IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

CJ Court

Reserved on: 30.07.2021
Pronounced on: 13.08.2021

CM(M) No.25/2019
CM No.4994/2019

Abdul Gaffar Dar ….Petitioner.

Through: Mr. M. Sultan, Advocate.

Vs.

Mohammad Shafi Khan and others. ….Respondent(s)

Through: Mr. M. M. Dar, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE

J U D G M E N T

01. The petitioner/ decree holder has invoked the supervisory jurisdiction of this Court under Article 227 of the Constitution of India read with Section 104 of the Constitution of Jammu & Kashmir so as to assail the order dated 11.07.2019 passed by the Executing Court directing the SDM, Chadoora, to submit report in respect of certain points and restraining the parties from changing the nature of the suit property or from excavating any soil or clay from it till the report is so filed by the SDM Chadoora.

02. The basic contention of learned counsel for the petitioner is that fresh report from SDM is not necessary at all as the Executing Court cannot

collect evidence for the purposes of executing the decree and has to rely upon the documents on record which includes a report of the revenue submitted during trial. Secondly, the Executing Court cannot go behind the decree to record its own finding. It has acted without jurisdiction in passing the interim direction which otherwise have the effect of nullifying the decree.

03. The facts of the case reveal that the petitioner/ decree holder instituted a civil suit in respect of the land under his ownership and possession measuring 19 kanals and 4 marlas covered by survey no.908/1 and 1302 situate at Nowbugh Tehsildar Chadoora District Budgam. The suit was decreed vide judgment and order dated 28.12.2017 which is final and conclusive. The petitioner put the aforesaid decree in execution wherein after considering the objections of the judgment debtors, the Executing Court vide order dated 23.04.2019 allowed the execution and the judgment debtors were directed not to cause any interference in the lawful ownership, possession, occupation and enjoyment of the land by the petitioner and it was further provided that if any interference is caused, the judgment debtors would be put in civil imprisonment.

04. It appears that on account of continuous violation of the injunction decree, the SHO P/S Chadoora detained the judgment debtors in civil prison for about four days. Accordingly, judgment debtors initiated proceedings for contempt against the SHO P/S Chadoora, wherein the present order impugned herein this petition came to be passed.

05. The submission of learned counsel for the respondents/ judgment debtors is that the petitioner in the garb of the decree in question is encroaching upon the kahcharai land and is excavating the same against the interest of the entire community. He submits that the decree of the trial court restrains the judgment debtors from causing interference in the lawful possession and ownership of the decree holder over the suit property measuring 19 kanals 4 marlas of survey no.908/1 and 1302 situate at Village Nowbugh but it has been clarified that the said decree would not have any impact on any grazing or kahcharai land. In other words what he is trying to submit is that the judgment debtors are restraining the petitioner only from digging and excavating the grazing/ kahcharai land and, as such, the Executing Court is justified in asking for a report from the SDM. The SHO, on the other hand, without distinguishing the above aspect unnecessarily detained the judgment debtors.

06. The Jammu & Kashmir Kachcharai Act, Svt. 2011, defines *"kahcharai"* means revenue derived or derivable from any duty, fee, tax, fine or penalty imposed under the provisions of this Act or of other law for the time being in force, relating to the levy of grazing or browsing dues.

07. In simple words, village land used for grazing purposes is generally called Kahcharai land and it is for the benefit of the entire village and the people connected with grazing activity. It is not the proprietary land or the land of any private individual.

08. It is admitted on record that the injunction decree passed by the trial court is final and conclusive. In execution proceedings, the judgment debtors have not filed any objections allegedly under Section 47 CPC so as to object its execution. The Executing Court, therefore, has finally passed an order on 23.04.2019 and subsequently an order dated 23.05.2019 directing SHO P/S Chadoora to implement the decree as well as its earlier dated 23.04.2019. It is in connection with these orders that the SHO had to detain the judgment debtors and in such a scenario prima facie he may not have committed any dis-obedience of the order of the court subjecting him to contempt proceedings.

09. The Executing Court has unnecessarily invited report on the following aspects as if it is holding a fresh trial:

> *"i. How much proprietary land, the plaintiffs father has purchased by virtue of Sale Deed from the mother of the defendants?*
>
> *ii. Is there any more land proprietary, hereditary or self acquired in kind of the plaintiff existing next to the land the mother of the defendants has sold to the father of the plaintiffs?*
>
> *iii. What kind of land it is neighboring the purchased proprietary land of the father of the plaintiff in reference to the old and present survey numbers and Record of Rights pertaining thereto?*
>
> *iv. Whether a person whosoever could be vested with ownership rights or State/ Shamilat-e-Deh/ kacharie land under any provision of J&K Agrarian Reforms Act?*
>
> *v. Whether any revenue Officer of the time when the defendant was in service posted in Tehsil Office Chadoora has given the*

ownership rights under Section 8 of the Agrarian Reforms Act to the defendant Abdul Gafar Dar. If yes, what is the name, designation and present address of the attesting officer?

vi. Whether Section 4 Agrarian Mutation has also been attested in favour of the defendant? If yes, by whom? If not, could Section 8 Mutation be attested in absence of Section 4 Mutation under J&K Agrarian Reforms Act?

vii. What are the numbers and dates of attested Section 4 and 8 Mutations favoring the defendant concerning the Shamilat-e-Deh Grazing land?

viii. Whether the plaintiff has lifted hundreds of trucks of clay by excavating the Kacharie/ Grazing / State land, if yes, when? And what action has the revenue officials have initiated against the defendant?

Whether the proprietary land measuring 05 kanals comprsing of present Survey No.1302 (old 311) sold by mother of the defendants to the father of the plaintiff is under Brick Killin at the instance of the plaintiff. If yes, how the interference is possible therein at the hands of the defendants?

x. What is the kind of land, all inclusive next to the Brick Killin?"

10. It is settled in law that the Executing Court has to decide only questions with regard to execution, discharge and satisfaction of the decree and cannot go behind the decree for the purposes of executing the same.

11. In view of the above, the very invitation of the report on the above aspect amounts to collecting fresh evidence which is not permissible while executing a decree.

12. In ***Satyawati v. Rajinider Singh and another : (2013) 9 SCC 491***, the Supreme Court while depreciating the unreasonable delay in execution of a decree held that when the Executing Court taking into consideration the report pertaining to land had passed the judgment and the decree which is put under execution, the Executing Court as well as the High Court erred in taking into consideration other subsequent reports in rejecting the execution application. In simple terms what has been laid down is that as of practice, the Executing Court is not entitled to collect evidence when sufficient evidence is already on record.

13. In the case at hand, the Executing Court has not directed the SDM to submit a fresh report as the evidence was lacking.

14. In view of the aforesaid facts and circumstances, the direction to the SDM to submit report appears to be wholly unwarranted.

15. It is important to note that by the interim order passed by the Executing Court directing the parties not to change the nature of the suit property or to excavate any soil or clay from it is completely contrary to the decree of injunction put under execution by the petitioner. In a way instead of executing the said decree, the Executing Court has completely stayed the same by way of its interim order. This has resulted in denial of the benefit and the fruits of the decree to the petitioner. The Executing Court is not meant for nullifying the decree rather to oversee that the decree is carried out, satisfied and stand discharged. The Executing Court without doing any of the above three things has simply nullified the decree that too by an

interim order and on an application for contempt moved against the SHO P/S Chadoora.

16. Thus, in the facts and circumstances, narrated above, I am of the opinion that the Executing Court went beyond its jurisdiction in passing the impugned order to the detriment of the decree holder and, therefore, the order passed by him cannot be sustained in law. It is, accordingly, set aside with the direction that the respondents/ judgment debtors would not excavate any soil or clay from any land muchless the kahcharai land except from using his own proprietary land 19 kanals 4 marlas survey no.908/1 & 1302 situate at Nowbugh Tehsildar Chadoora District Budgam.

17. The petition is, accordingly, allowed.

(PANKAJ MITHAL)
CHIEF JUSTICE

Srinagar
13.08.2021
Abdul Qayoom, PS

Whether the order is speaking? Yes.

Whether the order is rep ortable? Yes.

ABDUL QAYOOM LONE
2021.08.13 17:28
I attest to the accuracy and
integrity of this document