

CIVIL REVISION
PRESENT: The Hon'ble JUSTICE I.P. MUKERJI
C.O. NO.3013 OF 2008
Judgment on: 31.03.2010
SRI NANI GOPAL MAHINDAR
Versus
SRI ARABINDA MAHINDAR & OTHERS

POINTS:

EXECUTION, INORDINATE DELAY-Case pending for 35 years-Court in execution cannot go behind the decree-Attempt made to unnecessarily prolong the hearing of the application -Code of Civil Procedure, 1908 S.47.

FACTS:

In an order of 7th August 2008 passed by the Additional District Judge, Fourth Court, Paschim Medinipur, a section 47 application, under the Code of Civil Procedure, of the opposite party has been allowed. Despite two decrees passed by this Court in appeal, conclusively declaring that the petitioner had right, title interest over a property the learned Judge has held to the contrary. He has held that the opposite party has such right. The result of this determination is stalling the execution proceedings filed by the petitioner instituted more than thirty five years ago and finally decided in second appeal some five years ago.

HELD:

It is trite that a court in execution or any proceeding out of execution cannot go behind the decree. But in passing this order the learned judge has done just that. An attempt was made on behalf of the opposite party to unnecessarily prolong the hearing of this application by inviting the court to each and every factual detail, which was largely unnecessary, and also to the alleged scope of section 47 of the Code of Civil Procedure to reopen the decree. Para-2

This case is pending for over 35 years. The opposite party has adopted all kinds of dilatory and vexatious methods to prolong the suit to this extent. The Court will not permit any further delay in the execution of the decree. The learned court below, that is, the Civil Judge (Junior Division) First Court, Paschim Medinipur is directed to ensure that the decree in question is executed within a period to 3 weeks from the date of communication of this order. Para-7

For the petitioner : Mr. Mihir Chakraborty
Mr. Goutam Kumar Das

For the opposite party No.1 : Mr. S.P. Roychoudhury, Sr. Adv.
Mr. Rameswar Bhattacharya
Mr. Jayanta Das.

THE COURT:

1) In this judgment the reference to petitioner and opposite party will include reference to their respective predecessors in interest.

2) In an astounding order of 7th August 2008 passed by the Additional District Judge, Fourth Court, Paschim Medinipur, a section 47 application, under the Code of Civil Procedure, of the opposite party has been allowed. Despite two decrees passed by this Court in appeal, conclusively declaring that the petitioner had right, title interest over a property being plot No. 1233 in Mouza :Bibigunj, Dist. Paschim Medinipur, the learned Judge has held to the contrary. He has held that the opposite party has such right. The result of this determination is stalling the execution proceedings NO. 7 of 2004 out of T.S. No. 19 of 1974 filed by the petitioner instituted more than thirty five years ago and finally decided in second appeal some five years ago. Now this kind of an order could not have been conceived in a section 47 application. It is trite that a court in execution or any proceeding out of execution cannot go behind the decree. But in passing this order the learned judge has done just that. An attempt was made on behalf of the opposite party to unnecessarily prolong the hearing of this application by inviting the court to each and every factual detail, which was largely unnecessary, and also to the alleged scope of section 47 of the Code of Civil Procedure to reopen the decree. I have not allowed such exercise.

3) The first suit was filed by the opposite party being suit No. 172 of 1973 claiming right title interest over this plot of land. This suit was dismissed by the learned Munsif on 17th July, 1984; such order was carried in appeal before the learned Additional District Judge by the opposite party who allowed the appeal on 23rd August 1985; a second appeal was preferred before this court being

No. 191 of 1987 by the petitioner; this second appeal was allowed on 17th April 1997, affirming the decree of the Munsif; our court held as follows :

“Considering all these point of facts and law, I feel constrained to hold that the Learned 1st Appellate Court committed error in holding that the Learned Trial Court ought to have passed a decree for declaration of title on the basis of admissions contained in the pleadings of the Defendants. The approach to the legal points and facts of the Learned Trial Court, appears to be just and correct. In short, the judgment and decree of the Learned 1st Appellate Court cannot be sustained in law. Ultimately, the second appeal succeeds and the same is hereby allowed with costs. The impugned judgment and order passed by the Learned 1st Appellate Court is hereby set aside and the judgment and decree passed by the Learned Trial Court is affirmed.”

4) Special leave petition preferred before the Supreme Court being Special Leave Petition (Civil) No. 21161 of 1997 was dismissed by that court on 27th April 1998.

Instead of claiming his title in that suit by way of a counter claim the petitioner filed a Title Suit No. 19 of 1974 before the learned Munsif. That suit was dismissed on 18th February 1982; the petitioner carried the matter in appeal before the learned Additional District Judge First Court, Paschim Medinipur. He remanded the matter back to the learned Munsif; even after remand, the learned Munsif dismissed the suit on 27th February 1991; once again an appeal was preferred before by the petitioner the learned Additional District Judge, Fast First Track Court Paschim Medinipur; that appeal was allowed on 22nd December 2003; a second appeal was preferred by the opposite party before this court being SAT No. 456 of 2004, renumbered as SA 171 of 2005. Meanwhile, the petitioner had started Execution Case No. 7 of 2004 in the First Court of learned Civil Judge (Junior Division), Paschim Medinipur.

5) While dismissing the second appeal on 12th May 2005, the division bench of our court held as follows:

“Therefore, even if the licence claimed by the plaintiff is not proved, the moment title of the plaintiff in the property has been established, it is for the defendant to show that that particular title has extinguished by operation of law. In this case no plea of adverse possession has been taken and, as such, even if we assume for the sake of argument that the licence by virtue of exhibit

4 was not proved, the defendants cannot escape eviction on the basis of title of the plaintiff which has been established and the defendants are bound by the finding in the previous litigation.

We, therefore, find no reason to interfere with the ultimate findings recorded by the learned first appellate court below that the defendants had no right to resist the claim of eviction as the defence of the defendant that he was the owner of the property is without any basis and is barred by the principle of res judicata.”

6) In the face of the above two judgments and decrees of the High Court in the respective cross suits of the parties, the Additional District Judge could not have passed the impugned order. In the circumstances, the impugned order dated 7th August 2008 is set aside.

7) This case is pending for over 35 years. The opposite party has adopted all kinds of dilatory and vexatious methods to prolong the suit to this extent. I will not permit any further delay in the execution of the decree. The learned court below, that is, the Civil Judge (Junior Division) First Court, Paschim Medinipur is directed to ensure that the decree in question is executed within a period to 3 weeks from the date of communication of this order.

8) Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

(I.P. MUKERJI, J.)