

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**Reserved on: 14.09.2023.
Pronounced on: 18/10/2023**

CM(M) No. 208/2021

Dr. Abid Hussain, aged 62 years S/o Hakim
Mohammad Afzal R/o Shri Bhat (Nowshera)
Srinagar.

.....Petitioner

Through: Mr. Hakim Suhail Ishtiaq, Advocate.

Vs

1. State (now Union Territory) of J&K
through Chief Secretary, J&K
Government, Srinagar.
2. Commissioner-cum-Secretary,
Health and Medical Education
Department, J&K Government,
Srinagar/Jammu.
3. Director, Health Services Kashmir,
Srinagar.

..... Respondent(s)

Through: Mr. Sajad Ashraf, GA

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

1. The Petitioner, through the medium of this petition, has invoked the supervisory jurisdiction of this Court under Article 227 of the Constitution of India, being aggrieved of the order dated 27.08.2021 (for short the 'Impugned Order') passed by the Court of Sub-Judge/Chief Judicial Magistrate, Srinagar (for short 'Executing Court') while deciding an application under Section 47 of the J&K Civil Procedure Code (for short the 'Code') filed by Respondents- Judgement Debtors in an execution petition titled Dr. Abid Hussain *v.* State of J&K & ors. filed by Petitioner-Decree

Holder seeking execution of judgment and decree dated 16.10.2008.

2. In terms of the Impugned Order, the Executing Court has declared the decree dated 16.10.2008, passed in a suit titled Dr. Abid Hussain *v.* State of J&K & ors. filed by the Petitioner-Decree Holder against the Respondents-Judgement Debtors, as bad in law and void ab initio and consequently the execution petition filed for its execution has been dismissed.

3. **Factual Background:**

- Petitioner, appointed as Assistant Surgeon in the Respondent-Department in the year 1986, while performing his duties at Charar-i-Sharief, Budgam, had a fall which resulted in a fracture in his left shoulder. Petitioner proceeded on earned leave of 120 days w.e.f. 14.01.1995, a post facto sanction to which was accorded by the Respondents vide letter dated 30.10.1995. During the period of recovery, the Petitioner was diagnosed with gastric malignancy which constrained him to extend his leave and accordingly on 22.06.1995 he applied for 18 months leave supporting his application with a Medical Certificate. The said application was routed by the concerned Block Medical Officer through the concerned Chief Medical Officer to Director, Health Services Kashmir-Respondent No. 3. Petitioner underwent surgery and applied for extension of leave from time to time. After undergoing treatment for the malignancy and after being declared healthy to resume the duties by the doctors, Petitioner approached the Respondents for allowing him to re-join his duties. Petitioner claimed to have not heard from the department till the year 2000 when he received a show-cause notice from the Respondent

No. 2 alleging therein that he was required to join his duties and report to SDH, Sogam, Kupwara. Petitioner replied in detail to the said notice stating therein that he never received any order to that effect. The Petitioner claimed to have not heard from the Department yet again and he again approached them and it was only then that the Petitioner was informed that vide order No. 1017 HME of 2002 dated 23.12.2002 his services had been terminated.

- Petitioner immediately served got a notice under Section 80 of the Code served upon the Respondents which was replied by the Respondent No. 3. Being aggrieved of the order of termination, Petitioner filed a suit for Declaration and Injunction on 20.02.2004 which was transferred to the Court of Sub-Judge/Chief Judicial Magistrate, Srinagar.
- Respondents caused their appearance through different counsels engaged by the Respondents from time to time, however, despite several opportunities, failed to file to file written statement and were set ex-parte. An application came to be filed on behalf of the Respondents seeking aside ex-parte proceedings, however, the same was dismissed in-default and the trial proceeded ex-parte.
- The case set up by the Petitioner in his plaint was that his services were terminated illegally without following the due procedure established by law. No charge-sheet was served upon the Petitioner and no enquiry was conducted. Also, no 2nd show-cause notice for the proposed punishment was served upon him. In support of his case, the Petitioner appeared as witness. Also, the then legal assistant posted in the office of Respondent No. 2 appeared as witness who, after perusal of the record, deposed that there was no charge-sheet available in the file, no show-cause

notice was available on record. He further deposed that though a copy of the enquiry report was on record, there was no proof that the same was ever communicated to the Petitioner. No witness was produced by the Respondents. Evidence was closed and arguments were advanced on behalf of the Petitioner.

- The trial court, after deliberating upon the case set up by the Petitioner and in light of Rules 30, 33 & 34 of the J&K Civil Services (Classification, Control & Appeal) Rules, 1956 as also Section 126 of the Constitution of J&K read with Article 311 of the Constitution of India, decreed the suit in favour of the Petitioner vide judgment dated 16.10.2008 granting the following reliefs:
 - i. By a decree of declaration in favour of the Plaintiff and against the Respondents, the order of termination bearing no. 1017 HME of 2002 dated 23.12.2002 is declared illegal and ineffective as against the Petitioner and the same is declared as void, so far as it relates to plaintiff.*
 - ii. By a decree of mandatory injunction in favour of the Plaintiff and against the Defendants as a result declaring the impugned order as void, the defendants are directed to treat the plaintiff in continuous services.*
 - iii. By a decree of permanent injunction in favour of the Plaintiff and against the Defendants, the Defendants are directed to allow the Plaintiff to discharge his duties as Assistant Surgeon and allow him consequential benefits.*
- Upon passing of the judgment supra, decree was framed on the same date i.e. 16.10.2008.
- The Petitioner claims to have immediately approached the Respondents and submitted an application along

with the copy of the judgment followed by a legal notice.

- Upon failure of the Respondents to implement the judgment and decree dated 16.10.2008, Petitioner filed an execution petition in November, 2011, however, the same was dismissed in-default by the Executing Court vide order dated 04.09.2015.
- Petitioner, thereafter, filed a second execution petition on 18.07.2018.
- Upon issuance of the notices in the execution petition, no one appeared for the Respondents for a long time. On. 02.11.2019, a representative of the Respondents appeared and informed the executing court that due to darbar move, the decree could not be implemented and sought some time for implementation which was granted and the matter was directed to be posted on 18.11.2019.
- On 18.11.2019, nobody appeared for the Respondents. The matter was posted for 09.12.2019.
- On 09.12.2019, Respondent No. 3 was directed to appear in person to explain as to why the judgment and decree had remained un-executed till date and the matter was posted for 23.01.2020.
- On 23.01.2020, Respondent No. 3 did not appear, however, counsel appearing for the Respondents sought time to file objections which was granted and the matter was posted for 15.02.2020.
- Instead of filing objections on 15.02.2020, the counsel for the Respondents made a statement that he had taken up the matter with the Department for implementation of the decree and sought time to file compliance report. The matter was posted for 25.02.2020.

- On 25.02.2020, the counsel for the Respondent produced a communication dated 10.02.2020 addressed by the Respondent No. 3 to Respondent No. 2 with regard to the implementation of the judgment and decree.
- No effective proceedings were conducted during the lockdown ordered due to COVID-19 pandemic. Thereafter, when the matter was taken up for consideration on 11.11.2020, nobody appeared on behalf of the Respondents. A detailed order was passed by the Executing Court and an opportunity to implement the decree was granted to the Respondents. It was observed in the order that in case of default order in the application filed by the Petitioner seeking attachment of the account head No. 2210 would follow.
- When the matter was taken up on 01.02.2021, nobody appeared on behalf of the Respondents. The Executing Court vide order dated 01.02.2021 directed the attachment of the account head of the Respondents.
- On 13.03.2021, the law officer appeared on behalf of the Respondents and filed an application seeking recalling of the order dated 01.02.2021 on the ground that the matter has been taken up with the department and that the judgment and decree would be implemented within next one month. On this assurance, the executing court vacated the order dated 01.02.2021 till next date and the matter was posted on 12.04.2021.
- On 12.04.2021, instead of implementing the judgment and decree, as was assured on 13.03.2021, the law officer appearing on behalf of the Respondents filed an application under Section 47 of the Code. The matter

was posted on 28.04.2021 on which date objections were filed by the petitioner to the said application.

- In the application, the Respondents raised the plea of limitation stating therein that the execution petition had been filed after a gap of ten years from the date of decree, as such the execution having been filed after the expiry of the period of limitation was time barred. It was also pleaded that the Petitioner never presented himself before the Respondents after the judgment and decree was passed. The said application was objected to on the ground that the issues raised in the application were beyond the mandate of Section 47 and that the executing court cannot go behind the decree.

4. The Executing Court decided the said application by virtue of the impugned order which has been questioned by the Petitioner on the following grounds:

- i. ***That the Executing Court has gone behind the decree which is impermissible in law. The executing court has gone into the merits of the case and declared the judgment and decree void ab-initio without appreciating the real and actual controversy in question. The executing court has misunderstood the real controversy and being under such influence has passed the impugned order.***
- ii. ***That the executing court has observed that the trial court has touched only the legal aspect of the case without going into merits of the case, which observation is totally illegal and perverse. The executing court has failed to appreciate the fact that the Petitioner had challenged his termination on legal grounds which stood proved from the record of the Respondent-Department and that the Petitioner was not asking for a relief on the basis of the photocopies of the medical records annexed.***
- iii. ***Objection under Section 47 can be made at the initial stages of the execution application. It cannot be raised at a stage where the court has already exercised its jurisdiction and passed an order for effective execution and called for***

compliance report. Neither can it be raised once the respondents have agreed to comply with such judgment.

- iv. That the executing court has misinterpreted the suit, the judgment and decree, the execution of which was being sought as well as the judgments of the Hon'ble Supreme Court and has declared the judgments of the Hon'ble Supreme Court as not to be a correct law. The executing court has prima facie gone not only much behind the decree but behind the law and also beyond his jurisdiction. The executing court, being the court of Sub-Judge, cannot declare the law laid down by the Hon'ble Supreme Court as bad.*

Heard learned counsel for the parties and perused the record.

5. Section 47 of the code provides as under:

“47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.”

From a plain reading of the Section, it is amply clear that at the stage of execution, the powers of the executing court are very limited. The scope of Section 47 is that it empowers the court executing the decree to determine all questions arising between the parties to the suit or their representatives **relating to the execution, discharge or satisfaction of the decree** and not the questions which

ought to have been raised during trial, at the time of filing written statement, framing of issues or arguments.

Section 47 of the Code has been enacted for the beneficial object of checking needless litigation and eliminating unnecessary delay. The Apex Court in **Merla Ramanna v. Nallaparaju**, [reported as AIR 1956 SC 87] has observed that for Section 47 to apply the following conditions must be satisfied:

- (i) The questions must be one arising between the parties to the suit in which the decree is passed, or their representatives; and
- (ii) It must relate to the execution, discharge or satisfaction of the decree.

Thus, the condition for the applicability of Section 47 is that the question must relate to execution, discharge or satisfaction of the decree. Any question which hinders or in any manner affects execution of the decree are covered by Section 47.

In the case of **State of Punjab & Ors. v. Mohinder Singh Randhawa & Anr** [reported as AIR 1992 SC 473], it has been held by the Apex Court that in the absence of any challenge to the appellate decree in further proceedings, in execution this is not open to challenge.

In **M/s Century Textiles Industries Ltd. v. Deepak Jain & Anr**, [reported as 2009 (5) SCC 634], the Apex Court has held that there is no quarrel with the general principle of law and indeed, it is unexceptionable that a court executing a decree cannot go behind the decree; it must take the decree according to its tenor; has no jurisdiction to widen its scope and is required to execute the decree as made.

In the case titled **Kanwar Singh Saini v. High Court, Delhi** [reported as (2012) 4 SCC 307], it has been held by the Apex Court that it is a settled legal proposition

that the executing court does not have the power to go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution.

6. When the order impugned is examined in light of the law as pronounced by the Hon'ble Supreme Court in cases supra, it can be safely held that the Executing Court has failed to appreciate the law in its true perspective and misinterpreted the judgments which were not applicable owing to the facts of those cases.

The observation of the Executing Court that the law laid down by the Hon'ble Supreme Court in the case titled **Jainariain Ram Lundia vs Kedar Nath Khetan and ors** [AIR 1956 SC 359] does not hold good is not correct. The said judgment has been authoritatively cited in subsequent judgments governing the scope of sections 47 of the Code including judgments delivered by the Hon'ble Supreme Court in **Chen Shen Ling v. Nand Kishore Jhajharia** [reported as AIR 1972 SC 726] and by this Court in **Uttam Chand And Ors. v. Kamlo Devi** (decided on 18 May, 1992). This judgment, thus, continues to be a good law. The Executing Court in the impugned judgment has wrongly assumed, without giving any valid justification, that the said judgment is bad law.

The **Jai Nariain** case supra continues to hold binding value and is applicable to the present case. This case (Jai Nariain), as is clear from its facts, deals with the scope of section 47 of the Code and expressly states that *“the fact remains that the decree was passed in these terms and it must either be executed as it stands or not at all unless the Court which passed it alters or modifies it.”*

In the same way the impugned order has made incorrect observation in relation to the legitimacy of the case of **Merla Ramanna v. Nallaparaju & ors** supra and

this case as well continues to be a good law as the same has neither been expressly nor impliedly over-ruled.

The two judgments referred to by the Executing Court in the impugned order, to discredit judgment passed in **Merla Ramanna's** case supra do not expressly or impliedly over-rule or dilute down its binding value. Moreover, the Hon'ble Supreme Court has placed a positive reliance on this case in *Balwant Singh & ors. v. Gurbachan Singh & ors.* [Decided on 15 October, 1992].

Furthermore the case of **Bhavan Vaja v. Solanki Hanuji Khodaji Mansang** [reported as AIR 1972 SC 1371] has been wrongly applied by the executing court for the said judgment pertains to the interpretation of decrees, where it has been held that an execution court can consider the proceedings as well as the procedure leading upto a decree only when the content of the decree is vague and ambiguous.

The Executing Court has, therefore, incorrectly relied on this judgment. The Executing Court has completely failed to understand the context as well as the reasons for this judgment. This judgment was delivered with the idea to address an issue that may arise if the words used in a decree are vague and incomprehensible. It was not delivered with the object of giving the executing courts with the authority or jurisdiction to go into the validity or legality of such decree.

7. While deciding the application, the Executing Court has adjudicated and declared the decree as void ab-initio on the grounds which were never the issue for consideration before the trial court in the first instance. The Executing Court in the impugned order has observed that the Petitioner had placed on record photocopies of medical records and that the trial court did not ask him to prove those documents in accordance with the provisions of the Evidence Act. Executing Court has observed that the trial

court has touched only the legal aspect of the case without going into merits of the case, which observation is totally illegal and perverse. Executing Court has failed to appreciate the fact that the Petitioner had challenged his termination on legal grounds which stood proved from the record of the Respondent-Department and in light of the law governing the field and that the Petitioner had not sought any relief on the basis of such medical records.

Executing Court has further gone to observe that this court has acted as a mute spectator and has not utilized its powers to ascertain the reasons as to why the Petitioner remained absent from his duties for a pretty long time. The said aspect of the matter has been wrongly deliberated upon by the executing court. The Executing Court has gone beyond the scope of powers vested in it. The said issue was required to be considered by the Respondents in their enquiry which they did not conduct and not by the trial court or the Executing Court. The trial court was obligated only to deliberate over the legality or otherwise of the order impugned before it and not about the alleged conduct of the Petitioner which constrained the Respondent to pass the termination order.

8. The Executing Court has also failed to consider the aspect of principle of estoppel in the matter. Respondents admittedly did not challenge the judgment and decree despite having knowledge about the same and even undertook to execute the same and time and again sought time by giving assurances to the executing court that the judgment and decree is being executed.
9. The court that passed the original decree cannot undo it at the stage of execution. The Executing Court went into the merits of the case when the same were duly undertaken and decided by the court exercising original jurisdiction. The Executing Court went into the question of validity of the Petitioner's leave or absence from his service, which

was a question of fact that could only have been entertained and addressed by the court of original jurisdiction, if raised before it by the Defendants. The Respondents had the option of addressing this issue at the trial stage and also had the opportunity to challenge the outcome of said trial at the appellate stage.

10. Furthermore objection under rule 47 can be made at the initial stages of the execution application. It cannot be raised at a stage where the court has already exercised its jurisdiction and passed an order for effective execution and called for compliance report. Neither can it be raised once the respondents have undertaken to implement the judgment and decree.
11. It can safely be said that the Executing Court has passed the Impugned Order in exercise of jurisdiction which it did not possess, hence deserves to be set-aside.
12. Furthermore, the Executing Court, in the impugned order, has held the execution petition to be time barred for having been filed after a period of 10 years from the date of passing of the judgment and decree.

The Executing Court seems to have either ignored or forgotten that the Petitioner had earlier filed an execution petition which was dismissed in default on 04.09.2015. The second execution petition was filed on 18.07.2018 and Article 182 of the J&K Limitation Act clearly provides that the time from which the period begins to run in case of execution of a decree or order of a Civil Court is three years from, besides others, the **date of the final order passed on application made in accordance with law to the proper Court for execution or to take some step, in aid of the execution of the decree or order.** In the present case, the first execution petition filed by the Petitioner was within the limitation period, was dismissed for non-prosecution on 05.09.2015 and the second petition had been filed on 18.07.2018 i.e. within a period of three years.

Thus, the finding of the Executing Court that the execution petition was time barred is erroneous and suffers from non-application of mind.

13. For what has been observed, considered and analyzed hereinabove there is merit in the petition and, as such, same deserves to be allowed and is accordingly allowed and consequently the impugned order dated 27.08.2021 passed by the Court of Sub-Judge/Chief Judicial Magistrate, Srinagar in execution petition titled Dr. Abid Hussain vs State and others is set-aside, the application filed by the Respondents under Section 47 is dismissed and the Sub-Judge/Chief Judicial Magistrate, Srinagar is directed to proceed ahead in the execution petition from the stage it had reached prior to the filing of the application under Section 47 of the Code.

(Javed Iqbal Wani)
Judge

SRINAGAR
18.10.2023
Naresh, Secy.

Whether the order is reportable: Yes

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