



GAHC010064862023

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/60/2023

DEBABRATA SAHA
S/O LATE SURESH CHANDRA SAHA,
RESIDENT OF SUBHASH NAGAR, KARIMGANJ TOWN, PO , PS AND DIST
KARIMGANJ, ASSAM

VERSUS

NIBEDITA DAS AND 6 ORS.
D/O LATE SARAJ KUMAR DAS,
RESIDENT OF CHARAN ROAD, KARIMGANJ, WARD NO. 5, PO PS AND DIST
KARIMGANJ, ASSAM 788710

2:SMTI NABANITA DAS

D/O LATE SARAJ KUMAR DAS

RESIDENT OF CHARAN ROAD
KARIMGANJ
WARD NO. 5
PO PS AND DIST KARIMGANJ
ASSAM 788710

3:SRI BISWAJIT BHATTACHARJEE
S/O LATE PARESH BHATTACHARJEE

RESIDENT OF SUBHASH NAGAR
KARIMGANJ TOWN
PO
PS AND DIST KARIMGANJ
ASSAM

4:SMTI MEERA BHATTACHARJEE



D/O LATE PARESH BHATTACHARJEE

RESIDENT OF SUBHASH NAGAR
KARIMGANJ TOWN
PO
PS AND DIST KARIMGANJ
ASSAM

5:SMTI SUPRIYA BHATTACHARJEE
D/O LATE PARESH BHATTACHARJEE

RESIDENT OF SUBHASH NAGAR
KARIMGANJ TOWN
PO
PS AND DIST KARIMGANJ
ASSAM

6:SMTI SHILA BHATTACHARJEE
D/O LATE PARESH BHATTACHARJEE

RESIDENT OF SUBHASH NAGAR
KARIMGANJ TOWN
PO
PS AND DIST KARIMGANJ
ASSAM

7:SMTI SHUMA BHATTACHARJEE
D/O LATE PARESH BHATTACHARJEE

RESIDENT OF SUBHASH NAGAR
KARIMGANJ TOWN
PO
PS AND DIST KARIMGANJ
ASSA

Advocate for the Petitioner : MR. B C DAS

Advocate for the Respondent : MR. S P CHOUDHURY

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the appellant

: Mr. BC Das, Senior Advocate.

Ms. S Roy, Advocate



For the Respondents : Mr. SP Choudhury, Advocate.

Date of Hearing :10.05.2023

Date of Order :07.06.2023

JUDGMENT AND ORDER(CAV)

1. Heard Mr. BC Das, learned Senior counsel assisted by Ms. S Roy, learned counsel for the appellant. Also heard Mr. SP Choudhury, learned counsel for the caveator. Caveat stands discharged.
2. The present appeal is preferred under Section 100 of the Code of Civil Procedure'1908 assailing an order dated 24.02.2023 passed by the learned Civil Judge, Karimganj in Misc. Appeal No. 01/2022 whereby the order dated 07.01.2021 passed by the learned Munsiff No. 1, Karimganj dismissing Misc Case No. 215/2022, was affirmed.
3. The present appellant as petitioner preferred a petition under Order 21 Rule 97, 99 and 101 of the Code of Civil Procedure in Title Execution No. 06/2006 claiming right, title and interest and possession over the decretal property decreed in TS No. 332/1992.
4. TS No. 332/1992 was filed by the predecessor-in-interest of the respondent Nos. 1 and 2 against the respondent Nos. 3, 4, 5, 6 and 7 claiming that predecessor-in-interest of the respondent Nos. 3 to 7 were tenant under the plaintiff over a suit house and a prayer for eviction was made.
5. The defendants denied the tenancy under the plaintiff and claimed that he has purchased the suit premises by a registered sale deed. The learned



trial court under its judgment and decree dated 24.02.1995 and 06.03.1995 respectively dismissed the suit.

6. The plaintiff being aggrieved preferred an appeal, which was registered as TA No. 12/1995 and learned Appellate Court reversed the finding of the learned trial court and decreed the suit by holding that defendants were tenants under plaintiff and liable to be evicted from the suit house.
7. Such decision was challenged before this Court in CRP 256/2003, however, same was dismissed for non-prosecution by this court and thus the judgment passed in TA No. 12/1995 attained finality.
8. The decree was put into execution by filing Title Execution Case No. 06/2006. The judgment debtor filed an application under Section 47 CPC, 1908, which was registered as Misc. Case No. 14/2018, inter-alia, claiming that description of the suit land given in the decree was not correct. However, said Misc. Case was dismissed by the learned Executing Court and such dismissal order was unsuccessfully challenged before this Court in CRP No. 58/2011.
9. Thereafter, another person, namely, Malay Kar filed an application before the Executing Court under Order XXI Rule 97 resisting the execution of decree on the ground that he is co-sharer of the decretal land and he is enjoying right, title, interest and possession over the suit property jointly through common tenant along with the decree holder and therefore decree was not executable without his permission. Such petition was also rejected by the learned Executing Court holding that a co-owner can maintain a suit for eviction and accordingly, the learned Court continued with the execution.

10. Thereafter, the judgment debtor filed yet another application under Section 151 CPC'1908 before the learned Executing Court with a prayer to absolve them from the Execution proceeding since they have in the meantime handed over khas possession of the decretal land to Malay Kar (who claims to be co-sharer of the suit property and whose petition was earlier rejected) by executing an unregistered deed dated 11.07.2009. The learned executing court rejected such petition by its order dated 02.03.2020 holding that alleged handing over possession of the decretal land is not legally done as Malay Kar is not entitled to get the possession of the decretal property, rather the decree holder is entitled for such possession and accordingly, the learned executing court proceeded with the executing proceeding.
11. Thereafter, on 16.12.2020 the present appellant preferred an application under Order 21 Rule 91, 99, 101 resisting the decree, which was registered as Misc. Case No. 215/2020. The appellant claimed through the said petition title over the suit property on the basis of an registered deed of agreement for sale. According to Appellant, such Deed was executed by Malay Kar for an agreed consideration of Rs. 2,50,000/-. It was also claimed that already Rs. 1,50,000/- was paid to Malay Kar and the possession of the property was handed over to the appellant by Malay Kar.
12. The learned executing court dismissed the Misc. Case under the impugned order dated 07.01.2021 on the following considerations:
 - I. Rule 102 of Order XXI of CPC specifically exclude transferee *pendente lite* from seeking any relief under Rule 97 and 98 and thus such Rule recognises doctrine of lis pendens under Section 52 of the TP Act, 1982 to protect the decree holder in the present case

inasmuch as the petitioner was resisting his possession on the basis of an agreement for sale.

II. Relying on the decision of ***Hon'ble Apex Court in the case of Usha Sinha vs Dina Ram reported in AIR 2008 SC 997***, the learned executing court concluded that a helping hand cannot be extended to purchaser of property in respect of which litigation is pending and if such relief is extended the decree holder shall never be able to realise the fruits of the decree.

III. The claim of the petitioner regarding non identification of the decretal property was also rejected on the ground that the petitioner is not raising any grievance in respect of the four boundaries of the decretal property inasmuch as he is not denying that the shop house which he is occupying is not the same shop house under the decree. It was held that the decretal house is identifiable for the purpose of execution of the decree. Accordingly, such petition was dismissed.

13. Being aggrieved, Misc. Appeal No. 01/2022 was preferred before the learned Civil Judge, Karimganj. The learned Civil Judge dismissed the appeal under its order dated 24.02.2023 and upheld the decision of the learned executing court. While doing so, the learned appellate court concluded the following:

I. The vendor Malay Kar, even if admitted to be co-owner of the suit property is having no right to sell the property without partition.

II. The application filed by Malay Kar before the learned

executing court resisting the decree was also dismissed inasmuch as Malay Kar's title was not recognised by the learned executing court.

III. The decision of the learned executing court that the decretal property needs to be handed over only to the decree holder, in the proceeding initiated Malay Kar remained unchallenged.

IV. The dispute raised by the judgment debtor regarding identification of the decretal property was also rejected by the learned executing court in the proceeding initiated by the judgment debtor and has attained finality.

V. Therefore, there is no any impediment in identification of the suit property. The learned appellate court also upheld the decision on *pendente lite* transfer and accordingly dismissed the appeal with a cost of Rs. 5,000/-.

VI. Against the aforesaid two decisions, the second appeal is filed.

14. Mr. B.C. Das, learned Senior counsel argues the followings:

I. The judgment debtor in TS No. 332/1992 admittedly handed over possession of the decretal property to one of the co-sharer, namely, Malay Kar, therefore, such transfer *pendente lite* shall not come within the meaning of Order 21 Rule 102 of the CPC.

II. The appellant is claiming right, title and possession over the decretal property on the basis of a registered agreement

for sale executed by a co-owner and therefore such transfer cannot be said to be a transfer *pendente lite* within the scope of Order 21 Rule 102 of CPC.

III. The learned Appellate Court committed serious error of law by holding that transfer made by Malay Kar was hit by Section 44 to 47 of the TP Act, 1882 inasmuch as such transfer was made after surrender of possession by the judgment debtor to Malay Kar, who is admittedly a co-sharer.

15. Per Contra Mr. SP Choudhury, learned Counsel appearing for caveator/decreed holder submits that no substantial questions of law arises in the present case inasmuch as the conduct of the parties clearly shows that the petition filed before the learned Executing Court by the Appellant was at the behest of the original judgment debtor. The judgment debtor first attempted to resist execution of the decree on the ground of identity of the decretal property and when such attempt was failed brought Malay Kar to resist the decree on the ground that decree is not executable against Malay Kar. When such attempt was also unsuccessful then purportedly handed over possession to Malay Kar and filed an application to absolve them from the execution of the decree. When such attempt also failed, now the present appellants were brought in showing that said Malay Kar has handed over possession to the present appellant. The factual aspect has already been determined by the learned trial court and affirmed by the learned Appellate Court and therefore, such concurrent finding of fact should not be interfered in a second appeal when nothing has been shown that the aforesaid concurrent factual determination are perverse.

16. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties.
17. The Hon'ble Apex Court in the case ***Usha Sinha (supra)*** inter alia held that a *pendente lite* purchaser had no right to offer resistance or cause obstruction as the purchaser's right had not been crystallised in a decree. Rule 102 of Order XXI clarifies that Rules 98 and 100 would not apply in cases where resistance or obstruction in execution was offered by a transferee *pendente lite*, where the property was transferred by a judgment debtor to such a person after the institution of a suit in whose decree sought to be executed was passed.
18. The Order 21 Rule 97, 98 and 101 empowers an executing court to determine the dispute between the decree holder and a third party who resist such execution of decree. The executing court is also within its competence and jurisdiction to determine the title of the third party whether it is derived from the judgment debtor or on its own.
19. In the case in hand the executing court adjudicated the claim of the appellant and came to a finding that being a transferee *pendente lite*, the appellant's petition was barred under Rule 102 of the CPC, 1908. There is no dispute to the fact that the decree was passed on 06.03.1995 and the appellant claims to have acquired his right of possession during the pendency of the execution proceeding from one Malay Kar. It is also an admitted fact that obstruction raised by said Malay Kar on the basis of his own right and on the ground that decree is not executable against him, was also negated by the learned executing court and such determination has attained finality.

20. The prayer of the judgment debtor to absolve from execution of the decree for the alleged reason that the judgment debtor had satisfied the decree by handing over possession to Malay Kar was also rejected and such determination attained finality. Thus, the determination made by the learned Executing Court that decree is to be executed by handing possession to the decree holder remains unchallenged. Admittedly, the appellants entered the shoes of Malay Kar through a agreement for sale. Thus findings of the learned Appellate Court that such Agreement for sale does not confer any right and title ca not be faulted with.
21. In the aforesaid factual backdrop, the determination made by both the learned courts below that transfer was a transfer *pendente lite* and therefore, the transferee is having no right to resist such decree, in the considered opinion of this Court, is a correct view and based on settled proposition of law.
22. Law is well settled that in view of mandate of Rule 102 of Order 21, the Rules 98 and 100 is no applicable to resistance or obstruction in execution of a decree for possession of immovable property by a person whom the judgment debtor has transferred the property after institution of the suit in which decree was passed. It is true that in the case in hand the agreement for sale was not executed by the judgment debtor but by another person to whom the judgment debtor had purportedly handed over possession. As discussed herein above the action of judgement Debtor handing over the possession to the Malay Kar was rejected and also the obstruction raised by Malay Kar to the execution of decree. Therefore, for all meaning and purport, the possession got



transferred from the Judgement Debtor to the Appellant during the pendency of the Execution proceeding. The fact also remains that Malay Kar was well aware of rejection of his right and despite that he had handed over the possession to the Appellant.

23. In view of the aforesaid, this court is in total agreement with the view of the learned courts below. This court is of the view that the learned courts below has not ignored or misinterpreted or misapplied the provisions of Order 21 Rule 102 inasmuch as such decision was based on well settled principle of law enunciated by the Hon'ble Apex Court more particularly the decision in ***Usha Sinha (supra)***.

24. Accordingly, this court finds that no substantial question of law which is debatable, not previously settled having a material bearing on the decision of the case if answered either way, is involved in the present case. Accordingly, the same stands dismissed. Parties to bear their own cost.

JUDGE

Comparing Assistant