

Aibunnisha Vs. Masrur Alam

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Court : Patna

Decided On : Feb-24-2005

Judge : S.N. Hussain, J.

Acts : [Specific Relief Act, 1963](#) - Sections 22, 22(1) and 22(2); [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 and 115 - Order 21, Rule 32; [Transfer of Property Act, 1882](#) - Sections 55(1)

Appeal No. : Civil Revision No. 141 of 2005

Appellant : Aibunnisha

Respondent : Masrur Alam

Advocate for Def. : S.K. Verma, Sr. Adv., Surendra Kishore Verma, Jitendra Kishore Verma and Anil Kumar Roy, Adv.

Advocate for Pet/Ap. : Dhruv Narain, Sr. Adv. and Debi Das Srivastava, Adv.

Disposition : Revision dismissed

Prior history : S.N. Hussain, J. 1. Petitioner was defendant-judgment-debtor of Title Suit No. 203 of 1985, which was filed by the opposite party for specific performance of contract for sale of the suit premises vide deed of agreement dated 17.9.1984. The petitioner is aggrieved by the impugned order dated 5.1.2005 by which the learned Sub-ordinate Judge-3, Buxar, had allowed the decree-holder's (O.Ps.) petition for delivery of possession in Execution Case No. 4

of 1993, which was filed for execution of the

Judgement :

S.N. Hussain, J.

1. Petitioner was defendant-judgment-debtor of Title Suit No. 203 of 1985, which was filed by the opposite party for specific performance of contract for sale of the suit premises vide deed of agreement dated 17.9.1984.

The petitioner is aggrieved by the impugned order dated 5.1.2005 by which the learned Sub-ordinate Judge-3, Buxar, had allowed the decree-holder's (O.Ps.) petition for delivery of possession in Execution Case No. 4 of 1993, which was filed for execution of the decree passed in Title Appeal No. 78 of 1987 which had arisen out of the said Title Suit No. 203 of 1985.

2. Short fact of this case is that initially the petitioner had filed Title Suit No. 94 of 1985 against the opposite party for a declaration that the deed of agreement for sale dated 17.9.1984 was void, fraudulent and forged. Thereafter, the opposite party filed Title Suit No. 203 of 1985 against the petitioner for specific performance of the said contract for sale dated 17.9.1984. Both the suits were heard together and were decided by a common judgment dated 30.6.1987 by which Title Suit No. 94 of 1985 filed by the petitioner was dismissed and Title Suit No. 203 of 1985 filed by the opposite party was decreed in part.

3. Against the decree of Trial Court dismissing Title Suit No. 94 of 1985, the petitioner filed Title Appeal No. 93 of 1987, whereas against the decree of the Trial Court decreeing in part Title Suit No. 203 of 1987 the opposite party filed Title Appeal No. 78 of 1987. Both the appeals were heard together and were decided by a common judgment dated 3.8.1992 by which the Lower Appellate Court dismissed petitioner's Title Appeal No. 93 of 1987 and allowed opposite party's Title Appeal No. 78 of 1987 decreeing the opposite party's claim in full. Against the decrees in both the said Title Appeals the petitioner filed two Second Appeals bearing S.A. No. 299 of 1992 and S.A. No. 300 of 1992, but both of them were dismissed by this Court on 25.2.1994. Even SLP No. 9340 of 1994 filed by the

petitioner against the said judgment and decree was dismissed on 12.7.1994 by the Hon'ble Supreme Court.

4. It transpires that after the judgment and decree of the Lower Appellate Court, opposite party filed Execution Case No. 4 of 1993 for execution of the decree dated 3.8.1992 passed in Title Appeal No. 78 of 1987 for specific performance of contract. In the meantime, sale deed was executed through the processes of Court in favour of the opposite party with respect to the suit premises. Thereafter, on 18.1.2003 the opposite party (decree- holder) filed petition before the executing Court for deputation of Magistrate and police force for affecting delivery of possession of the suit premises in his favour.

5. The petitioner (judgment-debtor) filed her rejoinder on 3.5.2003 and thereafter filed a supplementary petition on 10.7.2004 raising objections that since neither the plaintiff-decree-holder had sought any relief of recovery of possession in his plaint nor any decree for delivery of possession had been passed, no such relief can be granted in an execution case. The decree-holder (O.P.) filed his rejoinder to the aforesaid supplementary petition of the judgment-debtor (petitioner) on 14.8.1994.

6. By the impugned order dated 5.1.2005 the learned Court below has allowed the petition of the decree-holder (O.P.), rejected the objection of the judgment-debtor (petitioner) and directed delivery of possession in favour of the decree-holder through Magistrate and police force. This order has been challenged in this revision by the judgment-debtor (petitioner) on the ground that neither any relief of delivery of possession was sought by the plaintiff (O.P.) in her suit or appeal nor any decree for delivery/recovery of possession was passed by any of the Courts, hence the executing Court should have confined itself only to execution and registration of the sale-deed in favour of the decree-holder (O.P.) and this having already been done, there was no occasion for the executing Court to direct delivery of possession.

7. The learned counsel for the petitioner further submitted that the mandatory provision of Sub-sections (1) and (2) of Section 22 of the [Specific Relief Act, 1963](#) (hereinafter referred to as the 'Act' for the sake of brevity) provides that in a suit for

specific performance of contract no relief of possession or partition shall be granted by the Court unless it has been specifically claimed. He also stated that proviso to the said Sub-section only provided that where plaintiff had not claimed any such relief in the plaint, the Court shall allow him/her to amend the plaint, but in this case the plaintiff never sought any such amendment at any stage. Hence, according to him, there was no occasion for the Court below to direct delivery of possession specially when Order XXI, Rule 32 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'Code' for the sake of brevity) does not provide that delivery of possession was necessary for executing a decree of specific performance of contract.

8. The learned counsel for the petitioner relied upon a decision of the Hon'ble Supreme Court in case of *Adcon Electronics Pvt. Ltd. v. Daulat and Anr.*, reported in, AIR 2001 SC 3712, in which it was held that suit for specific performance of an agreement for sale of suit property without a claim for delivery of possession, cannot be treated as a 'suit for land' and is, therefore, triable under Clause 12 of Letters Patent of Bombay High Court and that in a suit for land no order for delivery of possession can be validly passed without any such relief having been sought by the plaintiff. He also relied upon another decision of the Hon'ble Supreme Court in case of *Babu Lal v. Hazari Lal Kishori Lal and Ors.*, reported in, AIR 1982 SC 818, in which it was held that the relief of delivery of possession can be sought by way of amendment even at the appellate stage.

9. The learned counsel for the petitioner further submits that suit premises being a joint family house, delivery of possession cannot be given to the purchaser unless there is a partition among the co-sharers. It was also claimed that the husband of the petitioner had filed Partition Suit No. 174 of 1983 which was decreed by the Trial Court but that decree was challenged by one of his brother in First Appeal No. 258 of 1989 which is pending in this Court, hence delivery of possession cannot be legally affected and thus the impugned order of the learned Court below is illegal and perverse.

10. On the other hand, the learned counsel for the opposite party submitted that sale-deed was executed after the decree for specific performance of contract was

passed and unless such a deed is executed, no delivery of possession can be validly claimed. He further submitted that delivery of possession is implicit in a decree for specific performance of contract and hence after the sale-deed is executed in compliance of the decree, delivery of possession has to follow.

11. This High Court has already decided this issue in case of Bhanu Pratap Sah v. Bhagmuni Devi and Ors., reported in, 1992 (1) PLJR 118, in which it was held that the Court has got the power to allow the relief of possession even without a formal order of amendment as in terms of Section 55(1)(f) of the Transfer of Property Act, the seller is obliged to give possession of the property to the buyer, and in case where the deed of transfer is executed by a Court pursuant to a decree of specific performance, on the same principle it would be the obligation of the Court to put the decree-holder in possession of the vended property and if the Lower Court fails to do that, exercise of revisional jurisdiction under Section 115 of the Code cannot be refused.

12. Similarly, on another occasion this Court has decided the issue in case of Kailash Rai v. Hare Ram Dubey, reported in 2003 (4) PLJR 372, in which it was held that even if there was no prayer for delivery of possession in terms of Section 22 of the Act, the decree-holder was entitled to be put in possession in view of the admitted fact that the judgment-debtor was in possession of the land. In that case also the aforementioned decision of the Hon'ble Supreme Court in case of Adcon Electronics Pvt. Ltd., (supra) was cited, but the said case did not support the stand of the opposite party as the question for consideration in the said case was determination of title and declaration of right with regard to land which has to be decided on the averments in plaint and in that context it was held that suit for specific performance cannot be treated as a 'suit for land' as in true sense it is simply a suit for enforcement of contract.

13. It is also apparent that the other decision of the Hon'ble Apex Court in case of Babu Lal (supra) in fact supported the case of the decree-holder as it was held that in order to satisfy the decree against him, the judgment-debtor was bound not only to execute the sale-deed but also to put the property in possession of the decree-holder in consonance with the provisions of Section 55(1)(f) of the Transfer

of Property Act even if delivery of possession was not one of the reliefs specifically sought in the plaint, as the judgment-debtor was admittedly in possession of the suit property and hence bar of Section 22 of the Act would not operate in such cases.

14. Furthermore, it is quite clear that delivery of possession is implicit in an agreement for sale and also in a decree for specific performance of contract and hence after execution of the deed of transfer in terms of the decree, possession has to be delivered in accordance thereof. Thus, substantial Justice having been done by the learned Court below, this Court should refuse to exercise its revisional jurisdiction in this case specially when the provision of Order XXI Rule 32 of the Code is not relevant in the instant case as the point involved here is completely different.

15. So far the objection raised by the petitioner, that the suit house is joint family property and appeal is pending out of a Partition Suit and hence no delivery of possession can be validly affected, is concerned, it has also no legs to stand as it is apparent from the record that the said question was raised by the petitioner in her petition filed earlier in the executing Court under Section 47 of the Code, but the same was rejected by the Court below and the said order, not having been challenged, has become final and hence the same issue cannot be allowed to be raised again and again.

16. In the aforesaid facts and circumstances, I do not find any illegality or jurisdictional error in the impugned order of the Court below. Accordingly, this civil revision is dismissed.

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