

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CMPMO No. 342 of 2014

Reserved on: 19.4.2021

Decided on: 22.04.2021

Sh. Parveen Kumar & ors.Petitioners.

Versus

Smt. Fikki & ors.Respondents.

Coram

Ms. Justice Jyotsna Rewal Dua, *Judge.*

*Whether approved for reporting?*¹

For the petitioners : Mr. Anuj Gupta, Advocate.

For the respondents : Respondents No. 1 to 5 exparte.

Name of respondent No. 6 deleted.

Jyotsna Rewal Dua, Judge

The objections preferred by the judgment debtors to the execution petition filed by the decree holders have been partly allowed by the learned Executing Court vide order dated 29.8.2014, which is impugned herein by the decree holders. In terms of this order, instead of actual possession, only symbolic possession of the suit land has been ordered to be delivered to the decree holders.

2(i) A civil suit was instituted by S/Shri Rania and Chuni Lal, both sons of Shri Litru on 29.12.1995. The plaintiffs asserted

¹ ***Whether the reporters of the local papers may be allowed to see the Judgment?***

themselves to be owners alongwith other co-sharers of the suit land comprised in Khata No. 39 min, Khatauni No. 83, Khasra No. 77, measuring 0-00-43 HM, situated in village Tutwan, Sub Tehsil Fatehpur, District Kangra, on the basis of jamabandi for the year 1989-90. The allegations in the plaint were that the defendants were neither the owners nor the tenants over the suit land. Yet they had forcibly taken over the possession of the suit land in January 1988 an illegal and unlawful manner. Therefore, decree for vacant possession of the suit land was prayed for. Learned trial Court on 2.11.1998, decreed the suit of the plaintiffs against the defendants for vacant possession of suit land. The operative part of the judgment reads as under:

“.....suit of the plaintiffs is hereby decreed against the defendants for vacant possession of the land comprised in Khata No. 39 min, Khatauni No. 83, Khasra No. 77, measuring 0-00-53 HM, situated in village Tutwan, Sub Tehsil Fatehpur, Distt. Kangra, H.P. as per jamabandi for the year 1989-90.”

2(ii) On 11.8.2006, the legal heirs of original plaintiff No. 1 and Shri Chuni Lal-original plaintiff No. 2 (petitioners herein) filed an execution petition under Order 21 Rule 11 of Code of Civil Procedure for executing the aforesaid decree dated 2.11.1998. The execution was preferred inter-alia against the legal heirs of Dulo, Chunku as well as against legal heirs of Dhannu (original defendants). The prayer in the execution petition was for putting the plaintiffs/decreed holders (present petitioners) into actual possession of the suit land after demarcation of boundaries.

2(iii) On 12.1.2007 objections on behalf of judgment debtors were preferred pleading therein that the decree had become inexecutable for the reasons:-

a) The legal heirs of Dulo [judgment debtors 1(a) to 1(d)] had purchased 1/16th share in the suit land on 27.5.1999.

b) Judgment debtor Bhola Ram son of Shri Dulo had also purchased a separate share in the suit land.

c) After purchase of shares in the suit land, the judgment debtors had become joint owners in possession with the decree holders. The share of the judgment debtors/joint owners is not specified on a particular portion of land in question. Therefore, till the time the land is partitioned, every inch of it has to be construed as joint between the parties-joint owners.

d) The decree holders (present petitioners) in such circumstances are not entitled for actual possession of the suit land.

The reply to the objections was filed by the decree holders/present petitioners denying the purchase of suit land by the judgment debtors. It was also submitted that even after the purchase of a portion of the suit land by the judgment debtors, the decree could still be executed.

2(iv) Issues were framed in the objection petition on 28.12.2007. The parties led evidence in support of their respective contentions. After considering the pleadings and the

evidence adduced by the parties, the learned executing court held that the Dulo had purchased the suit land on 27.5.1999 to the extent of 1/16th share and Bhola Ram had also purchased separate share in the suit land. Therefore, the judgment debtors had become co-sharers of the suit land. On becoming co-sharers of the suit land, the judgment debtors cannot be ousted from their possession of the suit land and for this reason, actual possession of the suit land was not ordered to be delivered to the decree holders. Instead of warrant of actual possession, warrant of symbolic possession was ordered to be issued in favour of the decree holders.

Aggrieved against this order passed by the learned executing court on 29.8.2014, the decree holders have preferred instant petition under Article 227 of the Constitution of India.

3. Heard learned counsel for the petitioners and gone through the record.

4. Learned counsel for the petitioners/decreed holders submitted that learned Executing Court erred in not delivering actual possession of the suit land in favour of the decree holders. Learned counsel contended that there was no document on record to show that the judgment debtors had purchased any portion of land in the suit land. He further submitted that in any case even if it is to be presumed that the part of suit land was sold to the judgment debtors, then also it was sold much after

passing of the judgment and decree sought to be executed. The intention of the judgment debtors was only to deprive the decree holders from getting the possession of the suit land. In such circumstances, the objections filed by the judgment debtors were not legally maintainable and were liable to be rejected as the executing court could not have gone behind the decree.

4. On going through the record, impugned order cannot be said to be suffering from any infirmity. Following aspects become material in this regard:-

4(i) The objections preferred on behalf of the judgment debtors were in respect to the inexecutability of the decree dated 2.11.1998 vide which the plaintiffs were held to be the owners of the suit land alongwith other co-sharers. It was held in the judgment and decree that the defendants without any rights or authority had forcibly taken the possession of the suit land from the plaintiffs. Accordingly, the suit filed by the plaintiffs was decreed against the defendants for vacant possession of the suit land comprised Khata in No. 39 min, Khatauni No. 83, Khasra No. 77, measuring 0-00-43HM situated in village Tutwan, Sub Tehsil Fatehpur, District Kangra as per jamabandi for the year 1989-90.

4(ii) Petitioners preferred execution petition inter-alia impleading legal heirs of Dulo as judgment debtors. In response to the execution petition filed in the year 2006, the judgment debtors by submitting that they had purchased shares in the suit

land from other cosharers, objected to the executability of the decree. During evidence they placed on record jamabandi for the year 1999-2000 (Ex. R-2) and jamabandi for the year 2004-2005 (Ex. R-1) wherein it was recorded that Dulo (father of judgment debtors 1(a) to 1(d) had purchased 30 out of 480 shares in the suit land and the judgment debtor Bhola Ram had also purchased 45 out of 480 shares in the suit land. Sale deeds though have not been placed on record, however, the decree holders have not denied the revenue documents placed on record by the judgment debtors. In fact, no evidence in this regard whatsoever has been led by the plaintiffs/decreed holders to rebut the revenue record reflecting purchase of shares in the suit land by the objectors/judgment debtors. Thus, from the perusal of the evidence adduced by the parties in the objection petition, it is evident that subsequent to the passing of the decree, the objectors have purchased shares in the suit land from other cosharers and, therefore, have themselves become co-shares over the suit land.

4(iii) There is no dispute qua the settled legal position that the executing court cannot go behind the decree and has to execute it as it stands. However, in terms of Section 47 of Code of Civil Procedure, the executing court is required to look into the questions relating to the execution, discharge or satisfaction of the decree. Such questions are to be adjudicated by the

executing court and not by a separate suit. Section 47 reads as under:

"47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II—(a) For the purposes of this section, a purchaser of 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; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]"

4(iv) **(2010) 14 SCC 384**, title **Arun Lal and others** versus **Union of India and others** was a case where decree for recovery of possession by ejectment of defendants from a bungalow was passed with a direction to remove barracks constructed on part of compound. Union of India, in terms of a resumption notice, took over possession of land appurtenant to the bungalow. The notice was not challenged. In execution proceedings, respondents filed objections under Section 47 CPC that decree was rendered inexecutable to the extent of land

resumed under the resumption notice. The apex court upheld High Court's verdict that possession of said land could not be taken away from Union of India for delivering to the decree-holders, since after resumption of property and taking possession, Union of India in exercise of its rights as paramount title-holder, was no longer holding the same as a tenant so as to be answerable to petitioners as its landlords. Relevant para from the judgment is extracted hereinafter:-

"15. It is common ground that the land appurtenant to the bungalow had been utilised by the Union of India for construction of barracks. The entire extent of 2.792 acres of land including the one under the barracks could, therefore, be taken over pursuant to the resumption order which was never assailed and had thereby attained finality. Such being the position, the High Court was right in holding that possession of the above extent of land could not be taken away from the Union of India for delivery to the decree-holders. That is because after the resumption of the property and the taking over of the possession by the Union of India in exercise of its rights as the paramount title holder, it was no longer holding the same as a tenant so as to be answerable to the petitioners as its landlords. The Union of India was on the contrary holding the resumed property in its own right and in a capacity that was different from the one in which it had suffered the decree for eviction. This was a significant change in the circumstances in which the decree was passed rendering it inexecutable."

Jagdish Dutt and another v. Dharam Pal and others, reported in ***AIR 1999 Supreme Court 1694***, was a case where a decree for actual possession of immovable property was passed. One of the coparceners assigned/transferred his interest in the decree in favour of the judgment debtors. It was held that

the decree in such situation would get extinguished to the extent of the interest so transferred and further that execution petition would lie only to the extent of remaining part of the decree. It was also observed that where the interest of coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, then a decree for actual possession of immovable property cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. The relevant para of the judgment reads as under:

"7. When a decree is passed in favour of a joint family the same has to be treated as a decree in favour of all the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree holders and dispute between joint decree holders is foreign to the provisions of [Section 47, CPC](#). Order XXI, Rule 15, CPC enables a joint decree holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree holder will have

to work out his rights in an appropriate suit for partition and obtain necessary relief thereto. Various decisions cited by either side to which we have referred to do not detract us from the principle stated by us as aforesaid. Therefore, a detailed reference to them is not required."

The ratio of aforesaid judgments squarely applies to the facts of the case. In the instant case, the judgment debtors/objectors have proved on record that they had become co-sharers of the suit land subsequent to passing of the decree sought to be executed. The suit land is now jointly owned by them alongwith various cosharers. In such situation, their possession over the suit land cannot be treated as illegal and, therefore, they cannot be ousted from such possession. The judgment debtors/objectors have purchased shares in the suit land from the other co-sharers. Their possession of the suit land is now in a capacity different from the one in which they had suffered the decree for possession. In such circumstances, learned trial court was justified in not issuing the warrant of actual possession in favour of decree holders/petitioners. For the foregoing reasons, the petition lacks merit and is accordingly dismissed.

Jyotsna Rewal Dua
Judge

22nd April, 2021,
(vs)