

2022 SCC OnLine Gau 2161 : (2022) 5 Gau LR 671 : (2022) 236  
AIC 515

In the High Court of Gauhati  
(BEFORE DEVASHIS BARUAH, J.)

Jadav Chandra Chetia ... Petitioner;

*Versus*

Amila Bawri and Others ... Respondents.

CRP No. 44 of 2018

Decided on June 2, 2022

Civil Procedure Code, 1908, S. 115 — Powers of the High Court under section 115, CPC is not akin to the appellate power — Jurisdiction conferred upon the High Court can only be exercised when the court below had exercised a jurisdiction not conferred upon it by law or had exercised a jurisdiction illegally or with material irregularity

[Para 14]

Civil Procedure Code, 1908, O. 7, R. 3 and O. 22, R. 3 — Suit in regard to an immovable property decreed — Property not definitely identified — Defect in the court record caused by overlooking of provisions of order 7, rule 3 and order 22, rule 3, CPC is capable of being cured — Court can take resort to section 152 or section 47, CPC depending on the facts and circumstances of each case — Exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of section 47, CPC.

Advocates who appeared in the case:

Mr. N.C. Das and Ms. M. Borah for the petitioner.

Mr. A.K. Gupta and Mr. R.S. Mishra for the respondents.

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*Case referred:*

*Pratibha Singh v. Shanti Devi Prasad*, (2003) 2 SCC 330.

#### JUDGMENT AND ORDER

1. Heard Mr. N.C. Das, learned senior counsel assisted by Ms. M. Borah, learned counsel for the petitioner and Mr. R.S. Mishra, learned counsel appearing on behalf of the respondent.

2. This application had been filed under section 115 of the Code of Civil Procedure ('the Code') challenging the orders dated 30.7.2016 passed in Misc. (J) Case No. 63/2012 and 11.1.2018 passed in Misc. (J) Case No. 135/2016, both arising out of Title Execution Case No. 21/2009 by the Court of Munsiff No. 1, Dibrugarh, which is the Executing Court.

3. The brief facts of the instant case are that the decree holder, i.e., the respondent herein, as plaintiff had instituted a suit which was registered and numbered as Title Suit No. 104/1999. In the said suit, the plaintiff sought for a decree for eviction of the defendant; for delivery of khas possession by removing the defendant and his family members with all their belongings in respect to the suit land as described in Schedules A and B of the plaint. The defendant had filed his written statement. Pursuant thereto, by a judgment and decree dated 30.8.2005, the suit was decreed in favour of the plaintiff granting the reliefs as sought for.

4. Being highly aggrieved and dissatisfied, the petitioner herein preferred an appeal before the Court of Civil Judge, Dibrugarh which was registered and numbered as Title Appeal No. 43/2005. The said appeal was dismissed by a judgment and decree dated 16.9.2009. No appeal therefrom was filed and as such the judgment and decree dated 16.9.2009 by which the judgment and decree dated 30.8.2005 passed by the trial court was affirmed.

5. Thereupon, the decree holder-respondent herein filed an execution case which was registered and numbered as Title Execution Case No. 21/2009 before the Executing Court, i.e., the Court of the Munsiff No. 1 at Dibrugarh. In the said proceedings, the petitioner herein filed an application under section 47 of the Code challenging the executability of the decree dated 30.8.2005 passed in Title Suit No. 104/1999 and subsequently confirmed by the judgment and decree dated 16.9.2009 passed by the Appellate Court in Title Appeal No. 43/2005.

6. A perusal of the said application would show that in paragraphs 6 and 7, the petitioner herein had stated that the petitioner was in fact the tenant of Chabua Tea Company and obtained the tenancy khatian therein

which was filed in the suit being part of Dag No. 339 of Periodic Patta No. 44 of Chabua Town with land revenue paying receipts. It was also stated that there is no such dag as Dag No. 339 in Periodic Patta No. 3. On the basis of that, the petitioner-judgment debtor alleged that the

decree which was obtained by the decree holder-the plaintiff was on the basis of filing false documents while the Periodic Patta No. 44 which included the Dag No. 339 is owned by Chabua Tea Estate and not by the decree holder. It was further mentioned there is no Dag No. 334 in Periodic Patta No. 3 as falsely claimed in the suit and it belonged to "Mahatos" far away from the suit land. On the basis of that, the petitioner submitted that the said decree was not executable.

7. It further appears from the records that the petitioner herein had also adduced evidence of 2 witnesses and marked various documents as exhibits. The decree holder had also adduced evidence of 2 witnesses. The Executing Court vide an order dated 30.7.2016 after hearing both the sides came to a finding that a new dag number and patta number was allotted to the said plot of land and the said documents were not challenged. It was further observed that Ext. B (Possession Certificate) further confirmed that Periodic Patta No. 44 is the new Periodic Patta in respect to the Periodic Patta No. 3. The Executing Court further observed that the plea taken by the judgment debtor vide the petition was never raised before the trial court or before the Appellate Court and, thus, cannot be entertained before the Executing Court. Consequently, the Executing Court opined that the description of the suit land is not irregular and the Periodic Patta No. 44 is the new patta number in respect to Periodic Patta No. 3(old) of Dag No. 502(new)/339(old).

8. It further appears from the records that a review application was filed against the order dated 30.7.2016. The said review application was registered and numbered as Misc. (J) Case No. 135/2016. From perusal of the said review application, it transpires that the grounds taken therein were that the order dated 30.7.2016 passed was blatantly erroneous on the ground that the draft khatian as per the Assam Land and Revenue Regulation, 1886 had neither any evidentiary value nor recognized as a record of right either under the Assam Adhiars Protection and Regulation Act, 1948 or by the Assam (Temporarily Settled Areas) Tenancy Act, 1971 or by the Assam Land and Revenue Regulation, 1886.

Another ground which has been taken is that the order dated 30.7.2016 was also erroneous on the face of the record as the court had without any evidence on record or reliable documents before the court had come to a finding that Dag No. 339(old) pertains to P.P. No. 3(old) corresponding



to Dag No. 502{new) of P.P. No. 44(new), inasmuch as, after the last resettlement operation closed in 1973-1974, neither patta numbers or dag numbers are changed and finally granted as P.P. No. 3 consisting of Dag Nos. 132, 133, 134, 453 and 88 as well new P.P. No. 44 consisting of Dag No. 339. The other grounds which have been taken in the review petition primarily were on the ground that the Executing Court while passing the order dated 30.7.2016 had committed an error which is apparent on the face of the record as regards the identity of the land. Objections were duly filed to the said application seeking review.

9. The Executing Court vide an order dated 11.1.2018 rejected the review application holding, inter alia, that no case of an error apparent on the face of the record had arisen, inasmuch as, the court had taken into consideration the various aspects of the matter and on the basis thereof have passed the said order dated 30.7.2016. Consequently, it was held that the review petition was not maintainable. It is against these two orders dated 30.7.2016 and 11.1.2018 that the petitioner has approached this court under section 115 of the Code.

10. I have heard Mr. N.C. Das, learned senior counsel for the petitioner who submits that the Executing Court had committed a jurisdictional error in passing the impugned order dated 30.7.2016, inasmuch as, the decree is in respect to a particular plot of land and the execution is sought to be carried out in respect to another plot of land. He further submits that it is well established principle of law that the Executing Court cannot go behind the decree and the duty of the Executing Court is only to execute the decree as it stands.

11. On the other hand, Mr. R.S. Mishra, learned counsel for the respondent submits that the evidence on record would clearly show that there is no change in the Schedule of the decretal land, inasmuch as, the old P.P. No. 3 has become new P.P. No. 44 and old Dag No. 502 has now become new Dag Nos. 339 and 338, respectively. He further submits that the said aspect could be seen from a perusal of Ext. B which is the certificate issued by the Circle Officer dated 2.12.1997 and as such, there arise no question of the Executing Court executing the decree in respect to a different plot of land.

12. I have heard the learned counsel for the parties and given my anxious consideration to the matter.

13. This court is exercising the powers under section 115 of the Code. The said power is not akin to the appellate power. The jurisdiction which is being conferred upon this court can only be exercised when the court



below had exercised a jurisdiction not conferred upon it by law or failed to exercise its jurisdiction which is conferred upon it by law or had exercised a jurisdiction illegally or with material irregularity. A perusal of the decree would show that the decree has been passed in respect to two plots of land, i.e., Schedules A and B. Both the said plots of land are part of Dag No. 339 of P.P. No. 3 situated in Chabua Town under Mouza Chabua in the District of Dibrugarh. The boundaries of the said land have been specifically mentioned in the decree. The question which arose for consideration before the Executing Court is as to whether the P.P. No. 3(old) is now the P.P. No. 44(new) and as to whether the old Dag No. 502 is now Dag No. 339 and 338. The certificate issued by the Circle Officer, Chabua Revenue Circle dated 2.12.1997 stipulates that on the basis of the application filed by Smt. Amila Bawri, she was allotted the patta bearing Nos. 3(old)/44(new) in respect to Mouza Chabua pertaining to Dag No. 502(new)/339 and 338 (old) measuring a plot of land of 3 Kathas. It has also been mentioned that the said Smt. Amila Bawri was allotted the land on the basis of her possession for the last 42 years. From the materials on record, therefore, the Executing Court came to a finding in its order dated 30.7.2016 that the P.P. No. 44 is the new periodic patta number in respect to P.P. No. 3(old). At this stage, it may be also relevant to take into consideration the cross-examination of the petitioner herein who was a petitioner witness No. 1. He stated that he had never mentioned that the decretal land and the land mentioned in the section 47-Application are different. He further stated that he did not know as to whether there was change in the Dag and Patta No. of the suit land. He further stated that he did not know how much land is there in Exhibit 3 and who has purchased how much land. He also stated that he does not know as to whether the suit land was there in the Jamabandi. He had filed the application on the basis of some information received from one person named, Mr. Khemani. He further stated that he did not know as to whether the suit land presently has been allotted Dag No. 339 of Patta No. 44. Thus, from the cross-examination of the petitioner it would be seen that he had filed the application without having any knowledge as to whether the suit land was allotted a new Patta Number and Dag Number. Under such circumstances, this court does not find any infirmity in the order impugned in the present proceedings.

14. At this stage, it may be relevant to take into consideration the judgment of the Supreme Court rendered in the case of *Pratibha Singh v. Shanti Devi Prasad*, (2003) 2 SCC 330, wherein the Supreme Court at paragraph 17 observed that when the suit in relation to an immovable property is decreed and the property is not definitely identified, the defect in the

court record caused by overlooking of provisions contained in Order VII, Rule 3 and Order XX, Rule 3, CPC is capable of being cured. The Supreme Court further observed that taking into account that a successful plaintiff should not be deprived of the fruits of decree, resort can be had to section 152 or section 47 of the Code depending on the facts and circumstances of each case, which of the two provisions would be more appropriate, just and convenient to invoke. It was further observed that the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of section 47 of the Code. Paragraph 17 being relevant is quoted herein below:

“17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in order 7, rule 3 and order 20, rule 3, CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to section 152 or section 47, CPC depending on the facts and circumstances of each case — which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under section 152, CPC by the court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the executing court as a question relating to execution, discharge or satisfaction of decree within the meaning of section 47, CPC. A decree of a competent court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case, we think it would be more appropriate to invoke section 47, CPC.”

15. Thus, it would be seen that what the learned Executing Court had done by passing the order dated 30.7.2016 had exercised a jurisdiction conferred upon it under section 47 of the Code for which this court is not inclined to interfere under section 115 of the Code. It is the opinion of this court that the exercise of jurisdiction by the Executing Court in the order dated 30.7.2016 is in accordance with law. This court also does not find any error in the order dated 11.1.2018 passed in Misc. (J) Case No. 135/2016.

16. Consequently the instant petition is dismissed. In view of the dismissal of the instant petition, the stay order so passed by this court

whereby the execution proceedings, i.e., Execution Case No. 21/2009 was stayed is hereby vacated and the parties are directed to appear before the Executing Court on 21.6.2022. In the present facts, this court is not inclined to impose any costs.

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17. With the above observations, the petition stands disposed.

18. The Registry is directed to forthwith transmit the records to the court below.

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