A PERSPECTIVE ON TWO RECENTLY REPORTED DECISIONS OF THE GAUHATI HIGH COURT.

By
Sri S.M. Deka
Director
North Eastern Judicial Officers' Training Institute (NEJOTI)

In the August 2006 issues of the All India Reporter and of the Gauhati Law Reports, two decisions prompting this Writing have been reported. SMTI CHAMELI DEBI & ORS Vs DIPAK NATH & ORS, AIR 2006 GAUHATI 118 (CHAMELI DEBI hereinafter) decided on the 27th day of January, 2006 deals amongst others with a question of execution of a decree for delivery of possession. PAWAN KUMAR AGARWAL AND ANR Vs STATE BANK OF INDIA (2006) 2 GLR 729 (PAWAN KUMAR hereinafter) decided on the 20th day of February 2006 deals with a question of territorial jurisdiction. Thus the only patent common ground between the two decisions is their recent reporting. However, the latent common ground between the two decisions is that they do not appear to have dealt with the relevant law correctly and accurately. Hence this common perspective also of August, 2006 vintage.

1. CHAMELI DEBI

In 1962 Upendra Ch. Nath filed the Title Suit No. 132 of 1962 against Jagabondhu Nath for recovery of possession of the suit land. The suit ended in a compromise decree. In 1967 Jagabondhu filed Title Suit No. 5/1967 and through it fought unsuccessfully upto the High Court to get the compromise decree set aside. In the meanwhile on 18.09.1964 the compromise decree for recovery of possession was executed by evicting Jagabondhu from the suit land. However, at dead of night on the same day after the process server put Upendra in possession Jagabondhu again dispossessed Upendra . Upendra having died his legal heirs filed Title Suit No. 4/1972 which was decreed for right, title and recovery of possession against Jagabondhu. Jagabondhu's appeal also failed. Jagabondhu having died his heirs Chameli Debi and others fought the matter out against the heirs of Upendra in Second Appeal No.13.1996. The second appeal confirmed the decree for recovery of possession passed by the two Courts below. That

should have been the logical end of the Judgment but it contained something more which has the potential of creating confusion for the subordinate judiciary.

1.1. ***THE FLAB IN CHAMELI DEBI***

The Head Note (B) of the Report proceeds thus " decree-holder was dispossessed by defendant after getting possession of land in suit for declaration of title-remedy for him is to press into service for second execution with police force for restoration of possession ……."

The above in the Report has been wrongly indicated as having been digested from para (7) of the Judgment. Infact the Head-note (B) is a digest of para (6). The following is extracted from para (6) of the Judgment.

> **" Can it be a sound legal proposition that every time a decree holder is dispossessed after getting possession of lands in execution of a decree for declaration of title and recovery of possession he is required to file another suit for similar relief ? Order XXI of the Civil Procedure Code has the elaborate answer. Rule 35 and other related provisions of which could be pressed into service for second execution with police force for restoration of possession by ousting the impostor".**

The maintainability or otherwise of a second execution application was not the issue before the High Court. No second execution application had in fact been filed by the heirs of Upendra. They filed a suit out of which the second appeal arose and the second appeal was dismissed. Thus the question raised and the answer provided in the extract quoted from para (6) of CHAMELI DEBI are obiter dicta of the first water. The first Code of Civil Procedure (the code hereinafter) came into being in 1859. Decided cases during the Nineteenth and the Twentieth Century dealing with Order XXI, Rule 35 of the Code or its predecessor sections in the earlier Codes of Civil Procedure in one voice say that once a cause of action for recovery of possession crystallizes in a decree and the property is delivered to the decree holder in execution of the decree for possession, the decree is satisfied and, thereafter, a second application for possession on the ground that he was dispossessed by the Judgment debtor is not maintainable. Indeed Order XXI Rule 35 and other provision of the Code do not say anything at all about a second execution in the circumstances as in CHAMELI DEBI. Police help in execution is provided under Rule 203 of the Civil Rules and Orders of the Gauhati High Court. That Rule also does not say anything about police help in a second execution application in the circumstances as in CHAMELI DEBI.

1.2. *PRECEDENTS*

The Judgment of a Division Bench of the Madras High Court decided on the 17th day of August 1915 THANDAVAROYA MUDALI Vs SUBRAMANIA GURUKKAL, AIR 1916 Madras 930 (1) puts the pointbeyond doubt. The first paragraph of the brief two paragraph judgment of the Division Bench reads thus :

> **" Following GOPAL DAS Vs THAN SINGH (1) and the ratio decidendi in GOVIND BIDIRAJI BHUKTA V AKELLA VENKATA SASTRULA (2), We hold that the decree holder is not entitled to file a second application for possession under 0.21 R 35, Civil Procedure Code, after he had been put in possession in accordance with an Order passed on a previous application filed under the same Order and Rule".**

(1) in the extract above is reported in (1882) 4 ALL. 184 and (2) in (1907) 17 M.L.J 598. The same principle of law has been reiterated in AIR 1917 Mad 202 (DB) and AIR 1923 Mad 25 (DB). Even a decree holder satisfied with symbolical delivery of possession in execution where he is entitled to actual or khas possession cannot maintain a second application for execution seeking actual delivery of possession. See AIR 1931 Cal. 417, AIR 1955 Nag. 79, AIR 1957 Punjub 17 and AIR 1959 Punjub 468.

There are atleast two Division Bench and one Single Judge decisions of the Gauhati High Court dealing with the matter of second execution. These cases unlike CHAMELI DEBI held that a decree for possession cannot be executed twice. Only exception carved out was when the first execution was completed during the pendency of the appeal against the decree and thereafter the Judgment debtor dispossessed the decree holder , the decree holder can execute the appellate decree for possession if the appellate decree affirms the original decree. These three cases are GHANASHYAM DAS MOUR AGARWALLA V. FATIK CHANDRA DAS, AIR 1957 ASSAM 123 (DB) decided on the 15th February 1957, SUDHIR KUMAR MITRA Vs. MURALI MOHAN PYNE, Misc. Appeal (First) 27 of 1960 decided on the 16th of September 1964 (unreported DB) and SABAD CHANDRA DEKA Vs. NAOMAI DEKA & ORS, (1983)2 GLR 277 decided on the 16th of March, 1983.

1.3. *THE VOICE OF THE SUPREME COURT*

On the 15th of September 1960 a Three Judge Bench of the Supreme Court spoke on the matter at hand in SHEW BUX MOHATA AND ANOTHER Vs BENGAL BREWERIES LTD AND OTHERS, AIR 1961 Supreme Court 137. The appeal before the Supreme Court arose out of an execution proceedings. The High Court held that the decree having earlier been executed in full, the present proceedings for its execution were incompetent and dismissed the decree holders petition for execution filed for the second time. The Supreme Court first posed the question whether the decree had earlier been executed in full. After considering the facts extensively in para 2 to 18 the law under Order XXI Rule 35 of the Code was enunciated in para 20 and 22 of the Judgment. The following quoted from para 22 is the clincher :

> **"The decree holders in the present case, of their own accepted delivery of possession with defendant No.4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on September 8, 1949 on the basis that full possession has been delivered to them by defendant No.4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they obtained full possession. It was open to the decree holder to accept such possession. Having done so, they are bound to the position that the decree has been fully executed from which it follows, that it cannot be executed anymore". (Underline supplied.)**

Thus the holding of the High Court indicated earlier that second execution is incompetent was upheld by the Supreme Court.

2. PAWAN KUMAR

The State Bank of India instituted the Title Suit No. 12 of 1994 in the Court of Civil Judge (Sr. Division) Tinsukia, against Pawan Kumar Agarwala and Another. The following are the prayers in the Suit :

(a) a Judgment and decree against the defendant jointly and severally for Rs.6,12,962.61

(b) enforcement of hypothecation of assets and articles and mortgaged property described below, by attachment and sale thereof for realization of decreetal amount with interest thereon.
(c) A declaration of Bank's charge on the hypothecated assets and articles and mortgaged property.
(d) In case the sale proceeds of the hypothecated to satisfy the amount payable to the plaintiff with interest etc as aforesaid, the liberty be granted to plaintiff to recover the balance amount from the defendants as personal decree against the defendant.
(e) Preliminary decree U/O 34 of the CPC in respect of the mortgaged properties mentioned in the schedule herein under;
(f) .....
(g) .....
(h) .....
(i) .....

Two schedule added to the plaint read thus :-

> **"SCHEDULE OF THE HYPOTHECATED PROPERTY**
>
> **All Tea clones, Tea Bushes, Raw materials, Tools and Equipments, Tea Leaves, Book Debts and moveable assets etc of M/S Bajrangbali Clone Tea Nursery"**
>
> **"SCHEDULE OF THE MORTGAGED PROPERTY**
>
> **All that piece and parcel of land measuring 10B – OK-OL covered by P.P. No. 20 under Dag No. 96 of Tipling Mouza, Jalia Gaon, Naholia Dist, Dibrugarh, Assam including all standing trees, plants, bushes, structures standing thereon owned and mortgaged by defendant No.1, Sri Pawan Kr. Agarwala (Kejriwal)."**

The defendant raised a preliminary issue relating to jurisdiction of Tinsukia Court on the ground that the property in suit is situated within the jurisdiction of the Dibrugarh Court. The preliminary issue having been answered in favour of the plaintiff Bank. Pawan Kumar reached the High Court but success eluded him in the High Court as well.

2.1 *THE LAW APPLICABLE*

Section 16 of the Code provides thus :- "Suits to be instituted where subject matter situate –subject to the pecuniary or other limitation prescribed by any law, suits –

(a) .....
(b) .....
(c) for foreclosure, sale or redemption in the case of mortgage of or charge upon immovable property
(d) for the determination of any other right to or interest in immovable property.
(e) .....
(f) ....., shall be instituted in the Court within the local limits of whose jurisdiction the property is situate ;"

Opening part of Section 20 of the Code reads thus :- " 20. Other suits to be instituted where defendants reside or cause of action arises – subject to the limitation aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction .....". Reading the above two provisions of law together there can be no doubt at all that Section 20 is the residuary provision. The provisions of Section 20 would apply subject to other provisions of sections in the Code relating to place of suing that precedes it. In other words if section 16 applied in a given case section 20, despite any part of the cause of action arising within the jurisdiction of a Court where no part of the property involved in the suit is situated, cannot be applied. Indeed HARSHAD CHIMANLAL MODI Vs DLF UNIVERSAL LTD AND ANOTHER (2005) 7, SCC 791 at para 21 says as much. HARSHAD (Supra) was a case where Section 16(d) of the Code was applicable therefore despite the fact that the contract for purchase of the immovable property situated at Gurgaon, Haryana was made at Delhi, thus the cause of action arising in Delhi, the plaint was eventually returned on the holding that Delhi Court had no jurisdiction.

2.2. *THE SUBMISSION*

Relying on HARSHAD (Supra) it was contended before the High Court that Section 16(d) of the Code is applicable and as such the preliminary issue should have been answered in favour of the defendants by holding that only the Dibrugarh Court has jurisdiction. The High Court held that no question of any right title in immovable property is involved in the suit therefore Section 16(d) of the Code is not attracted and since the loan was taken from the Bank at Tinsukia. Tinsukia Court

has rightly been held to have jurisdiction as per Section 20 of the Code. It appears that the prayer portion of the plaint, the registration of the suit as a Title Suit and above all sections 16(c) were not placed and pressed into service during the arguments in the High Court. Had that been done conclusion could have been that the suit though involving a money claim is really a suit for money on the security of a mortgage. Indeed the plaintiff Bank has clearly prayed for a decree under Order 34 of the Code for sale of the mortgaged property and declaration of a charge on the hypothecated movables. Had such submission been made the preliminary issue would have been decided in favour of the defendant.

3. THE UPSHOT

The extract from CHAMELI DEBI beside being obiter is per incuriam being in the teeth of binding precedents like GHANASHYAM (Supra) and SUDHIR KUMAR (Supra) as also of SHEW BUX (Supra) of the Supreme Court. Similarly PAWAN KUMAR is per incuriam being in the teeth of Section 16(c) of the Code.

The former is an example of a case where the High Court did not restrict itself to the scope of the appeal apparently unaided by counsels and the latter, an example of a case where the High Court restricted itself only to the submissions made by the petitioner's counsel.

4. THE CONCLUDING COMMENTS

What has happened in these two cases considered in this writing reminds one of the advice of famous Lawyer jurist F.S. Nariman to the Judges and Lawyers of the Supreme Court and the confession of the eminent Judge jurist Lord Denning.

The advice of Sri F.S. Nariman is contained in an article in the inaugural issue of the journal of the National Judicial Academy and reads thus :-

> **" The first reform I would recommend would be a self imposed rule for both Lawyers and Judges for lawyers they must speak less.....**
>
> **As for Judges, I would suggest they write less after carefully pondering over what is drafted/or dictated, conscious of the mandate of the Constitution that whatever a Judge of the Supreme Court says is regarded by one and all as the law of the land"**

The recommendation attracts the lawyers and Judges of the High Court as well for whatever a Judge of the High Court says is regarded by one and all as the law of the land within the jurisdiction of the High Court.

Lord Denning's confession can be read in part seven entitled the Doctrine of Precedent in the book the Discipline of LAW by Lord Denning. The following is an excerpt :

> **"Thus rebuked, I may as well make a confession. On many occasion I have done my own researches and given an opinion in matters on which the Court has not had the benefit of the arguments of counsels or of the Judgment of the Court below. I have done this because counsels vary much in their ability and I do not think that their clients should suffer by any oversight or mistake of counsel"**

The advice and the confession as above appear to highlight the danger of total disregard of or over dependence on counsels' submissions in deciding cases.