SUPREME COURT OF INDIA

Abdul Rehman Shora (D) by LRs.

Vs.

State of J & K

C.A.No.25 of 2009

(Markandey Katju and V.S. Sirpurkar JJ.)

07.01.2009

JUDGMENT

V.S. Sirpurkar, J.

1. Leave granted.

2. Being aggrieved by the Order passed by the High Court in its Revisional Jurisdiction and issuing certain directions, ppellants have come up before this Court. The appellants herein are the original plaintiffs and the legal representatives of one of the original plaintiffs. First three appellants are the original plaintiffs, while the other three are the legal representatives of one Abdul Salam Shora, who was the original plaintiff No. 2. During the pendency of this appeal, appellant No. 1 died on 28.11.2007. Vide order dated 25.3.2008, his legal representatives were brought on record. They filed a suit for perpetual injunction against the respondents/defendants, whose defence was that the appellants/plaintiffs were encroaching upon the portion of land, which they alleged to have purchased and which is adjacent to the land in question. The location, identification and plaintiffs' title and possession over the suit land was not controverted by the respondents/defendants in their written statement. Two issues came to be framed and subsequently two additional issues also came to be framed and ultimately, the suit was decreed, after about 14 years of its filing by the Court of Sub-Judge, Srinagar. Admittedly, this judgment had become final, since no appeal was filed against this judgment. However, since the respondents/defendants did not obey the terms of the decree and did not allow the appellants/plaintiffs to fence the land, which was in their possession and which was identifiable and sufficiently delineated in the suit, Execution Application was filed in March, 1987 for issuing directions to the respondents/defendants to comply with the terms of decree dated 18.10.1984. An objection came to be raised by the Judgment-Debtors before the Executing Court that the decree was un- executable, since the identity of the land in respect of which the decree was passed, was itself not established. This objection was upheld by the Executing Court by its order dated 21.6.1988. Against this order, a Revision Petition was filed by the appellants herein before the High Court vide Revision No. 153 of 1988. The Revision stood allowed by the High Court by its judgment dated 25.8.1998, whereby, the order of the Executing Court was set aside and the Executing Court was

directed to proceed with the execution of the decree. The High Court had observed in the judgment that the Executing Court had not taken any steps to identify the suit land, though the factors like extent and limits of the suit land were available. The extent of the suit land was 1 canal 12 marlas, which was clearly given in Khewat and Khasra Numbers, while its location was given as Brari Nambal. It was found that no attempt was made by the Executing Court to look out for situational and other identifiable features and locale of the land even from the suit file, Revenue records including `Aksilatha'. Therefore, it was recommended that a Commissioner should be appointed for local investigation and if required, the oral evidence also could be taken. The High Court further observed that even the site plan coupled with the permission of Srinagar Municipality to raise the wall accorded to the decree holders for fencing or walling of the suit land, was not taken into consideration and it appeared that the Executing Court had gone by whatever had been raised and stated by the Judgment-Debtors alone, without arriving at an independent decision regarding executability of the decree, in totality of facts and circumstances of the case. It was also observed by the High Court that a decree cannot be defeated by reason of technical or hyper-technical objection and those unconnected with the realities on the ground level.

3. After this decision, the respondents/defendants filed an Application- cum-Reply/Statement, in which it was stated that the appellants/plaintiffs had grabbed the land of the respondents/defendants and under the garb of the decree, they were trying to grab the land of the respondents/defendants, adjacent to the suit land, which land was required to be protected by the Court. It was, therefore, prayed that the Revenue Authorities should be directed to demarcate the land, so that the decree- holders are not able to grab the land belonging to the respondents/defendants.

4. Much prior to this, Srinagar Municipality had granted permission to the appellants/plaintiffs for fencing of the suit land, which was demarcable and identifiable.

5. However, on this application, three persons were appointed as Commissioners, two of them were from the Revenue Department and one was from the Srinagar Municipality. They visited the spot on 7.12.2004 in presence of the parties, when the Deputy Director of Estates Department was also present on the spot, and after detailed inspection, the decreetal land measuring 1 canal 12 marlas was found to be in possession of the decree holders, i.e., the appellants. The decreetal land was also demarcated. A site plan was prepared and the report was submitted to the Court on 30.12.2004.

6. On receipt of this report, the Executing Court gave an opportunity to the parties to file their objections to the abovesaid Report. The counsel for the respondents/defendants appeared before the Court on 16.5.2005 and he also had made a Statement that he was satisfied with the Report of the Commissioners and he accepted the same as correct. Thereafter, various orders were passed by the Executing Court, and the Court went to the extent of issuing the coercive measures, compelling the respondents/defendants to obey the decree. The first such order dated 14.12.2005 was not even challenged by the respondents in time, while by the second passed order dated 27.6.2006, the Director of Estates was directed to file an undertaking regarding the acknowledgement of the decree and demarcation of land.

It is against these orders dated 14.12.2005 and 27.6.2006 that a Revision Petition came to be filed before the High Court, wherein, a totally new case was set up, which had no connection with the execution matter. Very significantly, the respondents/defendants had accepted the facts regarding the previous Revision Petition No. 153 of 1988 decided on 25.8.1998. After filing of the said Revision Petition, the respondents herein requested for placing certain documents on record. According to the appellants/plaintiffs, the respondents/defendants tried to manipulate the record, which could not have been considered in the Revision Petition by the High Court. The appellants/plaintiffs filed objections to the respondents' request of production of documents, in which it was contended that the documents can not be produced at the stage of Revision because by doing so, the whole case was tried to be reopened, and there was an attempt on the part of the respondents/defendants to adduce fresh evidence, which too was manipulated and manufactured.

7. However, it seems that the High Court allowed that Application by its order dated 23.11.2006, even without hearing the appellants. During that time, no lawyer used to appear in the Court due to the strike call given by the militants in the Valley of Kashmir. The Court went on to allow this application, and the appellants filed a detailed Application on 4.12.2006 for recalling the order dated 23.11.2006. Ultimately, it seems that the High Court passed the final judgment on 7.9.2007, whereby, the High Court gave a finding in the following words:

> "Accordingly, and in view of what has been stated above, I feel that the decreetal land whatever and wherever it is, is yet to be duly identified and demarcated without which the execution proceedings run the risk of being misdirected. So before passing final orders hereupon, I feel it would be proper to seek suggestions of appearing sides regarding mode and method of identifying the decreetal land, so that the decree under reference is properly executed and without any further loss of time."
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> The appellants, feeling aggrieved by this, have come up before us."

8. The Learned Counsel appearing on behalf of the appellants pointed out that there was no question of passing these fresh directions, particularly, in the wake of finalized order in the earlier Civil Revision dated 25.8.1998. Our attention was invited to the said order and more particularly, the observations made therein, to which we have already made reference in the earlier part of the judgment. Even at the cost of repetition, we must note that the High Court has clearly observed therein as follows:-

> "What the Executing Court has exactly failed to do is that it has not taken any steps to identify the suit land. The extent and limits of the suit land despite available evidence on record has not been determined. This aspect has not been considered. The extent of suit land (1 canal 12 marlas) is clearly given with Khewat No. and Khasra No. The location of the land is given as Brari Nambal. No attempt has been made by the Executing Court to look out for situational and other identifiable features and locale of the land even from the suit file, revenue records including `Aksilatha' and may be through appointment of Commissioner for local investigation and if required, on an

enquiry where oral evidence could have been taken. Even the site plan coupled with permission of Srinagar Municipality to raise the wall accorded to the decree holders for fencing/walling of the suit land has not been taken into consideration. It appears that the Executing Court has gone by whatever has been raised and stated by the respondent- judgment Debtors, without arriving at an independent decision regarding the executability of the decree in the totality of facts and circumstances of the case. The Executing Court appears to have been in a hurry to rush to the conclusion that the decree is un-executable for the ambiguity and vagueness as sighted by the Executing Court."

The learned counsel pointed out that by these observations, the High Court had finally held that the land had been finally identified and that the Executing Court was duty bound to execute the decree in respect of such identified land, which was clear from the Khewat and Khasra Numbers, as also the permission granted by Srinagar Municipality to the appellants to build a wall. Our attention then was invited to the Commissioners' Report, wherein, as many as two officers of the respondents'/defendants' department were present, as also the Deputy Director of Estates Department. It was pointed out that the Commissioners' Report had finally clinched the issue by locating the said land. Our attention was invited even to the sketch map drawn by the Commissioners. It was then pointed out by the learned counsel that the order dated 27.6.2006 read with order dated 14.12.2005, passed by the Executing Court, which was impugned before the High Court in the Revision, was clear enough, inasmuch as, in the order dated 14.12.2005, it was clearly mentioned that:-

"To cope up with the problem, this Court has also vide its order dated 10.7.2004 read with the order dated 16.8.2004 & 15.9.2004 got the decreetal land demarcated on 7.12.2004 through a commission for local inspection. The Commission has already submitted its report on 31.12.20004, which is on the file. The commission in its report has submitted that the demarcation of the decreetal land was conducted on spot in presence of both the parties on 7.12.2004. It has been reported that Deputy Director, Estates (Mr. Farooq Ahmad Lone) was present on behalf of the judgment debtors. It has been unambiguously reported that the decree holder were found the recorded owners, as well as in the physical possession of the decreetal land which was demarcated.

It is most pertinent to mention that the Ld. Standing Counsel for judgment debtors on 16.5.2005 had admitted in the open court that he admits the report of the commission and has no objection vis-`-vis the same. But, despite the demarcation of the decreetal land, the judgment debtors are persisting in their attempt of interference with the decreetal land by objections on spot the construction of the fencing wall by the decree holder around the decreetal land."

It was also found in that order that in spite of the demarcation of the decreetal land, the Judgment-Debtors were persisting in their attempt of interference with the

decreetal land by objecting to the construction of fencing wall. In that order, the Executing Court has very specifically observed that the objections of the Judgment-Debtors were already stood rejected by the High Court in its order dated 25.8.1998. Ultimately, the Court went up to the extent of observing:-

"As such, the judgment debtor Director Estates, Srinagar against whom the decree is sought to be executed is liable to be committed to civil prison for compelling him to implement the decree. The office is directed to issue bailable warrant of arrest in the amount of rupees thirty thousand for his appearance in person before this Court on 18.1.2006, which shall be entrusted to the S.S.P., Jammu for execution. The warrant shall be accompanied with a copy of this order put up on 18.1.2006."

On the heels of this order came the order dated 27.6.2006, wherein, the Executing Court noted that the Judgment-Debtor was not satisfied with the demarcation, which was already conducted in the case during execution process. It seems that on that day, the Judgment-Debtor was present before the Executing Court, which had issued a non-bailable warrant against him. The Court then went on to observe that the conduct of the Judgment-Debtors was contemptuous. The Court also noted that the execution was pending disposal right from 4.3.1987 and that made it a rarest of the rare case. It seems that these two orders were composedly challenged before the High Court in the Revision. The learned counsel, appearing on behalf of the respondents tried to feebly support the order of the High Court. However, one look at the High Court suggests that the High Court has gone on to reopen the whole process. It has undoubtedly, made a reference to some documents and on the basis of those documents, the Court seems to have observed in para 5 that the land under reference was sold by one Mehraj-ud-din S/o Assad Shah and Ghulam Nabi S/o Ghulam Shah to one Khazir Mohammad S/o Subhan Parey, who sold the same to Government in January, 1969. The Court further observed that the sale of land by aforesaid persons is shown to have been effected sometime prior to December, 1968, when the concerned Patwari had entered the mutation regarding it, while the other part of the land comprising of Survey No. 1659/1667 measuring 6 marlas is shown to have been mutated in favour of Government on 2.1.1960. A very curious observation is made thereafter, by the High Court as under:-

"At the same time, however, as per copy of the judgment, the decree holders had before the trial Court in their plaint claimed ownership of the land under reference under a sale deed purported to have been executed in their favour by Ghulam Nabi Shah S/o Ghulam Ali Shah reportedly executed on 12th and registered on 28th March, 1968. Accordingly, the root of the controversy appears to be lying somewhere here. If Ghulam Nabi Shah aforesaid who is shown as son of Ghulam Ali Shah and Ghulam Shah in photocopy of mutation No. 1004 above mentioned had sold the land to Khazir Mohammad S/o Subhan Parrey aforesaid before it is sold to decree holders in March, 1968 then obviously their claim would be defective."

> We do not know, as to how, such observations could be made regarding the appellants'/plaintiffs' title, particularly, in view of the decree which had finally been passed. This seems to be the main reason why the High Court has interfered in the matter. Even the observations made by the High Court in para 6 of the impugned judgment regarding the Commissioners' Report, could not have been made, particularly, because the counsel for the respondents/defendants unequivocally had accepted the Commissioners' Report, which is clear from the earlier orders passed by Executing Court on 27.6.2006 and referred to earlier. In short, the High Court in its Revisionary jurisdiction has tried to go behind the decree, which is not permissible. The High Court has also returned a finding of fact in para 8 that the decreetal land was yet to be duly identified and demarcated and, thereafter, the High Court has chosen to open a Pandora's box by inviting the suggestions from both the sides for identifying the decreetal land, which had already been identified by the Commissioners' report."

9. In short, the High Court has exceeded its jurisdiction in the matter and has chosen to allow itself to be swept away by some documents, which though available to the respondents/defendants, were never bothered to be filed either while the Civil Suit was in progress or even during the execution. We do not know how and under what provision, the said documents came to be produced at the Revisional stage, even without hearing the appellants/plaintiffs, who were parties to that Revision. In short, the impugned order is clearly erroneous and suffers from the jurisdictional error and the same is, therefore, set aside. The appellants shall be entitled to proceed on the basis of the Commissioners' Report, while the respondents/defendants would be bound by the subsequent orders dated 14.12.20005 and 27.6.2006 passed by the Executing Court. Under the circumstances, the appeal is allowed with costs.