

Civil Revision
Present:
The Hon'ble Justice Jyotirmay Bhattacharya

C.O. No.2668 of 2009
Sri Tapas Guha & Ors.
versus
Smt. Angur Bala Das
Judgment On : 27-01-2010.

Point:

DESCRIPTION OF BOUNDARIES, CONSTRUCTIVE RES JUDICATA: Suit property can be identified without reference to the boundaries- Objection in execution proceeding about description of the property- Application for local inspection in execution case whether can be allowed- The Code of Civil Procedure, S. 11, O 39 R 7

Fact: Execution of an eviction decree passed by the learned Trial Judge on the ground of reasonable requirement of the plaintiff which was affirmed upto this Hon'ble Court in Second Appeal, was resisted by the judgment debtors/petitioners by filing an application under Section 47 of the Civil Procedure Code giving rise to a Miscellaneous proceeding being Misc. Case No.165 of 2006. The bone of contention of the judgment debtors/petitioners in the said application was that the said decree was inexecutable due to wrong description of the boundary of the suit property mentioned in the decree. Such application was rejected. Judgment debtors/petitioners subsequently filed an application under Section 151 of the Code of Civil Procedure before the learned Executing Court inter alia praying for recall of the aforesaid orders by which the judgment debtors' two applications i.e. the application for local inspection and application under Section 47 of the Code of Civil Procedure were rejected by the learned Executing Court. The judgment debtors' said application was rejected by the learned Executing Court by the impugned order. Hence, the instant application under Article 227 of the Constitution of India has been filed by the judgment debtors/petitioners.

Held:

When the suit premises can be identified even without reference to the boundaries of the suit property mentioned in the decree, this Court does not find any justification to allow the petitioners'

application for local inspection for ascertaining the correctness of the description of the boundaries of the suit property and for similar reason, this Court also does not find any merit in the petitioners' objection under Section 47 of the Code of Civil Procedure.

Paragraph 18

Such an objection cannot be raised by the judgment debtors for the first time in the execution proceeding as the petitioners' such objection is barred by the principles of constructive res judicata.

Paragraph 19

For the Petitioners : Mr. Sakya Sen,
 Mr. Subhasish Sengupta,
 Mr. Tapas Kr. Mondal.

For the Opposite : Mr. S.P. Roy Chowdhury,
Party. Mr. Jahar Lal De,
 Mr. Gurusaday De.

The Court:

1. Execution of an eviction decree passed by the learned Trial Judge on the ground of reasonable requirement of the plaintiff which was affirmed upto this Hon'ble Court in Second Appeal, was resisted by the judgment debtors/petitioners by filing an application under Section 47 of the Civil Procedure Code giving rise to a Miscellaneous proceeding being Misc. Case No.165 of 2006. The bone of contention of the judgment debtors/petitioners in the said application was that the said decree was inexecutable due to wrong description of the boundary of the suit property mentioned in the decree. To be more precise, the contention of the petitioners was that the eastern and western boundaries of the suit property mentioned in the decree were erroneous and as such, the suit property cannot be identified with reference to the description of the property mentioned in the decree.

2. To substantiate the said contention regarding wrong description of the decreetal property mentioned in the said decree, the judgment debtors/petitioners filed an application for local inspection of the suit premises bearing premises no.27D, Haritaki Bagan Lane, Kolkata – 700006, for ascertaining its true and correct boundaries.

3. In the aforesaid background, the decree-holder/opposite party filed two applications. One of such applications was filed under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the description of the suit property as mentioned in the plaint. The other application was filed under Section 151 read with Section 152 of the Code of Civil Procedure for amendment of the decree for rectification of the description of the decreetal property therein.

4. Both the aforesaid applications of the decree-holder/opposite party were allowed by the learned Trial Judge.

5. The judgment-debtors/petitioners were aggrieved by the said order. Hence, they challenged the said order by filing a revisional application before this Court. The said revisional application which was registered as C.O. No.2837 of 2007 was rejected by this Court on contest on 17th April, 2009.

6. In the meantime the judgment-debtors' application for local inspection of the suit property was rejected by the learned Executing Court by holding inter alia that no such inspection was necessary after amendment of the decree as the misdescription of the boundaries of the

decreetal property was rectified by amendment. Similarly, the judgment debtors' objection under Section 47 of the Code of Civil Procedure was also rejected by the learned Executing Court for identical reason.

7. However, rejection of the petitioners' those two applications by the learned Executing Court was not brought to the notice of this Court while disposing of the petitioners' earlier revisional application being C.O. No.2837 of 2007. As a matter of fact, in course of hearing of the said revisional application, an impression was given to this Court by the learned Counsel appearing for the petitioners that as if those two applications filed by the judgment-debtors i.e. the application for local inspection and the objection under Section 47 of the Code of Civil Procedure were pending before the learned Executing Court and under such impression, this Court while rejecting the petitioners' said revisional application made the following observation in the concluding part of the said order:-

“Thus, though this Court does not find any illegality in the order impugned but, still then, this Court makes it clear that while considering the petitioners' application under Section 47 of the Code of Civil Procedure and their application for local inspection, the learned Executing Court will consider the merit of those applications independently, as the petitioners still maintain their stand that the suit property cannot be identified even by the substituted schedule which was brought on record by way of amendment of the schedule of the plaint and/or by way of correction of decree in the manner as aforesaid as even now the eastern and western boundary of the suit premises which are mentioned in the corrected decree do not tally with the boundaries of the suit property at the site.”

8. Being encouraged by the aforesaid observation made by this Court, the judgment debtors/petitioners filed an application under Section 151 of the Code of Civil Procedure before the learned Executing Court inter alia praying for recall of the aforesaid orders by which the judgment debtors' two applications i.e. the application for local inspection and application under Section 47 of the Code of Civil Procedure were rejected by the learned Executing Court so that those two application are reconsidered in the light of the observation made by this Court while disposing of the earlier revisional application as aforesaid.

9. The judgment debtors' said application was rejected by the learned Executing Court by the impugned order. Hence, the instant application under Act 227 of the Constitution of India has been filed by the judgment debtors/petitioners by this Court.

10. Heard Mr. Sen, learned Advocate appearing for the petitioners and Mr. Roy Chowdhury, learned Senior Advocate appearing for the opposite party. Considered the materials on record including the order impugned.

11. Let me now consider the merit of this revisional application in the facts of the instant case.

12. At the very outset this Court wants to make it clear that had this Court ever been informed about the rejection of petitioners' those two applications at the time of disposal of the earlier revisional application, this Court would not have made the aforesaid observation in its

earlier order passed in the earlier revisional application. Since those applications were rejected by the learned Executing Court prior to the disposal of the earlier revisional application by this Court, the judgment debtors ought to have brought the said fact of rejection of those said two applications to the notice of this Court and further ought to have prayed for suitable direction for reopening the said issue again and if such a prayer would have been made then this Court itself could have resolved the said dispute without referring the same to the learned Executing Court.

13. Be that as it may, let me now consider the merit of the petitioner's application under Section 47 of the Code of Civil Procedure in the aforesaid background.

14. On perusal of the petitioners' objection under Section 47 of the Code of Civil Procedure, this Court finds that the decree-holder never questioned the correctness of the holding number of the suit premises which was allotted by the Municipal Corporation. The judgment-debtors never contended at any stage of the trial of the suit and/or the execution proceeding that they were not tenants in respect of two rooms and a privy on the first floor and three rooms at the second floor and one kitchen and one bathroom at the ground floor at the premises no.27D, Dr. Dhiren Sen Sarani (formerly known as Haritaki Bagan lane), Kolkata – 700006. In fact, the very same description of the petitioners' tenancy was given by the judgment-debtors in the plaint.

15. Though the judgment-debtors evasively challenged the correctness of the identity of the suit property in the written statement but ultimately did not make any effort to substantiate such challenge in course of trial of the suit and/or the appeal arising therefrom either before the learned Trial Judge or before the learned First Appellate Court or before this Hon'ble Court.

16. On the contrary, the suit property was identified to the learned Advocate Commissioner by both the parties at the time of holding inspection thereof by the learned Commissioner. As such, both the parties participated in the trial of the said suit with their full knowledge about the identity of the suit property. As such, there cannot be any confusion with regard to the identity of the suit property in the minds of the parties.

17. That apart, in a Municipal town the premises are identified by holding number allotted by the Municipal Authorities. It is not the case of the judgment-debtors/petitioners that premises No.27D cannot be identified even without reference to the boundaries mentioned in the decree.

18. Thus, when the suit premises can be identified even without reference to the boundaries of the suit property mentioned in the decree, this Court does not find any justification to allow the petitioners' application for local inspection for ascertaining the correctness of the description of the boundaries of the suit property and for similar reason, this Court also does not find any merit in the petitioners' objection under Section 47 of the Code of Civil Procedure.

19. That apart, such an objection cannot be raised by the judgment debtors for the first time in the execution proceeding as the petitioners' such objection is barred by the principles of constructive res judicata.

20. Moreover it is not the case of the petitioners that they are holding more than one tenancy in the said premises and/or in any adjacent premises and the decree holders are trying to

dispossess the judgment debtors from their other tenancy in respect of which no decree was passed. The judgment debtors are holding one single tenancy in the suit premises. They do not claim that they are holding any other portion of any adjacent premises in any capacity. They do not possess any other portion of the said premises in any other capacity. As such, this Court does not find that any difficulty may arise in executing the said decree even though there is any misdescription of the eastern and western boundary of the said premises.

21. This Court, thus, holds that the learned Executing Court did not commit any illegality in rejecting the petitioners' said application under Section 151 of the Code of Civil Procedure in the aforesaid background.

22. The revisional application, this, stands rejected.

23. Considering the long pendency of the execution proceeding, the learned Executing Court is directed to make all endeavours to dispose of the said execution proceeding as early as possible.

24. Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.

(Jyotirmay Bhattacharya, J.)

