

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA.

CMPMO No.77 of 2007

Date of Decision : 29.6.2007

Inder Ram

...Petitioner.

Versus:

Radha Krishan & others

...Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, ACJ.

Whether approved for reporting?¹ No

For the petitioner: Mr. Ashwani Sharma, Advocate.

For respondent No.1: Mr. Naresh Thakur, Advocate.

For respondent No.2: Mr. Dushyant Dadhwal, Advocate.

For respondent No.3: Mr. Ashok Sharma, Advocate.

Deepak Gupta, ACJ.

This petition is directed against the order dated 14.3.2007 passed by the Civil Judge (Sr. Division), Hamirpur, whereby he has rejected the application filed by the petitioner herein for appointment of Local Commissioner in an Execution Petition. The decree holder, petitioner herein, had filed a suit against the respondents (judgment debtors), which was decreed

¹ Whether reporters of Local Papers may be allowed to see the judgment?

in his favour on 20.9.2004, in the following terms:

"31. The suit of the plaintiff is decreed to the effect that plaintiff is having right to path as has been shown by letters ACDEFGHIJKLB in the site plan Ex.PW2/B having 3 meters of width and defendants have encroached upon said path as the encroachment has been shown in the L.C. report Ex.PA/2, supplementary report Ext.PA/3 and Tatima /field book Ex.PA/4. The defendants are hereby directed to remove the aforesaid encroachment i.e. C/1 comprising khasra No. 2665/690/1 measuring 4-00 'Gair mumkin Pouri' and wall, B/1 comprising khasra No. 2665/690/2 measuring 8-75 'Gair mumkin Varandah', gate and wall and A/1 comprising khasra No. 916/1 measuring 4-88 'Gair mumkin Danga', from the aforesaid path, by way of decree of mandatory injunction. Defendants are further restrained by way of permanent prohibitory injunction from causing any interference or interfering in any other manner whatsoever in the free and unobstructed running of the aforesaid path situated in Up-Mahal Lalhri, Mouza Bajuri, Tehsil and District Hamirpur. The Tatima / field book Ex.PA/4 shall form part of the decree sheet. Parties shall bear their own costs."

An appeal was carried against the said judgment before the learned District Judge, Hamirpur by two of the defendants but the same was dismissed on 8.11.2005. Thereafter, the petitioner filed an execution petition being Ex. Petition No. 15/2006 before the trial Court. The judgment debtors filed objections to the execution petition. The objections

were dismissed by the learned trial Court on 26.8.2006 and the Civil Judge on the said date directed the judgment debtors to comply with the decree in letter and spirit within a period of 30 days, failing which the decree holder would be at liberty to apply for execution of the decree and on 21.11.2006, the trial Court framed the following issue:

- "1. Whether the JDs have violated the judgment and decree dated 20.9.2004 despite having an opportunity to obey it? OPP "

This issue was framed on 21.11.2006 and the matter was listed for evidence on 30.8.2007. I fail to understand why the learned trial Court adjourned the matter for nine months for this purpose. No reason has been given in the order as to why such a long date was given.

The decree holder thereafter filed an application under Order 21 Rule 32(5) and submitted that since the decree holder has not complied with the decree, the process of execution of the decree be issued to the Revenue Officer. This application was also contested. The learned trial Court vide order dated 18.1.2007 came to the conclusion that the Court must be satisfied that the decree for injunction has not been obeyed and only then other action can be taken. According to the learned trial Court, unless violation of the judgment and decree is proved, provisions of Order 21 Rule 32(5) cannot be invoked. There is a difference between disobedience of a decree

or willful disobedience thereof. The decree holder was complaining that the judgment debtors had not complied with the terms of the decree. The Court had given an opportunity to the judgment debtors to comply with the terms of the decree. Thereafter, the decree holder filed an application praying that a Local Commissioner be appointed to visit the spot and to report whether the JDs have complied with the decree under execution or not and whether the encroachment, as pointed out in the decree, still exists on the spot or not. This application has been dismissed by the learned trial Court primarily on the ground that the provisions of Order 26 Rule 9 are not applicable to an execution petition. The trial Court has relied upon a judgment of Apex Court in ***Bhushayya* vs. *Rama Krishanayya*** (AIR 1962 SC 1886). It appears that the learned trial Court has not even perused the bare provisions of the CPC. The authority relied upon by the trial Court was given in the context of the Civil Procedure Code as it stood prior to its amendment in the year 1976. Vide The Code of Civil Procedure (Amendment) Act, 2002, Rule 18-A and Rule 18-B have been inserted. Order XXVI Rule 18-A reads as under:-

“18-A. Application of Order to execution proceedings:- The provisions of this Order shall apply, so far as may be, to proceedings in execution of a decree or order.”

A bare perusal of the Rule clearly shows that the learned Civil Judge has totally misdirected itself. The second

ground taken by the learned trial Court is that it was for the decree holder to prove that the JDs have violated the judgment and decree and the burden of proving this issue upon them. He has relied upon two judgments of this Court in ***Diwakar Dutt*** vs. ***Ranjit Singh*** (1997 (1) SLJ 242 and ***Jeet Ram*** vs. ***Sita Ram*** (2002 HLJ 1173). In my opinion, both these judgments are totally inapplicable and since these related to appointment of Local Commissioners in civil suits.

In the present case, the decree had been passed in favour of the decree holder. According to the decree holder, the decree had not been complied with by the respondents. The terms of the decree have been quoted hereinabove. It is apparent that the decree was also passed on the basis of the report of the Local Commissioner. The question whether the decree had been obeyed by the judgment debtors, could only be decided by appointing a Local Commissioner. It is only after demarcation by the Local Commissioner that the Court can determine whether the decree has been obeyed or not. It is the duty of every Court to ensure that a decree passed by it is duly executed. The order of the learned trial Court is not only against the basic provisions of the CPC but is also against the settled legal position.

Therefore, the order of the learned trial Court is set aside and the application filed by the decree holder is allowed. I hereby appoint the District Revenue Officer, Hamirpur, to be the

Local Commissioner in the case. His fee is fixed at Rs.3,000/-, which shall be paid by the petitioner.

The parties through their counsel are directed to appear before the learned trial Court on 1st August, 2007. The trial Court on the said date, shall make appropriate reference to the Local Commissioner and ensure that the same is delivered to the Local Commissioner within one week. The Local Commissioner shall visit the spot after giving notice to the parties and after making demarcation on the spot in accordance with law, shall file his report as to whether the decree in question has been complied with by the defendants or not. This report shall be submitted by him to the trial Court latest by 29th August, 2007 and the matter shall be listed before the trial Court on 30th August, 2007 as already fixed. The learned trial Court is directed to ensure that the execution proceedings are taken to their logical conclusion at the earliest and in any event not later than 31st December, 2007.

**(Deepak Gupta),
Acting Chief Justice.**

**June 29, 2007.
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