

Tara Devi and ors. Vs. Shanker Prasad and ors.

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Court : Madhya Pradesh

Decided On : Nov-07-2001

Reported in : 2002(1)MPHT40

Judge : P.C. Agrawal, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(2), 47 and 96 - Order 28, Rule 9; Civil Procedure (Amendment) Code, 1976; [Specific Relief Act, 1963](#) - Sections 28

Appeal No. : First Appeal No. 362/99

Appellant : Tara Devi and ors.

Respondent : Shanker Prasad and ors.

Advocate for Def. : Sudhir Rawat and ;Archana Nagaria, Adv.

Advocate for Pet/Ap. : C.K. Sharma, Adv.

Judgement :

P.C. Agrawal, J.

1. First Additional District Judge, Mudwara, Katni in Execution Case No. 56-A/72 (Baranglal since deceased through legal representatives v. Shanker Prasad) on 14-5-99 decided certain objections of the judgment debtor Shanker Prasad (since

deceased through legal representative Nos. 1 to 8) who have been impleaded in this appeal under Section 47 and Order 28 Rule 9 of the Code of Civil Procedure (to be called as Code only) and by impugned order set aside the decree under execution in Civil Suit No. 56-A/72 with a direction that condition contained in para (e) were not complied with and the sale deed dated 19-7-75 was cancelled, the execution was dismissed and possession of the legal representatives of judgment debtor was ordered to be restored.

2. Appellants being in suspense whether the impugned order amounts to a decree, filed this first appeal on 24-6-99. The respondent raised a preliminary objection that the impugned order being passed under Section 47 of the Code and during the execution proceedings did not amount to a decree and no appeal is competent as held in *Babulal v. Ramesh Babu*, AIR 1990 MP 317 (Full Bench), after amendment of 1976, the term decree has defined under Section 2(2) of the Code which does not include determination of any question under Section 47 of the Code. Placing reliance in the case of *Moolchand v. Jung Bahadur*, 1997 (I) MPWN 147, it is argued that the impugned order not being a decree, is not appealable under Section 96(2) of the Code and only a revision could be competent.

3. Obviously, to amount to a decree the conclusive determination should be in a suit, as held in the case of *Diwan Brothers v. Central Bank of India and Ors.*, AIR 1976 SC 1503 and in *R. Rathinavel Chettiar and Anr. v. Sivaraman and others*, 1999 (4) SCC 89. The impugned order was not passed in a civil suit. No plaint was filed. Further no formal decree was drawn by the learned Trial Court. The learned Trial Court itself did not consider the order as a decree.

4. Advocate for the appellants has vehemently contended that by impugned order the learned Trial Court has not only set aside the impugned restoration of possession to the judgment debtor. According to him this amounts to a formal expression of adjudication which so far as the Executing Court is concerned has conclusively determined the rights of the parties, however it in itself is not determinative. However, he has vehemently argued that the impugned order was wholly without jurisdiction. Such order could be possible only in case a rescission of a contract under Section 28 of the [Specific Relief Act, 1963](#), According to him a

part of the decree was already satisfied and a sale deed was executed before decision of F.A. No. 9/1974 and F.A. No. 10 of 1974 by this Court in respect of the property which according to respondent was covered by the agreement. A direction to execute a supplementary sale deed for conveyance of remaining property was given on 18-1-80. The execution according to him was pending only in respect of such supplementary sale deed and thus the whole of the decree could never be set aside. According to him such an action could only be taken on an application under Section 28 of the [Specific Relief Act, 1963](#) when the contract was rescinded, however it was not the situation here. Reference to *Kanhaiyalal v. Mutta Abdul Hussain*, 1984 MPLJ 377, *Ramankutty Guptan v. Avara*, AIR 1994 SC 1699 and *V.S. Palanichamy Chettiar Firm v. C. Alagappan and Anr.*, AIR 1999 SC 918, were not apposite in the facts of the case as the impugned order was not passed under Section 28 of the Specific Relief Act. According to him the impugned order was wholly without jurisdiction and was actually a misconduct on the part of the Executing Court. However, all these questions relate to the merits of the controversy and do not determine the nature of the impugned order which being under Section 47 of the Code is not included within the definition of decree.

5. Thus, in my considered opinion no appeal lies against the impugned order, only revision lies, hence the appeal be treated as a revision.

6. It is true that the appellants do not think it fit to file a separate application to treat this appeal as a revision. However, this was their prayer from the very beginning in the memorandum of appeal. Thus, no capital can be made out of this contention.