petition under Order 21 Rule 29 of the CPC only. After all this again similar nature of applications under Order 21 Rule 26 of the CPC and Order 21 Rule 29 of the CPC were filed by the judgment-debtor before the Executing Court. So far as the application under Order 21 Rule 26 of the CPC is concerned, the learned Munsif by the impugned order rejected the same on the ground that in an earlier civil revision case this Court permitted the judgment debtor/petitioner to file an application under Order 21 Rule 29 of the CPC instead of filing the application under Order 21 Rule 26 of the Code of Civil Procedure. By the impugned order the other application under Order 21 Rule 29 of the CPC was also rejected.

The question whether the judgment-debtor is entitled to stay of execution till the disposal of the suit is to be decided on the merit of the application filed. In the background of the facts as stated hereinabove the learned Munsif was perfectly justified in refusing to stay execution proceeding till the hearing of the suits. Such being the position and considering the facts and circumstances of this case I am also in agreement with the learned Munsif that the judgment-debtor is not at all entitled to any order of stay of execution till the disposal of the suits.

Apart from that it is not the law that only because two suits have been filed challenging the decree on the ground of nullity, the judgment-debtor/petitioner is entitled to an order of stay of execution till the disposal of the suits. Looking through the averments made in the plaint of the two suits filed by the judgment-debtor it can only be said that such suits have been filed by the judgment-debtor only to delay their dispossession in execution of the decree passed in the year 1980. In view of my discussions made hereinabove and considering the facts and circumstances of this case and the background of the same I am satisfied that the Executing Court was perfectly justified in rejecting the application filed under Order 21 Rule 26 and Order 21 Rule 29 of the CPC as such applications had been filed only for the purpose of delaying execution of the decree. Accordingly the revisional application is rejected."

8. It appears that the ground that there was fresh cause of action and/or the issues were independent and were not involved in the earlier suit as contended by Mr. Bagchi, cannot be justified having regard to the facts as discussed above. The grounds on which the relief in the plaint was claimed by the plaintiff-respondent, in fact, were grounds, which could be taken as defence in the earlier suit and, in fact, such defence was so taken though in a different manner. The principle of constructing res judicata includes defence, which ought to have been taken but not taken and also issues in respect of which the Court remains silent. Therefore, the absence of issues and silence of the Court on a particular question would not allow the parties to reopen the same issues, which would have been raised in the earlier proceedings and were open to be agitated by the parties. But then the question is whether these grounds could be available to resist the decree. In fact, the suit has been filed only to resist the decree. Therefore, these grounds are grounds within the meaning of Section 47 which can only be taken in an application u/s 47 and not otherwise by a separate suit. We are given to understand that Section 47 application was resorted to by the judgment-debtor on three occasions unsuccessfully. The grounds, which could have been taken as grounds u/s 47 cannot be repeated one after the other. That apart there is already a finding by this Court that the subsequent suit was filed only to resist the execution of the decree, a finding binding between the parties.

9. Mr. Bagchi had relied on the decision in Deva Ram and Another Vs. Ishwar Chand and Another, on the ground that if the cause of action is different subsequent suit is not barred. The principle is not in dispute. If the subsequent suit between the same parties relating to the same property is on a different cause of action, then the principles of res judicata would not apply. In order to avail of the benefit of the said ratio, one has to show that the cause of action for the suit is different from the one resulting into the decree of which res judicata is sought to be avoided. In the present case, we have seen that the cause of action is not different from the earlier suit and as such this ratio enunciated in this decision does not help Mr. Bagchi. Mr. Bagchi had relied on the decision in Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I.

and Others, . This decision is also distinguishable on fact and there, issues involved in the subsequent suit were not gone into in the earlier proceedings, as such this decision also would not help us. The other decision cited by Mr. Bagchi is Shew Bux Mohata and Others Vs. Bengal Breweries Ltd. and Others, , in order to sustain his contention that the decree having been partly executed can no more be executed when the judgment-debtor has been allowed to remain in the premises. But that decision is wholly distinguishable on fact. In that case the delivery of possession was accepted by the decree-holder accepting the defendant remaining in the suit property and the decree stood fully satisfied. Therefore, a decree, which stood satisfied, can no more be executed. This ratio does not apply in a case where the execution is pending. This ratio applies to cases where the decree stands fully satisfied and executed not in case of partly satisfied and partly executed decree. In this case the decree has not been fully satisfied; the execution is still pending. It is this execution of which stay is being asked for by reason of the suit, which is already found to have been filed by the judgment-debtor to resist his dispossession in execution of the decree in an earlier proceeding. However, we do not want to go into this question. It would be open to the respondent to take this ground before the Executing Court, if it is available in law to the plaintiff-respondent herein as judgment-debtor in the said proceeding.

10. However, Mr. Dasgupta had pointed out and rightly, that the decree was executed against the other judgment-debtor excepting plaintiff-respondent against whom the decree is yet to be executed and the decree is pending and the proceeding thereof is continuing. This is being attempted by the plaintiff-respondent to stall through different modes and manners. It is already observed by Mr. Chatterjee, J. that these attempts are being made by the plaintiff-respondent to stall the execution one-way or the other. The suit was instituted in 1966 and it had travelled a long way to the Supreme Court and then the execution is also quite old and is pending for a long time and we are also of the view having regard to the pleadings of the plaint itself that it is a misadventure on the part of the judgment-debtor to forestall the execution after having been unsuccessful in his three attempts u/s 47 and two attempts under Order 21 Rule 26 and under Order 21 Rule 29. In fact, we also are in agreement with Justice Chatterjee that the processes adopted by the plaintiff-respondent are sheer abuse of process of the Court.

11. Mr. Dasgupta, on the other hand, had relied on the decision in Ittavira Mathai Vs. Varkey Varkey and Another, , to contend that once a decree is passed in respect of a matter over which the Court had jurisdiction, such decree cannot be treated to be ignored in a subsequent litigation and the questions which could have been taken as defence in the earlier suit could not be a ground for subsequent suit which supports the view we have taken. The second decision cited by Mr. Dasgupta is in Parbathi Devi Jain v. Kedarlal Jain, 1995 (Supp) (4) SCC 574 . In the said decision, it was held that when an application was filed for execution for a decree, a suit for

obtaining injunction-restraining decree holder from executing the decree in the former suit cannot be sustained. Normally, the Supreme Court does not interfere with interlocutory order but in such a situation that Supreme Court had intervened. In fact, when it appears to the Court that the process of the Court is being abused, the Court cannot shut its eyes and it has to activate itself so that the abuse can be prevented. The procedure of the Court cannot be abused to deny the fruit of a decree to a decree holder through unending speculative proceedings, which are merely in the realm of technicalities and which predominantly and apparently seem to the Court to be ploy or camouflage to forestall the execution. In such a case the Court cannot sit idle. It has to activate itself to prevent such abuse in order to enable the decree holder to get the fruit of the decree.

12. In the result, the appeal succeeds and is allowed with cost. The order appealed against is hereby set aside.

13. The urgent xerox certified copy of this judgment be made available to the learned advocates appearing for the parties.

R.N. Sinha, J.

14. I agree.