

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 25th August, 2023

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.37 of 2017

Petitioner : Kiran Devi Chouraria

versus

Respondents : Jhumar Mal Singhi and Others

Application under Article 227 of the Constitution of India

Appearance

Mr. N. Rai, Senior Advocate with Ms. Navtara Sarada, Mr. Yozan Rai, Ms. Tara Devi Chettri and Mr. Pradeep Tamang, Advocates for the Petitioner.

Mr. Sudhir Prasad, Advocate for Respondent No.1.

Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate for Respondent Nos.2 to 4.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Order of the Court of the Learned District Judge, Special Division - I, Sikkim, at Gangtok, dated 07-04-2017, in Civil Execution Case No.03 of 2015, rejecting the prayer for execution of the Arbitral Award and declaring the Award a nullity, is being assailed by the Petitioner/Decree Holder under Article 227 of the Constitution of India. An application filed by the Respondent Nos.2 to 4 as Objectors to the Execution Application filed by the Petitioner before the Learned Executing Court was registered as Civil Misc. Case No.23 of 2015 and was also disposed of by the above assailed Order.

2. The questions requiring determination by this Court are as follows;

(i) *What is the locus standi of the Objectors? and*

(ii) *What is the remedy available to the Objectors who were not a party to the Deed of Settlement dated 11-06-2013 and a*

subsequent Memorandum of Family Arrangement dated 24-06-2013?

3. The facts leading to the Arbitral Decree are that the Petitioner-Decree Holder and the Respondent No.1-Judgment Debtor are siblings, being the children of one Late Banechand Singhi. They mutually agreed to divide the properties described in Schedule 'A' of the "Deed of Settlement", executed between them, at Gangtok, dated 11-06-2013, by way of transfer of Schedule 'B' property therein to the Judgment Debtor and Schedule 'C' property to the Decree Holder. The Deed of Settlement was prepared between the siblings allegedly without the knowledge of Ajay Kumar Singhi, Respondent No.2 herein, who is the son of Respondent No.1. On 13-06-2013, the Respondent No.2 along with Respondent Nos.3 and 4, being the sons of Respondent No.2, submitted an application before the Sub-Divisional Magistrate (SDM), seeking a hearing, in the event any person sought transfer and registration of their building mentioned in the Schedule to the application. The SDM accordingly heard the matter on 01-07-2013 and vide Order dated 13-02-2014 advised the parties to approach the competent Civil Court. The Deed of Settlement dated 11-06-2013 was entered into between the Decree Holder and Judgment Debtor prior to their objection, but this fact was not revealed by the siblings, either to the Respondent Nos.2, 3 and 4/Objectors, or to the SDM on 01-07-2013, the date of first hearing of the objection of the Respondent Nos.2, 3 and 4. A second agreement was entered into between the Decree Holder and Judgment Debtor on 24-06-2013, at Chennai, titled "Memorandum of Family Arrangement". At Clause (V) of the arrangement, a Mediation clause was inserted, wherein it was agreed that all further disputes

and differences arising amongst the parties relating to the agreement would be referred to the Sole Arbitrator, namely, one Kesari Chand Galada, said to be the father-in-law of the Decree Holder's son.

(i) An Arbitral Award was passed on 30-01-2014 by the said Arbitrator having been asked to adjudicate upon the disputes between the siblings regarding claims made by the Decree Holder against the Judgment Debtor, with regard to the possession of her share of the property.

(ii) Pursuant to the Arbitral Award, Civil Execution Case No.03 of 2015 was filed by the Decree Holder/Petitioner before the Learned Executing Court, which vide Order dated 14-05-2015 ordered *inter alia* that the possession of the Scheduled property be delivered to the Decree Holder. The Nazir of the Court was ordered to assist the Decree Holder by putting her in possession of the Scheduled property and to submit compliance report.

(iii) Following this Order, on 16-06-2015, the Respondent Nos.2, 3 and 4 as Objectors, filed an application under Section 47 read with Order XXI Rule 101, Order XXI Rule 97 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter, the "CPC") and Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter, "Arbitration Act"), which was registered as Civil Misc. Case No.23 of 2015. The Objectors averred that they have an interest in the property. That, the Arbitration Award dated 30-01-2014 was passed behind their back, hence the order of execution dated 14-05-2015 passed by the Court in Civil Execution Case No.03 of 2015 be stayed until the objection filed by them is disposed of. The Learned Court being of the opinion that the

Objectors should be given an opportunity to be heard, recalled the order of execution dated 14-05-2015. The Learned Counsel for the parties were heard by the Learned Trial Court and the impugned Order pronounced.

4. Learned Senior Counsel for the Petitioner referring to the impugned Order dated 07-04-2017, submitted that, the portion allotted to the Decree Holder in the Deed of Settlement was not made over to her by the Judgment Debtor and has till date not been handed over to her, despite the Arbitral Award. That, initially the "Memorandum of Family Arrangement" having been prepared at Chennai, the Execution Case was filed by the Petitioner in the High Court of Madras on its Original Side, but was returned by the High Court on the ground of lack of jurisdiction, *inter alia* with the observation that, as the Arbitration Award is not a Decree it can be executed directly by any Court without order of transmission from the said Court. Civil Execution Case No.03 of 2015 was accordingly registered in the Court of Learned Principal District Judge, East Sikkim, at Gangtok, to which the Judgment Debtor raised no objection. That, in fact, the ground floor of the property was exchanged by the Judgment Debtor with the original seller of the property, who had sold the property to the father of the Judgment Debtor Late Banechand Singhi and his two uncles (the brothers of Late Banechand Singhi). Referring to the provisions of Section 47 of the CPC, Learned Senior Counsel invited the attention of this Court to *Explanation II* therein and contended that the Objectors have no locus to interfere in the proceedings between the Judgment Debtor and the Decree Holder as the provision specifically mentioned that, for the purposes of Section 47, a

purchaser of property at a sale in execution of a Decree shall be deemed to be party to the suit in which the Decree is passed. Therefore, it does not include persons who are in possession of the property, sans right, title and interest therein. The disputed property is ancestral property and partitioned in terms of the Hindu Succession Act, 1956, between the siblings, Decree Holder and Judgment Debtor.

(i) That, it is settled law that the Court cannot look beyond the Decree and that the Learned Executing Court had wrongly interpreted the provisions of Section 47 of the CPC by erroneously relying on a decision of the High Court of Kerala in **India Cements Capital Limited vs. William and Others**¹.

(ii) It was next urged that Order XXI Rule 97 of the CPC cannot be resorted to by the Objectors since the provision is for invocation by a Decree Holder. Contending that the challenge to the Award ought to have been filed under Section 34 of the Arbitration Act, reliance was placed on **Union of India vs. Popular Construction Co.**², wherein it was held that Section 34(1) itself provides that, recourse to a Court against an Arbitral Award may be made only by an application for setting aside such Award, in accordance with sub-Section (2) and sub-Section (3).

(iii) Canvassing that the Executing Court is merely to execute the Decree obtained by the Decree Holder, reliance was placed on **Haryana Vidyut Prasaran Nigam Limited and Another vs. Gulshan Lal and Others**³, wherein the Supreme Court observed that an Executing Court cannot go behind the Decree, if on a fair interpretation of the Judgment, Order and Decree passed by a

¹ MANU/KE/1512/2015

² (2001) 8 SCC 470

³ (2009) 13 SCC 354

Court having appropriate jurisdiction in that behalf, the reliefs sought for by the Plaintiff appear to have been granted. That, there would be no reason as to why the Executing Court would deprive the Decree Holder from enjoying the fruits of the Decree. On this point, succour was garnered from ***Sneh Lata Goel vs. Pushplata and Others***⁴.

(iv) It was further contended that in ***Shri Jai Prakash vs. Khimaraj and Another***⁵ the Court opined that where the obstructor is not a party to the execution proceedings, he has no right to be heard because he is a stranger to the proceedings. That, such an Objector can avail any other alternative remedy under the law.

(v) It was urged that in ***Kanwar Singh Saini vs. High Court of Delhi***⁶ the Supreme Court while referring to its earlier decision in ***State of Punjab and Others vs. Mohinder Singh Randhawa and Another***⁷ held that in the absence of any challenge to the Decree, no objection can be raised in execution.

(vi) That, in ***Balvant N. Viswamitra and Others vs. Yadav Sadashiv Mule (Dead) through Lrs. And Others***⁸ the Supreme Court placed reliance on its earlier decision in ***Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and Others***⁹, wherein it was held that the executing court cannot go behind the Decree between the parties or their representatives and it must take the Decree according to its tenor. It cannot entertain the objection that the Decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a Decree even if it be erroneous is still binding between the parties.

⁴ (2019) 3 SCC 594

⁵ AIR 1991 Rajasthan 136

⁶ (2012) 4 SCC 307

⁷ 1993 Supp (1) SCC 49

⁸ (2004) 8 SCC 706

⁹ (1970) 1 SCC 670

(vii) That, in **Sundaram Finance Limited represented by J. Thilak, Senior Manager (Legal) vs. Abdul Samad and Another**¹⁰ the Supreme Court has observed that the enforcement of an Award through its execution can be filed anywhere in the country where such Decree can be executed and there is no requirement for obtaining a transfer of the Decree from the Court, which would have jurisdiction over the arbitral proceedings.

(viii) The Learned Senior Counsel for the Petitioner urged that the Objectors have no *locus standi* to interfere in the Arbitral Award, but have the right to avail other legal remedies. Hence, no relief can be obtained by them in the instant matter.

5. Learned Counsel appearing for the Respondent No.1/ Judgment Debtor submitted that he adopts the contentions put forth by the Learned Senior Counsel for the Decree Holder/Petitioner.

6. *Per contra*, Learned Senior Counsel for the Respondent Nos.2 to 4/Objectors advancing his arguments contended that the Supreme Court has conclusively propounded in **Prasantha Banerji vs. Pushpa Ashoke Chandani and Others**¹¹ that the provisions of Order XXI Rule 97 of the CPC can be invoked even by an Objector. That, in fact a fraudulent Decree was obtained on 30-01-2014, as there was no dispute between the Judgment Debtor and the Decree Holder pertaining to the properties in the "Memorandum of Family Arrangement". That apart, the Arbitrator is the father-in-law of the Decree Holder's son, which is clearly barred by the provisions of Section 12 of the Arbitration Act read with Clauses 9, 10, 13 of the Fifth Schedule to the said Act. That, the Supreme Court in

¹⁰ (2018) 3 SCC 622

¹¹ AIR 2000 SC 3567(2)

Prasantha Banerji (*supra*) while considering the only point in the Appeal observed that:

"3. whether the suit filed by the Appellant who is not a party to a decree is maintainable, when execution proceeding in respect of the same property has been initiated under Order 21, Rule 97 of the Code of Civil Procedure or his remedy is going in the said executing proceedings. The High Court came to the conclusion that the suit having been filed after initiation of execution proceedings, the same is not maintainable hence dismissed the second appeal. The High Court further held that the Appellant is entitled to raise all such lawful subtenancy or any of his right in the execution proceedings, under Order 21, Rule 97 of the Code."

(i) Further fortifying his arguments with the decision of the Supreme Court in **Noorduddin vs. Dr. K. L. Anand**¹², Learned Senior Counsel went on to urge that a third party is not perforce bound by a Decree and can resist the execution of the Decree. That, the Objector herein had also made an application under Order XXI Rule 97(1) and as held in the said decision the executing court is enjoined to adjudicate the claim and record a finding, allowing or rejecting the claim.

(ii) That, the three Judge Bench of the Hon'ble Supreme Court has elucidated the powers of the Executing Court in **Bhavan Vaja and Others vs. Solanki Hanuji Khodaji Mansang and Another**¹³ and held that, an executing Court cannot go behind the Decree under execution, but that did not mean that it has no duty to find out the true effect of that Decree. 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. That, to ascertain the meaning of the words employed in a Decree, the Court often has to consider the circumstances under which those words came to be used. Accordingly, nothing debars the executing

¹² (1995) 1 SCC 242

¹³ (1973) 2 SCC 40

Court from examining whether the Arbitral Award was obtained fraudulently and if it was, to set it aside.

(iii) Relying on the decision in *Shreenath and Another vs. Rajesh and Others*¹⁴, Learned Senior Counsel contended that when a third party is in possession and claims an independent right to the immovable property, he can get his claim adjudicated when sought to be dispossessed by the Decree Holder. He is not required to wait till he is dispossessed.

(iv) That, in *Union of India vs. M/s. Jagat Ram Trehan and Sons*¹⁵ a Division Bench of the High Court of Delhi held that a plea that an Award is void can be raised in execution proceedings. That, a Judgment and Decree can be directly attacked by the procedure prescribed, namely, by filing objections thereto or by appealing against the order rejecting the objections. A collateral attack of the Award and Decree in execution proceedings is not precluded. That, this is a well-settled principle applicable to Civil Courts executing Decrees.

(v) That, as no error arises in the dismissal of the Decree by the Learned Trial Court, hence the instant petition be dismissed.

7. Having considered the submissions put forth by Learned Senior Counsel for the parties, it is relevant to notice that the Executing Court on consideration of Civil Execution Case No.03 of 2015 rejected the prayer of the Decree/Award Holder seeking execution of the Arbitral Award and thereby allowed the prayers of the Objectors put forth in Civil Misc. Case No.23 of 2015 to declare the Award a nullity. The Learned Executing Court while reaching

¹⁴ AIR 1998 SC 1827

¹⁵ AIR 1996 Delhi 191

the conclusion was guided by the decision of the Kerala High Court in **William** (*supra*).

(i) The Kerala High Court had observed *inter alia* in **William** (*ibid*) that under Section 47 of the CPC the jurisdiction exercisable by a Court executing a Decree is very wide. That, *Explanation II* to Section 47 of the CPC lays down that for the purpose of the Section, a purchaser of a property at a sale, in execution of a Decree, shall be deemed to be a party to the suit in which the Decree is passed. Thus, although the normal rule is that in a dispute between a party to the suit or his representative on the one hand and a stranger who is not a purchaser at the execution sale on the other hand is outside the scope of the Section, by adding *Explanation II* to the Section, a purchaser of property at a sale in execution of a decree, though a stranger to the suit, is deemed to be a party to the suit in which the Decree has been passed. Therefore, there is no bar under the law for a stranger to the proceedings who has an independent legal right to appear and contest the execution proceedings and whose property interests will be adversely affected by sale of the property in execution proceedings, to point out that the Decree sought to be executed is a nullity. That, his right to approach the executing Court under Order XXI Rule 97 of the CPC anticipating dispossession cannot be rejected. The decision of the Delhi High Court in **Jagat Ram Trehan** (*supra*) prior in time, supports this view. On the bedrock of the legal provisions, this Court is in respectful agreement with the afore-mentioned decisions.

8. It may relevantly be noticed that in **Shreenath** (*supra*) the Supreme Court was considering an appeal arising out of the

Judgment of the High Court of Madhya Pradesh, Bench at Indore in Civil Revision No.406 of 1983. The question raised was whether the third party in possession of a property, claiming independent right as a tenant, not party to a Decree under execution, could resist such Decree by seeking adjudication of his objections under Order XXI Rule 97 of the CPC, wherein the Supreme Court observed that;

"6. The appellants' case is that they were not parties to those proceedings. However, this objection of the decree-holder was rejected in the first round by the Executing Court and the Revisional Court holding that the persons resisting, viz. the present appellants were not parties to the suit nor there is any decree against them. It seems subsequently. The decree-holder again moved another application in the aforesaid execution case No. 1A of 1970-81 for delivery of vacant possession. The present appellants also moved an application/ objections under Order 21 Rule 97, C.P.C., resisting that they cannot be dispossessed in terms of the said decree, as they were not parties to the said suit nor they are deriving any right and title through the judgment debtor. They claim separate and independent legal right, not affected either by the mortgage or redemption of the mortgage. It is not clear as under what circumstances the second application for actual possession was made by the decree-holder after the matter was earlier disposed of. Since this point seems not raised either before the Executing Court or the High Court, we are not advertent to this point. We find the Executing Court in the second round in consideration of a subsequent decision of the Full Bench of the M.P. High Court in Usha Jain v. Manmohan Bajaj, AIR 1980 Madh Pra 146, held that the appellants had no right to object to the decree under Order 21 Rule 97.

.....
10. Order 21, Rule 97 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through the judgment debtor or claiming independent right of his own including a tenant not party to the suit or even a stranger. A decree holder, in such case, may make an application to the Executing Court complaining such resistance, for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the Executing Courts when such claim is made to proceed to adjudicate upon the applicant's claim in accordance with the provisions contained hereinafter. This refers to Order 21 Rule 101 (as amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the parties under Order 21 Rule 97 or Rule 99 shall be determined by the Court and not by a separate suit. **By the amendment, one has not to go for a fresh suit but all matters pertaining to that**

property even if obstruction by a stranger is adjudicated and finally given even in the executing proceedings. We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus by the use of the words 'any person' it includes all persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger.

11. So, under Order 21 Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the Executing Court. A party is not thrown out to relegate itself to the long-drawn-out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and other person claiming title on their own right to get it adjudicated in the very execution proceedings. **Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to the decree-holder or purchaser is resisted by any person. 'Any person', as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including stranger.**

13. Thus even prior to 1976 right of any person claiming right on his own or as a tenant, not party to the suit, such person's right has to be adjudicated under Rule 99 and he need not fall back to file a separate suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the property, on the own, if resists delivery of possession to the decree-holder the dispute and his claim has to be decided after the 1976 Amendment under Rule 97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99.

15. Thus a person holding possession of an immovable property on his own right can object in the execution proceeding under Order 21 Rule 97. One has not to wait for his dispossession to enable him to participate in the execution proceedings. This shows that such a person can object and get adjudication when he is sought to be dispossessed by the decree-holder. For all the aforesaid reasons, we do not find the Full Bench in Smt. Usha Jain (supra) correctly decided the law."

9. Thus, it is clear that by filing a Petition under Order XXI Rule 97 of the CPC, although the Objector is not a party to the arbitral proceedings, he can seek and obtain relief if the Award has not been given fairly. The word 'fairly' is being employed here for the reason that the Decree Holder and Judgment Debtor had entered into a "Deed of Settlement" dated 11-06-2013 and a subsequent "Memorandum of Family Arrangement" dated 24-06-

2013. The "Deed of Settlement" dated 11-06-2013 was prior to the objection of the Respondent Nos.2, 3 and 4 filed before the SDM, but this fact was not revealed by them, either to the Respondent No.2/Objector, or to the SDM on 01-07-2013, the date of first hearing of the objection of the Respondent Nos.2, 3 and 4.

10. In the context of the argument raised by Learned Senior Counsel for the Petitioner/Decree Holder relying on **Popular Construction Co. (supra)** while going through Section 34 of the Arbitration Act it is clear that the said law only applies to parties to the Arbitral Award and not to a third party thereof, hence, this argument cannot be countenanced. Reliance on **Sundaram Finance Limited (supra)** on the point of enforcement of an Award and its execution, which can be filed anywhere in the country, is a superfluous argument there being no assailment to the filing of the execution petition before concerned the Court in Sikkim. Having considered the facts in the case of **Kanwar Singh Saini (supra)** relied on by the Petitioner, it is not applicable to the present circumstances for the reason that the Decree therein was passed on the basis of admission/undertaking made by the Appellant and the averments in his written statement. The Supreme Court held therein that in a case where there was any disobedience of the Judgment and the Decree, the application under Order XXXIX Rule 2A of the CPC should not have been entertained. Such an application is maintainable in a case where there is violation of interim injunction passed during the pendency of the suit. The appropriate remedy available to the Decree Holder had been to file an application for execution under Order XXI Rule 32 of the CPC. The Supreme Court concluded that in view of the above as the

application under Order XXXIX Rule 2A of the CPC itself was not maintainable all subsequent proceedings remained inconsequential with the observation that the Judgment would not affect in any manner the merit of other cases pending between the parties with regard to the suit property.

11. The plethora of Judgments relied on by Learned Senior Counsel for the Respondent Nos.2 to 4 lends substantiation to the submissions that they have a remedy at the execution stage and the Executing Court has a duty to find out the true effect of the Decree. It has been held in ***Bhavan Vaja (supra)*** that it is the duty of the Executing Court to find out the true effect of that Decree. In the instant case, it is an admitted fact that the Objector/ Respondent No.2 is the son of the Judgment Debtor and Respondent Nos.3 and 4 are his offspring, their rights to the said property therefore require consideration to prevent protracted and multiplicity of litigation.

12. In the aforesaid circumstances and for the reasons enumerated hereinabove by this Court, the questions formulated by this Court stand determined accordingly.

13. Consequently, the impugned Order of the Learned Trial Court warrants no interference.

14. Writ Petition stands dismissed accordingly.

15. No order as to costs.

16. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with all records received.

(Meenakshi Madan Rai)
Judge

25-08-2023

Approved for reporting : **Yes**