

**IN THE HIGH COURT OF HIMACHAL PRADESH AT
SHIMLA**

CMPMO No. 367 of 2017

Reserved on : 17.3.2018

Decided on : 29.3.2018

Paras Ram

...Petitioner/Decree Holder/Plaintiff

Versus

Om Parkash and another

...Respondents

Coram

Hon'ble Mr. Justice Sureshwar Thakur, Judge.

Whether approved for reporting? yes

**For the petitioner : Mr. Ramakant Sharma,
Advocate.**

**For the respondents: Mr. Aman Deep Sharma,
Advocate.**

Per Sureshwar Thakur, Judge

A conclusive binding executable decree vis-à-vis suit Khasra No. 5, was rendered under Ext. A-1, whereupon the defendants, were, permanently restrained from changing the nature of the suit land, and, from raising any construction thereon, till, dismemberment of the undivided estate, occurs by metes and bounds. The afore-referred decree for permanent prohibitory injunction, was, put to

execution by the plaintiff-Decree Holder. However, during pendency of the apposite execution petition bearing No. 3 of 2009, the plaintiff instituted, therefore, an application, cast under the provisions of Order 26 Rule 9 CPC, (a) wherein he sought appointment of a Local Commissioner, for holding the suit land to demarcation, for ascertaining whether willful disobedience, vis-à-vis the mandate, of a conclusive binding decree of permanent prohibitory injunction, hence emanated. The learned Executing Court, proceeded to, under the impugned order, decline, relief to the plaintiff/Decree Holder, hence the latter is aggrieved therefrom, hence, has through the instant appeal, made a concert to beget its reversal.

2. The short reason, which is assigned by the learned Executing Court, for declining relief to the plaintiff/Decree Holder, is comprised in the factum, of, a petition, cast under Order 21 Rule 32 CPC, (a) holding penal consequence, and, hence the assistance of the Court, as concerted, by the Decree Holder, for proving infringements, if any by the JD, vis-à-vis the mandate of a conclusive binding decree, of permanent prohibitory injunction, rather being unavailable to him b) especially it being not the duty of the Court, to collect evidence on behalf of any party to the lis, rather, it being incumbent upon the petitioner, to

prove purported violations, by the Judgment Debtor, vis-à-vis the conclusive binding decree, rendered by the Civil Court. The aforesaid reasons' assigned by the learned Executing Court are per se flimsy a) given the learned Executing Court remaining unmindful, to factum of the provisions of Order 26 Rule 9 CPC, being available to the Court concerned, for theirs being recoured, conspicuously for hence making the relevant ascertainties, b) also whereupon alone the Courts would be sufficiently satisfied qua the Judgment Debtor, hence infringing or not infringing the mandate, of the apposite decree. Consequently, if the mandate of order 26 Rule 9 CPC, is assuredly meant, for Courts concerned, for theirs taking recourse thereto, (c) thereupon the apposite recourse(s) as aspired by the Decree Holder, could not be throttled, merely, on the per se flimsy reason, of it, being rather incumbent upon the petitioners/Decree Holders, to prove the apposite violation(s), (C) especially when the best evidence for validating or invalidating the espousal(s) of the decree holder, would, emanate, only, upon the Local Commissioner concerned purveying its report, (d) rather than from the oral testification(s) rendered by the Decree Holder or by his witness(es).

3. Be that as it may, the learned Executing

Court, has by assigning the aforesaid reasons, meted irreverence vis-à-vis the mandate of Order 29 Rule 6 CPC, also has proceeded to relegate, into the realm of redundancy, the innate nuance, of the provisions borne in Order 26 Rule 9 CPC, hence, has abandoned its duty, to ensure efficacious execution, of the conclusive decree for permanent prohibitory injunction, pronounced vis-à-vis the suit land, (a) significantly also when the joint estate, in respect whereof, the apposite decree is pronounced, yet remains unpartitioned by metes and bounds, nor when hence the part thereof, qua wherewith the alleged infringement has purportedly occurred, is also hence not demonstrated, upon its partition, to hence stand allotted to the Judgment Debtor, (f) thereupon dehors the penal consequence(s) ensuing, from, proven infringements, being made by the Judgment Debtor, vis-à-vis the mandate of the decree, it was not befitting, for the learned Executing Court, to decline relief upon, the application preferred before it, under the provisions of Order 26 Rule 9 CPC. It is not only the duty of the parties concerned, but also the duty of the Court, to ensure efficacious execution of the apposite decree, moreso, when adduction of best documentary evidence would secure a conclusive binding verdict qua occurrence(s), of apposite infringement(s). Consequently,

the reasons aforesaid assigned, by the learned Executing Court, are thoroughly flimsy, specious and, are sequelled by gross non-application of mind. The learned trial Court has not exercised the jurisdiction vested in it under law, also the impugned order is permeated with a vice of material irregularity and illegality. Hence, there is merit in the petition and the same is allowed. The impugned order, rendered by the learned Civil Judge (Senior Division) Nadaun, District Hamirpur in CMA No. 24 of 2017 in Civil Execution No. 3 of 2009, upon application under Order 26 Rule 9 CPC, is quashed and set aside. The learned trial Court is directed to appoint a Local Commissioner, to visit the relevant site, for his making the apposite ascertainment(s), qua whether, willful disobedience(s), vis-à-vis the mandate, of conclusive binding decree of permanent prohibitory injunction, has or not emanated. The records be sent back forthwith. The parties are directed to appear before the learned Court below on 16.4.2018.

All pending application(s), if any, are disposed of. No costs.

(Sureshwar Thakur)
Judge

March , 2018
Kalpana