

RAJASTHAN HIGH COURT

GopalLal

Vs.

BabuLal, (Rajasthan)

Civil Revn.Petn. No. 147 of 2004

(N.P. Gupta, J.)

24.05.2004

ORDER

N. P. Gupta, J.

1. This revision has been filed by GopalLal against the order of the learned Addl. Dist. Judge No. 1, Bikaner D/- 4-5-2004 passed in Execution Case No. 9 of 2004.
2. By this order two matters were decided; one taken by the learned trial Court, to be the objection of the petitioner-judgment-debtor GopalLal under Section 47 read with Section 151, C.P.C., objecting about the executability of the decree, or in the alternative praying for partition, along with an application under Section 5/14 of the Limitation Act, while the other one was taken to be the Civil Misc. Case No. 17 of 2004, said to be the application filed by the four sons of the present petitioner, under Order 21, Rules 29 and 97, C.P.C.
3. Since, this revision is confined to the order passed in relation to Execution Case No. 9 of 1984 (sic), I need not deal with the aspect regarding Civil Misc. Case No. 17 of 2004.
4. The facts of the case are, that the parties to this revision are real brothers. A suit for partition was filed by the non-petitioner BabuLal on 9-4-1980, and in that suit, on 31-10-81, a compromise was arrived at by the parties, and formally the suit was decreed in terms of the compromise. The precise terms of the compromise decree are as under :-

(Vernacular matter omitted..... Ed.)
5. Thus, according to para 4 of the decree, certain property covered by this para was

agreed to be kept joint between the parties, each having 1/4th share, each of the parties was to remain in possession for a period of one year, by rotation, and was free to carry on business therein during that period. In accordance with the rotation, to start with, the possession was physically handed over to the plaintiff BabuLal, who was to remain in possession thereby, upto 1-11-1982, then he was to deliver possession to the non- petitioner KishanLal, who was to remain in possession from 1-11-1982 to 31-10-1983, and on 1-11-1983 KishanLal was to hand over the possession to the present petitioner-GopalLal, who was to remain in possession from 1-11-1983 to 31-10-1984, and on 1-11-1984 GopalLal was to deliver possession to Moda Ram, who was to remain in possession from 1-11-1984 to 31-10-1985, and Moda Ram was to again deliver possession to BabuLal on 1-11-1985, and according to this cycle, each party was to remain in possession for one year, and was to deliver possession to the next in turn. During the period of possession, the person in possession was responsible for all profits and losses. It was further stipulated, that thereafter, if it is not possible to keep the property joint, the parties will be free to have it partitioned.

6. It further appears that since the petitioner was to remain in possession upto 31-10-1984, and was supposed to deliver possession to non-petitioner Moda Ram on 1-11-1984, the trouble started from that point, inasmuch as, on 31-10-1984 itself the present petitioner filed a suit for cancellation of the decree, and for injunction, on various grounds, including it being fraudulent. That suit was dismissed on 3-8-1988, against which decree a Regular First Appeal was filed, which was dismissed on 6-12-1995, and then D. B. Civil Special Appeal was filed, which was also dismissed on 9-3-2004. It was informed by the learned counsel for the non-petitioners, that a Special Leave Petition was filed against the decree, which too was dismissed. This suit was dismissed on the ground, that the suit was not maintainable on the face of the provisions of Order 23, Rule 3-A read with Order 43, Rule 1-A, C.P.C. It is in this sequence, that on 4-2-2004, i.e. just before disposal of the D.B. Civil Special Appeal, which was decided on 9-3-2004, the petitioner filed a suit for partition. In that partition suit, he also filed an application for temporary injunction, seeking to restrain defendants from dispossessing the petitioner. That temporary injunction application was dismissed by the learned trial Court on 1-4-2004. Against that order a Civil Misc. Appeal No. 453/2004 was filed by the petitioner before this Court, which was dismissed by me on 13-4-2004.

7. To continue sequence of narration of facts, it may also be noticed, that I am informed by the counsel for the non-petitioners, that after passing of the decree D/-31-

10-1981, Moda Ram appears to have moved an application before the learned Court below on 2-3-1985, for being delivered possession, and that application was dismissed by the learned Court below on 12-2-1987, on the ground, that the decree passed was only preliminary decree, and therefore, that application could not be entertained, and can be filed only after a final decree is prepared.

8. Likewise, when the proceedings were taken by the learned trial Court for preparation of final decree, by the present non-petitioner, submitting necessary non-judicial stamp on 20-3-1987 i.e. soon after the rejection of Moda Ram's prayer, which was rejected on 12-2-1987, the matter was taken up by the learned trial Court, and then the order D/- 7-10-1987 was passed. By the order D/- 7-10-1987 it was noticed, that on 11-2-1986 non-petitioner BabuLal filed an application, to the effect, that in the order dated 31-10-1981, stamps were directed to be furnished, whereon the decree would be scribed, but then the order recorded passing of the preliminary decree, instead of recording it to be a final decree, which was required to be corrected. This application was registered as Civil Misc. Case No. 14 of 1986, and after notice to the parties, vide order D/- 12-2-1987, exercising powers under Section 152, C.P.C., necessary amendment was made, and it was directed that on submission of stamps the decree be scribed on the stamp. Thereafter on 20-3-1987 stamps were submitted as noticed above, thereafter, on 16-4-1987 the present petitioner filed an application, contending that he has learnt that application has been filed for preparation of decree, and stamps have been submitted which are deficit. Another objection raised was, that the decree covers certain property, which is his personal property, and which could not be made subject-matter of partition, and that after passing of the preliminary decree D/- 31-10-1981, he has spent substantial amount on the property, and that his consent has not been obtained for preparation of final decree, and therefore, the application for preparation of final decree be rejected. It was also contended, that correction could not be made in purported exercise of power under Section 152, Civil Procedure Code. The learned trial Court noticed, that the petitioner has not challenged the order D/- 12-2-1987, and that, the filation of the suit for cancellation of decree, also is of no obstruction in preparing the final decree. It was also observed, that in view of the fact, that the petitioner has filed a suit for cancellation of decree, the objection about property being wrongly included as part of compromise, is also of no consequence. Inter alia with these findings, vide order dated 7-10-87, the objection of the present petitioner was dismissed, and final decree was ordered to be prepared.

9. This order D/- 7-10-1987 was challenged by the petitioner in this Court by way of

S. B. Civil Revision No. 578/87, and thereafter the order D/-12-2-1987, passed under Section 152, C.P.C. was also challenged by the petitioner vide S. B. Civil Revision No. 23/1988, and both those revisions were dismissed by this Court on 2-12-1988, as withdrawn; some further directions were also given, in the order D/- 2-12-1988, which will be considered, at appropriate place. I am informed that as the proceedings for preparation of final decree were stayed in these two revisions, after disposal of the revisions, the final decree was prepared by the learned trial Court on 3-4-1989, by scribing it on necessary non-judicial stamps. It is thereafter i.e. on 5-4-1989 itself, that an application for execution was filed by Moda Ram, for execution of the final decree D/- 3-4-1989. I am told, that since dismissal of Suit No. 49 of 1987, mentioned above, was assailed by the petitioner in appeal before this Court, in that first appeal stay was granted, staying dispossession of the petitioner, which stay continued during pendency of that appeal, and again during pendency of that special appeal, which as noticed above, was dismissed on 9-3-2004, in the meantime the aforesaid suit for partition was filed, wherein temporary injunction application was also filed on 5-2-2004, which was finally dismissed by this Court on 13-4-2004. It is thereafter, that the petitioner, on 16-4-2004, submitted before the learned Executing Court, purportedly a reply to the execution application, and in the alternative, making a prayer for partition, which was replied, and it is this 16-4-2004 document, which has been adjudicated, and dismissed by the Executing Court, by the impugned order D/- 4-5-2004.

10. It also appears from the record, as supplied to me, that on 10-4-1989, the present petitioner filed an application before the learned Executing Court, alleging that the execution application has been filed after two years of the order D/- 12-2-1987, whereby the decree was declared to be final decree, and therefore, notice under Order 21, Rule 22 were required to be issued, but suppressing those mandatory provisions, order has been obtained, to the effect, that warrant for possession be issued, if necessary by police assistance, and breaking open the locks, which is wholly without jurisdiction. Then, it was alleged, that the decree is not executable, being unworkable, and that, since at the time of the passing of the decree, possession has been delivered to BabuLal, warrant for possession cannot be issued over again for delivery of possession to BabuLal.

11. Since, in this revision I am not required to adjudicate upon the another part of the order, disposing of the Civil Misc. Case No. 17 of 2004, I need not notice facts, as informed to me, about the petitioner's sons having filed the suit for partition, and cancellation of the decree, and for permanent injunction on 25-8-1988, and therein

having moved an application for temporary injunction, which having been dismissed by the learned trial Court on 3-4- 1989, against which order Civil Misc. Appeal No. 62 of 1989 having been filed before this Court, and the same also having been dismissed by this Court way back on 6-12-1995.

12. Assailing the impugned order, it is contended by the learned counsel for the petitioner, that in the very nature of things, the compromise is only a contract, superimposed with the seal of the Court, and is not enforceable, in absence of any stipulation being there in it to that effect. It was then contended, that in any case the compromise decree is not executable, being only a declaratory decree. The other submission made was, that the decree exhausts after delivery of possession being made once, and cannot be executed again and again. The next submission made was, that in the petition D/- 16-3- 2004, the petitioner had also made a prayer for partition of the property, and since according to para 4 of the decree, mentioned above, it is clearly stipulated, that if it is not possible to keep the property joint, the parties will be free to partition it, and since according to contents of para 4, it is not in dispute that the property was kept joint, it is also clearly stipulated that each of the parties has 1/4th share, and therefore, if at all the decree is said to be executable, it also contemplates effecting of partition, therefore, the petitioner's request for partition was required to be allowed, in which event, the petitioner need not be dispossessed, and in view of the recital of para 4 of the decree, since there is no impediment in the way of the partition, the impugned order is required to be set aside. It is also contended, that the learned Court below has proceeded under the obsession, about the petitioner being said to have deprived the other parties of the possession for 20 years, and laboring under that obsession, the objections of the petitioner have been rejected, by not giving appropriate judicial considerations, which also vitiates the impugned order. In this regard, it was contended, relying upon the judgment of Hon'ble the Supreme Court, in (2000) 8 SCC 532 : (2000 AIR SCW 3967) that, the past conduct of the petitioner is not required to be seen for the purpose of adjudicating his right, in praesenti. In other words, the mere fact that, for some reason or the other, the petitioner could not be dispossessed for a period of 20 years, or more, it can be no ground for rejection of his legitimate objections, if they are otherwise sustainable. Another submission made was, that the Executing Court is bound to interpret the decree, as to whether it is merely declaratory, or is executable. Next submission made was, that the petitioner was never given possession of the property by KishanLal, rather he was already continuing in possession of the property, since before passing of the decree, and according to the learned counsel, this fact was never controverted on the side of the respondents,

inasmuch as, to his application D/- 16-4-2004, reply was filed by BabuLal only, and not by KishanLal, nor any affidavit of KishanLal has been filed, to the effect that he delivered possession to petitioner GopalLal, in accordance with the terms of the decree. Thus, the compromise decree was never acted upon, and therefore, also it could not be executed.

13. Yet, another argument made was, that in execution application, request is made by Moda Ram for delivery of possession, but he did not mention, as to whether the petitioner ever denied to deliver the possession to him, when it became due in the year 1984, and since Moda Ram was entitled to keep possession only upto 31-10-1985, he could not file application for execution in the year 1989. The argument about unworkability, and in-executability of the decree was elaborated, by submitting, that by this decree, the property was declared to be joint, and each of the parties were declared to be having 1/4th share, and only arrangement was made as to how the respective parties would remain in possession. It was also pointed out, that in the decree there is no provision that the person entitled to possession, will be entitled to take possession. It is also contended, that the arrangement made is wholly unworkable, and not executable, as it cannot be conceived, that one person will remain in possession for one year, and then he will hand over possession to the other person, and the rotation will continue, apart from the fact, that the decree does not amount to decree for possession.

14. Then it was contended, that in any case, at best, the decree can be said to be one for mandatory injunction, obliging one party to deliver possession to another party, and since there is different procedure prescribed for execution of decree for mandatory injunction, which having not been followed, the decree cannot be executed. Regarding right of partition, it was contended that the expression ("Badme") appearing in para 4 of the decree only means, "after the compromise", and the petitioner has already made a prayer for partition, which prayer was not denied, and there is no reason, as to why the property cannot be partitioned, and no reason has been given by the learned Executing Court either.

15. On the authority of decision of Orissa High Court, in *KhalliRath v. EppiliRamachandra*, reported in ¹ it was contended, that in absence of any stipulation in the decree about entitlement of the party to have the decree executed through the Court, the decree like the present one, cannot be executed. Reference was also made to *BhavanVaja v. SolankiHanujiKhodajiMansang*, reported in ² to contend, that the Executing Court is to find out the true effect of the decree by construing it.

16. Another submission made was, that since the petitioner did not receive possession of the property under the decree, the fact of petitioner's present possession of property, by itself, cannot furnish any ground to dispossess him, by purported execution of the decree.

17. Then it was submitted, that the Executing Court is to execute the decree as it is, and nothing can be supplied in a decree. According to the learned counsel, when a cyclic order has been prescribed in the decree, if the particular period of cycle has passed, that cannot be deferred by the Executing Court. In other words, whatever time has passed, the operation of that part of cyclic rotation automatically stands lapsed, and it was to be seen, as to whether the petitioner could be ordered to be dispossessed now, and since if calculated according to the rotation, the period from 1-11-2003 to 31-10-2004 comes to the rotation of the petitioner, he cannot be dispossessed in execution of the decree, in the moment. Since there is no stipulation in the decree, as to what will be the effect, if the cyclic rotation is not followed, it is not open to the parties to arrest the cyclic operation of the decree, and claim to it operate now, w.e.f. 1-11-1984, in the year 2004.

18. On the other hand, learned counsel for the respondents narrated, the sequence of events, right from the date of the passing of the decree, till the date, and submitted, that it is not in dispute, on the face of averments made in para 5 of the petitioner's application D/- 10-4-1989, that at the time of the decree, BabuLal was delivered possession. It is obvious that the petitioner received possession according to the cyclic rotation on 1-11-1983, and was required to deliver possession to the non-petitioner Moda Ram on 1-11-1984, and precisely at that point of time, on 31-10-1984, suit was filed by the petitioner, being Suit No. 49 of 1987 (though the suit was filed in 1984, by the time it was decided, suit happened to be transferred from Court to Court, and therefore, the suit happened to be decided as Suit No. 49/87), and that suit was dismissed on 3-8-1988, and the appeal filed against that decree dated 3-8-88 was dismissed on 6-12-1995, and D. B. Civil Special Appeal was dismissed on 9-3-2004, and just before dismissal of that appeal, on 4-2- 2004, the petitioner had already filed a suit for partition. In that view of the matter, the petitioner having opted the remedy of partition, by filing a regular civil suit, wherein he made an application for temporary injunction, which was dismissed on 1-4-2004, and after appeal against that order had been dismissed on 3-4-2004, it was not open to the petitioner, in the present execution proceedings, on 16-4-2004, to make a request for partition.

19. Regarding nature of the decree being executable, or declaratory, it was contended,

that the petitioner had filed Revision Petitions Nos. 578/87 and 23/88, against the order of learned trial Court D/- 7-10-1987, and 12-2-1987, respectively, which came up for hearing on 2-12-1988, and on that day, the petitioner was present in person, and with eyes open, he not only withdrew both the revisions, while dismissing the revision as withdrawn, this Court made a positive direction, granting three months' time to hand over vacant possession of the shop, in terms of the compromise, to the other brothers. The petitioner never objected to making of such direction, on the ground of decree being merely declaratory, or not capable of entailing such a direction. Thus, till that date, the parties were ad idem, that the decree is executable, and the petitioner is required to deliver vacant possession of the property, in terms of the compromise, to other brothers. Thus, it being clear to the petitioner, that the decree is neither declaratory, nor is unworkable, and that the vacant possession is required to be delivered, now these objections are not maintainable, and are not maintainable even on the principles of res judicata/constructive res judicata. It was also contended, that operation of the cyclic rotation was arrested by the activities of the petitioner only, and in the order of this Court D/- 13-4-2004, passed in Civil Misc. Appeal No. 453/2004, which is an order inter-parties, and in relation to this very property, and on the question of entitlement of the non-petitioners to get possession under the decree, it was positively found, firstly, that in the suit filed on 31-10-1984, there was no averment to the effect, that compromise was not acted upon, rather it was also noticed, that till then, it is nowhere the averment of the present petitioner, that he did not receive amounts, mentioned in para 5 of the compromise decree, and it was clearly held, that this Court did not find any sufficient ground to grant injunction to the appellant (present petitioner), restraining the respondents from dispossessing him, during pendency of the partition suit, moreso, when they are seeking to dispossess through due process of law (the present execution proceedings). This finding was given after noticing the findings of the learned trial Court, and concurring therewith, whole hog. Thus, when this Court, in order D/- 13-4-2004, passed inter-parties, clearly adjudicated upon the rights of the petitioner, finding him to be not entitled to restrain the respondents, from dispossessing him during pendency of the partition suit, through due process of law, even on the considerations of res judicata/constructive res judicata, the present objections, filed by the petitioner on 16-4-2004, are clearly not maintainable, as the execution is pending since 1989, and it was way back on 10-4-1989, that the petitioner had already filed some objections, including objection about executability, and non-workability of the decree. It was contended, that in para 4 of the decree, it is clearly recited, that after completion of the cyclic rotation, if the parties

feel, that it is not possible to keep the property joint, it will be open to have the property partitioned. The precise words used have already been quoted above, wherein the word ("Badme") is significant. According to the learned counsel, therefore, simply because, the parties were given right to have the property partitioned, till it is partitioned, the operation of the cyclic rotation cannot be arrested. It was pointed out, that in reply to the objections D/- 16-4-2004, it was categorically pleaded, that the decree had worked, and it was workable, as the petitioner had come into possession of the property, thereunder only, and that, the stand of the petitioner, about his being in possession of the property since beginning, has repeatedly been turned down. According to him, the objection of the petitioner, that his objections having not been decided, were replied, by making reference to para 14 of the impugned order, and various other paras. The judgments cited by the learned counsel for the petitioner, being reported in (2000) 8 SCC 532 : (2000 AIR SCW 3967); AIR 1953 Orissa 74, and (1973) 2 SCC 40 : (AIR 1972 Supreme Court 1371) were distinguished, and reliance was placed by the learned counsel for the non-petitioners, on *Parkash Chand Khurana v. Harnam Singh*, reported in ³*DevduttaDheer v. JankiVallabh*, reported in ⁴*V. N. Sreedharan v. Bhaskaran*, reported in ⁵and *Haji T. J. Abdul Shakoor v. Bijai Kumar Kapur*, reported in ⁶ (paras 3, 4 and 5), and it was submitted, that in view of this consistent legal position, it cannot be said, that the decree is not executable, or that it is merely a declaratory decree, here the intention of the parties is clearly manifested in para 4 of the decree, that each party was entitled to be in possession for one year by cyclic rotation, and till the property gets partitioned, none of the parties, who may simply have happened to come in possession, can be allowed to arrest the cyclic rotation of the decree, rather in view of the order of this Court D/- 2-12-1988, mentioned above, the petitioner was clearly required to deliver possession of the property to the brothers, and therefore, any of the brothers could continue in execution. It was also contended, that the stand taken by the petitioner, to the effect, that at each point of time, when a warrant of possession is sought to be issued, or enforced, it is required to be ascertained, as to, on that particular date, according to the cyclic rotation, which party would be entitled to remain in possession, irrespective of the fact, that for all times in the past, all other parties have been deprived of the possession, in other words, according to the learned counsel, when the warrant happens to be required to be issued, the petitioner may be claimed to be entitled to retain possession on the ground of that time being of his turn in rotation, and on completion of that turn, when the warrant is required to be issued, and for one reason or the other, he may again obstruct the enforcement of the other parties' rights for three

years, and then may again put the boggy about his entitlement of the possession, such an attempt, to bring about this situation, is just preposterous, and not only makes the mockery of the Judicial System, rather is a gravest abuse of the process of the Court, and thus the contention of the petitioner is not required to be sustained at all.

20. In rejoinder learned counsel for the petitioner reiterated, that any of the orders passed in the past, could not have the effect of amending the decree, therefore, the petitioner cannot be dispossessed during the period 1- 11-2003 to 31-10-2004, and since the petitioner had already laid a claim for partition, the cyclic rotation comes to an end, and the property can be partitioned any time. The cases cited on behalf of the respondents were attempted to be distinguished on facts.

21. I have considered the submissions and have gone through the impugned order, so also the various documents, made available to me for perusal, by either side, with consent of each other.

22. The above narration of rival contentions, in my view, can be summed up, in the manner, that according to the petitioner the decree is not executable because:-

1. It is a compromise decree, not incorporating stipulation of executability, in the event of non-compliance by any of the parties.
2. Is only a declaratory, about the status of the property being joint, each party having 1/4th share, and only makes arrangement as to how each of the joint owners will remain in possession.
3. The arrangement made in para 4 of the decree is wholly unworkable.
4. That the petitioner was in possession since before the decree, and is continuing till the date, and thus the decree was never acted upon.

23. The other objection is, that since para 4 contemplates a right of the parties to have the property partitioned, and since the petitioner had made a prayer for partition, in his petition dated 16-4-2004, the Executing Court was required to partition the property, as there is no reason why the property should not be partitioned.

24. The next objection, is that in absence of any provision to that effect in the decree, even if the cyclic rotation is to be followed, it is to be strictly followed, in the sense, that if for any reason, including any of the acts of any of the parties, the possession for a particular period of time, as contemplated by the decree, does not happen to be enjoyed by any of the parties, it does not entitle that party to claim retrospective right

of possession, and since, according to the rotation, during the period 1-11-2003 to 31-10-2004, it comes to the turn of the petitioner, he cannot be ordered to be dispossessed, simply because, according to the non-petitioners, they stood deprived of the possession for the last about two decades. As a limb of this argument, the submission appears to be, that since Moda Ram was entitled to keep possession only upto 31-10-1985, he could not file the execution petition in the year 1989.

25. The other contention appears to be in the alternative, that the decree, at best, can be said to be one for mandatory injunction, for execution whereof, different procedure has been prescribed.

26. The submissions made on the side of the respondents are substantially controversion of the contentions, and in support thereof reliance has been placed on certain circumstances, and judgments, as noticed above.

27. Taking up the first contention about executability of the decree, so far as the first part thereof is concerned, as noticed above, reliance is placed on Khalli's case (AIR 1953 Orissa 74) and BhavanVaja's case (AIR 1972 Supreme Court 1371). In Khalli's case, the suit was for recovery of possession, which was compromised on 21-3-46, stipulating that at the end of the year he would vacate house without notice. Considering that compromise, it was held in para 2 as under :-

"(2) The Courts below have held that the compromise decree is executable as the suit itself was for possession. It appears to us that it would be travelling beyond the words used by the parties in the compromise deed, to import into it anything like a provision directing execution to be taken in the event of the defendant not vacating the house after the expiry of the period of one year. The compromise does not say that the decree-holder shall be entitled to enforce the compromise in execution proceedings and eject the defendant. Nor does it say that the defendant should deliver back possession at the end of the stipulated period. All that the stipulation amounts to is that the defendant agreed to vacate after a certain date. What would happen in the event of a violation of this provision was not stipulated or agreed to between the parties. In such circumstances it is difficult to hold that the parties intended that the plaintiff should recover possession by way of execution as the suit itself was one for possession. We are, therefore, unable to accept the view taken by the Courts below that the decree was executable as the suit itself was for possession and would set aside the order under appeal."

28. True it is, that view taken by the Division Bench of Orissa High Court, in Khalli's case (AIR 1953 Orissa 74) does support the proposition propounded by Mr. Bhoot. So far BhavanVaja's case (AIR 1972 Supreme Court 1371) is concerned, that is a case for the proposition, that though the executing Court cannot go behind the decree under execution, but it has the duty to find out the true effect of that decree, and that, 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. It was also held, that in order to find out the meaning of the words employed in a decree, the Court, often has to ascertain the circumstances under which those words came to be used. It was also held, that it is plain duty of the Executing Court, and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. The jurisdiction of Execution Court does not begin and end with merely looking at the decree as it is finally drafted. In my view, therefore, this judgment rather concedes some powers to the Executing Court to construe the decree, in appropriate case, even by taking into consideration the pleadings, as well as the proceedings leading up to the decree, and to find out the meaning of the words employed in a decree, and to ascertain the circumstances under which those words came to be used.

29. On the other hand, as I find, that in Haji Abdul Shakoor's case (AIR 1964 Supreme Court 874) interpreting the decree, it was clearly held that it would not be open to the construction, that it is a mere agreement to convey contained in Clause 2, whereunder conveyance was to be effected. Then in Prakash Chand Khurana's case (AIR 1973 Supreme Court 2065) in para 18, this precise controversy was adjudicated by the Hon'ble Supreme Court, and it was held as under :-

"18. The next contention of the appellants is that the award is merely declaratory of the rights of the parties and is, therefore, inexecutable. This contention is based on the wording of clause 7 of the award which provides that on the happening of certain events the respondents "shall be entitled to take back the possession". We are unable to appreciate how this clause makes the award merely declaratory. It is never a pre-condition of the executability of a decree that it must provide expressly that the party entitled to a relief under it must file an execution application for obtaining that relief. . . .

(Emphasis supplied)

30. Likewise in V. N. Sreedharan's case (AIR 1986 Kerala 49) in para 8 dealing with identical argument, it was held as under :-

"8. The second limb of his argument on the executability of the compromise decree is based on the absence of a clause in it that on failure of the performance of the conditions undertaken therein, the aggrieved party is entitled to get the performance enforced through Court. Though the learned counsel for the petitioner has cited few decisions to support this contention, I do not think that any one of them is of any useful help to build up this argument. Those decisions are, *Girdharilal v. Hukam Singh*, ⁷*SubramaniaIyer v. ChinnuPillai*, ⁸and *ShyamSundar v. Indramoni Das*, ⁹In none of the above decisions, the Court was called upon to consider the effect of the decree of a clause in the compromise decree providing for initiation of execution proceedings. I, therefore, do not think it necessary to refer to those decisions in detail. The question here is, when a decree contains declaratory clauses and stipulations regarding obligatory performances, is that the decree capable of enforcement through execution proceedings without an express provision in the decree permitting the decree-holder to do so? Executability is one of the main incidences of a decree, whether it is a compromise decree or otherwise. Unless the right to execute a decree is restricted either expressly or by necessary implication either by the terms of that decree, or by the provisions of any supervening legislative enactment, the executable character of a decree is not lost. It is not necessary that the decree must embody in it, a clause empowering the initiation of execution proceedings in the event of non- satisfaction of it or non-fulfillment of any condition or non-compliance of any term therein. Absence of such a clause in it does not strip the decree of its executability which inheres in a decree."

(Emphasis supplied)

31. Then continuing the discussion, in para 12, it was held as under :-

"12. The emerging position is that the non-inclusion of a particular clause in a compromise decree, that in the event of non-performance of the conditions in it the party concerned is entitled to apply for execution and get the conditions enforced through Court, will not render the decree inexecutable."

(Emphasis supplied)

32. Then, in *DevduttaDheer's case* (AIR 1986 Supreme Court 170) the controversy was, that in a suit for eviction, the parties entered into a compromise whereunder the defendant agreed to pay a rent of Rs. 30/- per month w.e.f. 1-3-1967, and to vacate the premises by the end of 1970, the question was, as to whether this decree was

executable, as it was contended that a fresh contract was entered into between the parties, as an undertaking was given, that he would vacate the suit premises at the end of 1970, and that the possession could be obtained only by a fresh suit. Repelling these contentions it was held in para 15 as under:-

".....The defendant agreed to get passed a decree for ejectment against him, and the Court granted him time to vacate the suit premises, till the end of 1970. After this period, the decree-holder would certainly be entitled to execute the decree. It is incorrect to say that this decree was a fresh contract or a declaratory decree. No fresh lease was arrived at between the parties. So, the decree was executable."

33. And then in para 19 again, after interpreting the compromise, it was held as under :-

".....I am of the opinion that the intention of the parties was that the decree for ejectment be passed. The defendant prayed for time to vacate the suit premises up to the end of 1970, to which the plaintiff agreed. So, it cannot be said that the decree for ejectment had not been passed. The decree is a clear decree for ejectment, and time was granted up to the end of 1970. So, the decree is not a declaratory decree, and is executable."

34. Though the counsel for the petitioner tried to distinguish the judgments in Prakash Chand Khurana's case (AIR 1973 Supreme Court 2065), and V. N. Sreedharan's case (AIR 1986 Kerala 49), so also the DevduttaDheer's case (AIR 1986 Supreme Court 170) by contending that in Prakash Chand Khurana's case the Court was dealing with an arbitration award, which has the force of decree, and is therefore, executable. Regarding V. N. Sreedharan's case it was submitted that the Court had only interpreted the terms of the decree, and in the ultimate analysis the decree was found to be not executable. Regarding DevduttaDheer's case it was submitted, that, that was a suit for ejectment which was decreed, therefore, the decree for eviction was obviously executable.

35. In my view the distinction sought to be made cannot be accepted, inasmuch as, in Prakash Chand Khurana's case Hon'ble the Supreme Court had clearly dealt with the precise contention, of the nature raised by the learned counsel for the petitioner, inasmuch as, therein the direction was that the respondents "shall be entitled to take back the possession", and the decree was held to be not merely a declaratory decree. It was positively held, that it is never a pre-condition of the executability of a decree, that

it must provide expressly that the party entitled to a relief under it must file an execution application for obtaining that relief. Similarly in V. N. Sreedharan's case also the principle was carried a little ahead, and while interpreting a compromise decree it was held, on the other hand, that unless the right to execute a decree is restricted, either expressly, or by necessary implication, either by the terms of that decree, or by the provisions of any supervening legislative enactments, the executable character of a decree is not lost, and in a very categorical terms it was held, that it is not necessary that the decree must embody in it, a clause empowering the initiation of execution proceedings in the event of non-satisfaction of it, or non- fulfillment of any condition, or non-compliance of any term therein. It was also held, that absence of such a clause in it does not strip the decree of its executability, which inheres in a decree.

36. Thus, in my opinion, the first part of the submission about inexcusability of the decree, on account of the compromise not incorporating stipulation of executability, in the event of non-compliance by any of the parties, has no substance. In view of the judgment of Hon'ble the Supreme Court in Prakash Chand Khurana's case (AIR 1973 Supreme Court 2065), the judgment in Khalli's case can safely be held to be no longer a good law, and in any case, with all humility at my command, I am not able to persuade myself to subscribe to the view taken by the Orissa High Court in Khalli's case (AIR 1953 Orissa 74).

37. The findings recorded by me in the foregoing paragraphs, sufficiently negative the second part of the argument of the learned counsel for the petitioner, as well, inasmuch as, though the decree recognizes the joint status of the property, and each party having 1/4th share, but then, in my view, it cannot be said, that it only makes an arrangement as to how each of the joint owners will remain in possession, rather an overall reading of the decree, right from paras 1 to 5, does make it clear, that all the properties were divided, and as mentioned in paras 1 to 3, the petitioner was paid cash amount in consideration of the things, as noticed in para 5, and as noticed above, it is nowhere the case of the petitioner, that he did not receive the amount mentioned in para 5. It is in this background, that according to para 4, the cyclic rotation was agreed. According to which each party was to enjoy exclusive possession of the property, mentioned in para 4, and was entitled to the profits, and was liable for the losses, during that period. Thus, the stipulation cannot be said to be merely making arrangement, as to how each of the joint owner will remain in possession, rather it entitles each of the joint owner, to remain in exclusive possession, with all its

consequences, and in cyclic rotation.

38. Taking up the third and fourth objection, about unworkability of the arrangement, and about the petitioner being in possession since before the decree, and is continuing till the date, and thus the decree was never acted upon. Suffice it to say, that in view of the recitals made in para 5, of the application of the present petitioner D/- 10-4-1989, wherein the petitioner had taken a categorical stand, that possession had been delivered to BabuLal, and therefore, warrant for possession cannot be issued over again to deliver possession to BabuLal, it can very safely be said, that it is an admitted position, on the side of the petitioner, that as per the stipulation contained in para 4 of the decree, at the time of compromise itself, BabuLal was delivered possession of the property, and since no other stipulation of the decree is alleged to have not been acted upon, the only natural consequence flowing is, that the petitioner came into possession on 1-11-1983 only, under and in accordance with the decree.

39. That apart, as is clear from a look at the application D/- 10-4-1989, that thereunder, the petitioner had clearly claimed in para 3 that the decree is not executable, as it clearly provides, that this property shall remain joint, each party having 1/4th share, and possession having been delivered to BabuLal, and recapitulating the cyclic rotation, and right to partition subsequently, the decree is unworkable, and is not capable of being executed, this leads to an inference, that whatever objections the petitioner had against the executability of the decree, had been taken therein, and in view of the Division Bench judgment of this Court, in *Barkat Ali v. Badrinarain, reported in*¹⁰ on the principles of res judicata, the petitioner is debarred from raising any such objection, which was not taken at the initial stage. In that view of the matter also, it is not open to the petitioner to contend, that he was in possession since before the decree, and is continuing till the date, and that the decree was thus never acted upon. So far workability is concerned, the cyclic rotation had already worked *qua* BabuLal, KishanLal and GopalLal, and simply because, the petitioner finds it uncomfortable to allow the fourth person to enjoy possession of his rotational term, it cannot be allowed to be contended, that the decree is unworkable.

40. It may also be noticed here that as noticed above, the petitioner had filed an application on 16-4-1987, before the learned trial Court, for recalling the order D/- 12-2-1987, and raising objections against the validity of the decree dated 31-10-1981 on various grounds, including the decree to be covering his personal property, which could not be made subject-matter of partition, and his having spent substantial amount on the property, and praying for rejection of the application for preparation of final

decree, which application was dismissed by the learned trial Court vide order D/- 7-10-1987. Significantly at this time also, the objection about workability of the decree was not taken, and the revision filed against that order, being Revision No. 578/87, so also the revision filed against the order D/- 12-2-87, being Revision No. 23/1988, were both withdrawn on 2-12-1988, and, as informed to me, since in both the revisions, proceedings for preparation of final decree were stayed, and while dismissing the revisions as withdrawn, this Court clearly granted three months' time to the petitioner, to deliver vacant possession, in terms of the compromise, to the other brothers. It is a different story, that neither the petitioner objected to making of such a direction, on any ground whatever, nor that part of the order was ever assailed, in any appropriate legal manner. Therefore, also this objection cannot be sustained.

41. Likewise it may also be significantly noticed, that the petitioner had already filed a suit on 31-10-1984, for cancellation of the decree and injunction, on various grounds, including it being fraudulent. It is a different story, that, that suit was dismissed as not maintainable, but then the fact remains, that the petitioner, in that suit, could take all grounds for cancellation of the decree, including its unworkability, and having not taken that ground, and also having not availed the other remedies available to him, for interference with the decree, rather having filed the suit for partition on 4-2-2004, in my opinion, again on the principles of res judicata/constructive res judicata, this objection cannot be accepted. Thus, the third and fourth objections also have no substance and cannot be allowed to be raised.

42. Then taking up the next objection about the decree conferring right of partition, and prayer having been made by the petitioner for partition, the property being required to be partitioned. In my view, this objection also has no substance, inasmuch as, a look at para 4 of the decree does clearly show, that it lays down the cyclic rotation, according to which, each of the joint owners is to enjoy exclusive possession of the property, and thereafter, if it is found to be not possible to keep the property joint, the parties will be free to have it partitioned. The word (Vernacular matter omitted....Ed.) used in para 4 is of significance, inasmuch as, true it is, that this word cannot be said to mean, to deprive the parties of the right to have this property partitioned, for all times to come, but then, it does confer a right on each of the parties, to either distribute the property, or to ask for partition.

43. Learned counsel for the petitioner, during course of the argument, was put a specific question, as to what is the legal position regarding the status of the property, after prayer for partition is made, and till it is actually partitioned, to which the learned

counsel submitted, that after suit for partition is filed, normally status quo order is obtained. Then, learned counsel was put, that if a status quo order is not obtained, then what is the consequence, to which the learned counsel very frankly, and fairly conceded, that the things, as prevailing at the time of making request for partition are to continue.

44. This, in my opinion, is sufficient to negative the petitioner's this contention. Admittedly, on 4-2-2004 itself, the petitioner had already filed a suit for partition, and thus the petitioner had already exercised the option available to him, to have the partition effected, as provided, in para 4 of the decree. It is a different story, that in that suit, the petitioner, as noticed above, had already made a request for temporary injunction, restraining his dispossession, and that prayer had already been turned down, right upto this Court. In that view of the matter, the remedy of partition, sought by the petitioner will have its own course, in accordance with law, and simply because the petitioner chooses to allege, that there is no impediment in partition, and the property can be partitioned right now, this Court, or the Executing Court, cannot be made to decree the suit for partition, filed by the petitioner. One does not know, as to what objections, the present respondents have, or may have, in accordance with law, in that suit for partition, and therefore, in view of the prayer for temporary injunction having been already refused, the natural consequence is, as conceded by the learned counsel for the petitioner, that the things, as prevailing at the time of making the request for partition, have to be continued. Accordingly, the cyclic rotation, as per para 4 of the decree, is to operate, till the property is actually partitioned. It may also be noticed here, that in the order D/- 13-4-2004, passed in Civil Misc. Appeal No. 453/2004, filed by the petitioner, it was clearly held, that during pendency of the suit for partition, there is no sufficient ground, for grant of injunction, restraining the respondents from dispossessing the petitioner, moreso, when they are seeking dispossession through due process of law. Thus, till the request for partition is carried to its logical conclusion, in the suit filed by the petitioner on 4-2-2004, the petitioner cannot be allowed to arrest the cyclic rotation, as stipulated in para 4 of the decree.

45. Then taking up the next contention, about the requirement of strictly following the cyclic rotation, in the sense, that if for any period, or any part of the period, the possession could not be enjoyed by the concerned person, on his rotation, still the person entitled to possession, at the given point of time, has a right to remain in possession, if as per the cyclic rotation, at that time it happens to be his turn of rotation, and accordingly during the period 1-11-2003 to 31-10-2004, comes to the

turn of the petitioner, and also taking up the another limb of this argument, about non-entitlement of Moda Ram to file execution petition in the year 1989.

46. In my opinion, the argument though looks to be attractive, but then is devoid of force. True it is, that in the decree, it is not provided, as to what is to be the consequence, if the operation of the cyclic rotation is obstructed, or arrested by anyone, but then, in my view, in the very nature of things, the Courts are part of "Justice Delivery System", and therefore, the predominant consideration has to be, to advance the cause of justice, and negative any injustice, being done, or contemplated to be done, by any of the litigating parties. It is yet another established legal principle, that no-one can be allowed to take advantage of one's own wrong. The contention of the petitioner, is required to be considered, inter alia, on these principles, and if so considered, it is clear, that the petitioner has taken full advantage of the decree, by receiving cash amount, forming integral part of the decree, rather a consideration of the decree, and also having enjoyed the possession of the property in question, for the full term of his rotation, and has, thereafter, taken a U-turn, only when, according to the terms of the decree, to be just, he was supposed to deliver the possession to Moda Ram. In that view of the matter, in absence of any stipulation in the decree, as to what is to happen, in the event of operation of cyclic order being obstructed, or arrested i.e. as to whether, the petitioner is to be deprived of his turn of rotation, which he was otherwise entitled to avail, in view of his having remained in possession by his action of obstructing, or arresting operation of this cyclic rotation, or as to whether, the other parties are entitled to claim cash compensation for the loss, of their turn of rotation, I am not required to decide as to what is to happen for the past period, in these proceedings, as it is for the parties to find their remedies out, if available in law, but then, for the present purposes, in my view, the requirement of justice, at least demand, that the period of rotation of the petitioner having already come to an end, he is required to be made, to hand over the possession to the person entitled to it, next in the rotation, as per para-4 of the decree, and then the cyclic rotation to be made to operate. In view of my this finding, the Executing Court is required to deliver possession of the property, to the person next entitled to possession in rotation, after completion of the period of rotation of the petitioner, i.e. Moda Ram is to be delivered possession, who is to remain in possession for one year, then Moda Ram is to deliver possession to BabuLal, who is to remain in possession for another one year, then he is to deliver possession to KishanLal, who is to again remain in possession for one year, and then he is to deliver possession to the present petitioner, who again is to remain in possession for one year, and then to again deliver back the possession to Moda Ram,

provided of course, that in the meantime, the property is partitioned. This objection of the petitioner is thus decided.

47. Then taking up the last contention, about the decree being tantamounting to be a decree for mandatory injunction, and capable of being executed, only in accordance with the procedure prescribed for execution of the decree for mandatory injunction. In my view, this contention also has no force, inasmuch as, admittedly the suit instituted on 9-4-1980, by BabuLal, was a suit for partition, and therein on 3-4-1989, a final decree was passed, decreeing the suit for partition, and in that final decree, all other properties were partitioned by metes and bounds, and the property mentioned in para 4, by mutual consent of the parties, was kept joint, and each of the parties were held entitled to enjoy possession for a period of one year, according to the cyclic rotation, as mentioned therein, and also conferring right on the parties to partition it subsequently, if it is found to be not possible to keep it joint. This part of the decree, in my view, is a clear decree for possession, in favor of each of the parties, for a period of one year, against the party in actual possession, to become executable on completion of his period of one year of rotation. In other words, in terms of the decree, on completion of one year's rotational period, the person completing the period, acquired status of judgment-debtor, and the person entitled to possession, next in rotation, fulfils the character of decree-holder, and accordingly the decree is required to be executed as a decree for possession from time to time.

48. Viewed from this angle as well, on completion of the rotational term of one year, the decree becomes executable against the person in possession, by the person, next entitled to possession, and that decree stands, till it is executed. To put it in other words till execution, the person in possession, continues to remain in the category of judgment-debtor, and the person receiving possession, on execution of the decree, is to become judgment-debtor, only on completion of enjoying his rotational turn, and is liable to the decree-holder, being the person, next entitled to possession. Therefore also, since the petitioner became judgment-debtor, as on 31-10-1984, for the decree-holder Moda Ram, he remains the judgment-debtor, under a decree for possession, till the decree is executed, and Moda Ram is to become judgment-debtor, only after he enjoys the possession, for his rotational period, and in that event, he is to become judgment-debtor, for the decree-holder BabuLal, and so on. Taking any other interpretation, as desired by the learned counsel for the petitioner, is to result in bringing about a situation, viz. when the warrant happens to be required to be issued, the person in possession may claim to be entitled to retain possession, claiming it to be

his turn in rotation, and on completion of that rotation, when the warrant is required to be issued, for one reason or the other, he may again obstruct the enforcement of the other parties' rights for three years, and then again put, the boggy about his entitlement of the possession, such an attempt, to bring about this situation, is just preposterous, and not only makes the mockery of the Judicial System, rather is to result in the gravest abuse of the process of the Court.

49. I may also deal the contention raised during the course of arguments, about omission on the part of Moda Ram, to have not mentioned in the execution application, about the petitioner having denied to deliver possession to him, when it become due in the year 1984. Suffice it to say, that the execution application is not supposed to contain pleadings in the nature of plaint, requiring to plead all facts constituting cause of action, it is supposed to be an application, in a prescribed pro forma, having specified columns, and in the very nature of things, taking of such a plea, by decree-holder, cannot be contemplated to be a *sine qua non* for maintainability of execution application.

50. Considering the facts and circumstances, in my humble view, it is high time, that looking to the prevailing circumstances, as have prevailed during these decades, which have made it prove, that "the misfortunes of the plaintiff starts only when he gets a decree". As the proceedings for execution is the "BATTLE-ROYAL", ahead of him to be fought against the judgment-debtor, and that the Legislature's attention is required to be drawn to appropriately reconsider about the matter, by making appropriate amendment in the Civil Procedure Code, so as to relieve the decree-holder, of the obligation to have the decree executed, by making appropriate provision for the judgment-debtor, to come-forward before the Court, and show his having satisfied the decree, at the pain of appropriate penal, and financial consequences. In my humble view, this is the only practical way out, required to be legally provided to curb the proverbial obstructionist attitude of the judgment-debtors, and eliminating the docket of execution proceedings, which constitutes very significant share, of the volume of litigation, pending, in practically all the Courts, and at all levels.

51. The next result of the aforesaid discussion is, that I do not find any force in the revision petition, and the same is, therefore, dismissed summarily. In view of the fact that respondents have appeared as caveators, they cannot be awarded any costs of this revision. Therefore, the parties are directed to bear their own costs.

Petition dismissed.

Cases Referred.

1. AIR 1953 Ori 74
2. (1973) 2 SCC 40: (AIR 1972 SC 1371)
3. AIR 1973 SC 2065 (paras 16 and 18)
4. AIR 1986 Raj 170
5. AIR 1986 Ker 49
6. AIR 1964 SC 874
7. AIR 1977 SC 129
8. AIR 1952 Tranvancore Cochin 179
9. AIR 1951 Orissa 46
10. 2001 Raj LW 489: (AIR 2001 Raj 51)