

Sk. Raheman Vs. Sk. Sirajuddin

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Court : Orissa

Decided On : Jun-18-2004

Reported in : AIR2004Ori181; 98(2004)CLT445

Judge : P.K. Tripathy, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 and 115 - Order 20, Rule 14; ;[Partition Act, 1893](#) - Sections 4

Appeal No. : Civil Revision Petition No. 294 of 2002

Appellant : Sk. Raheman

Respondent : Sk. Sirajuddin

Advocate for Def. : D.K. Mishra, ;G.K. Nayak and ;R. Mahalik

Advocate for Pet/Ap. : S.P. Mishra, ;S.K. Misra, ;S. Das, ;S. Mishra, ;R.R. Das, ;L. Bhuya, ;M.R. Das and ;S.S. Samantaray

Disposition : Revision dismissed

Judgement :

P.K. Tripathy, J.

1. Following facts which find mentioned in Civil Revision No. 830 of 1988 and the impugned judgment of the learned Additional District Judge, Bhadrak in Misc.

Appeal No. 75 of 1999 are not in dispute.

2. Petitioner filed OS No. 70 of 1973 in the Court of Subordinate Judge, Bhadrak with the prayer for partition. On 29.1.1974 preliminary decree was passed. On 20.8.1977 final decree was passed. It was directed therein that the disputed property would be allotted to the share of the plaintiff. That decree was put to execution in Execution Case No. 29 of 1978. The defendant-judgment debtor No. 2 i.e., present opposite party filed on objection and claimed benefit of right of pre-emption under Section 4 of the Partition Act on the ground that plaintiff is a stranger to the family and he (Opp. Party) is entitled to the preferential claim under Section 4 of the said Act. Petitioner questioned maintainability of such application in course of the Execution Proceeding. On 26.4.1978 the Executing Court held such application under Section 4 of the Partition Act to be maintainable. Petitioner assailed that order in Misc. Appeal No. 102 of 1978 and Civil Revision No. 297 of 1978. A learned Single Judge of this Court heard the said appeal and revision and on due consideration of the facts and circumstances upheld the order of the Court below by a common judgment delivered on 15.11.1979. As against that, petitioner preferred AHO No. 10 of 1979 and that was also dismissed with an observation as noted by learned Additional District Judge that 'it was open to the petitioner to move Executing Court for review of his order dated 26.4.1978. 'Thereafter, petitioner filed application in the Executing Court to recall the order dated 26.4.1978. That was registered as Misc. Case No. 78 of 1980. Petitioner also filed Misc. Appeal No. 131 of 1980 against the order which the Executing Court passed during pendency of the AHO permitting the judgment-debtor i.e., opposite party to deposit a sum of Rs. 975/- towards value of the land. That Misc. Appeal was dismissed by this Court on 18.6.1986. On 22.9.1988 the Executing Court rejected the application vide Misc. Case No. 70 of 1980 and as against that, petitioner filed Civil Revision No. 830 of 1988. This Court after taking note of all the aforesaid facts and developments and different orders passed on the subject by the different forums dismissed the Civil Revision and held that 'The impugned order is one rejecting the application for review. Having gone through the said order, I do not find any error of law or error of jurisdiction committed by the Executing Court so as to be interfered with by this Court in exercise of power under Section 115 of the Code of Civil Procedure.' That Civil Revision was decided on 28.3.1991. When the

matter was set at rest in that manner, on 2.7.1997 petitioner filed application under Section 47, read with Order 20, Rule 14, CPC, inter alia, contending that as per the order relating to pre-emption, opposite party was supposed to deposit Rs. 1017/- i.e., Rs. 975/- towards valuation of the land, Rs. 171/- towards cost of the trees and Rs. 25/- towards the proportionate valuation of the common passage and besides that the opposite party was also to deposit cost of Rs. 72.40 paise and such amount having not been deposited in its entirety by 13.3.1980, therefore, the order of pre-emption is not executable and in that respect deposit of Rs. 992/- on 20.3.1980 does not save the situation. Regarding the delay in filing such application, petitioner explained that he came to know about such short deposit after perusal of record on 23.6.1997.

3. Learned Civil Judge (Senior Division), Bhadrak on 4.10.1999 disposed of that Misc. case by rejecting the application filed by the petitioner with reference to different orders passed and particularly to the orders passed in the executing Court on 28.2.1980, 13.3.1980 and 20.3.1980. He observed that mistake committed by the Court for not giving specific date for deposit and also not directing for deposit of the cost of the execution does not amount to breach of the order by the opposite party for due implementation of the order on pre-emption so as to defend his right under Section 4 of the Partition Act. Petitioner challenged that order in Misc. Appeal No. 75 of 1999. Learned Additional District Judge, Bhadrak dismissed that appeal on merit as per the impugned judgment delivered on 4.12.2002. The lower appellate Court while concurring with the view of the executing Court also observed that after a lapse of about 17 years from the date of the deposit, petitioner's aforesaid contention that he was not aware of such deposit is not believable when petitioner is in crossed swords situation with the opposite party all through out.

4. The revision-petitioner reiterate his contention in support of the claim of non-executability of the order passed under Section 4 of the Partition Act in favour of the opposite party and relied on the cases of Naguba Appa v. Namdev, AIR 1954 SC 50. Duttatraya v. Shaikh Mahaboob Shaikh Ali and Anr., AIR 1970 SC 750, Sulleh Singh and Ors. v. Sohan Lal and Anr., AIR 1975 Supreme Court 1957 in support of his contention that Court cannot grant extension of time when there is a

failure to deposit the amount within due date. He also relied on the cases of Dr. Ram Kumar v. Mahadeo Lal and Anr., AIR 1962 Rajasthan 54, Shivashankar Dayal v. Smt. Shanti Devi, AIR 1972 Rajasthan 139, Panni Lal and Ors. v. Daya Ram, AIR 1985 Punjab and Haryana 277 on the position of law that extension of time cannot be granted by the Court to deposit such money.

5. The opposite party on the other hand while supporting to the impugned order contended that while granting relief under Section 4 of the Partition Act and directing him to deposit the money, no specific period was stipulated. Be that as it may, he deposited the money in accordance with the order of the Court below and therefore, his claim under Section 4 of the Partition Act cannot be defeated. He also supported to the finding of the Courts below to the belated action taken by the petitioner. Above all the opposite party raised objection to the maintainability of the Civil Revision in view of the amendment of Section 115, CPC by Act 46 of 1999.

6. In order of preference the question of maintainability is needed to be considered first. The issue which the opposite party raised is no more res integra: The legal consequence of the provision under Section 115 after amendment by Act 46 of 1999 has been considered by this Court in a batch of cases vide Sitaram @ Mahendra v. Sri Antaryami Mohapatra and Ors., 96 (2003) CLT 762 : 2003 (II) OLR 409. Relating to maintainability of a Civil Revision, this Court has held that :

'7. Therefore, this Court finds that a Civil Revision, at the instance of a litigant is maintainable on satisfaction of the following circumstances cumulatively, viz :

- (a) (i) impugned order amounts to a case decided,
- (ii) such order must have been passed by any Court subordinate to such High Court,
- (iii) such order must not be appealable one.
- (b) There must be allegation of jurisdiction at error, i.e., to say.
 - (i) exercise of jurisdiction not vested in the Court below by law, or
 - (ii) a jurisdiction vested in it by law was failed to be exercised, and/or

(iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.

(c) If the impugned order had been passed in favour of the revision-petitioner then that would have finally disposed of the suit or other proceedings.'

Applying the above test and keeping in view the nature of the proceeding under Section 47 and its legal status being independent of the execution proceeding, this Court finds that a revision against the Impugned judgment and orders is maintainable. Accordingly, the contention of maintainability raised by the opposite party stands rejected.

7. Coming to the substantial issue in this case, it is necessary to refer to the relevant orders passed by the executing Court relating to allowing the right of pre-emption and making direction for deposit of the consideration money. On perusal of the LCR of execution Case No. 29 of 1978, it is seen that on 20.2.1978 petitioner's application for execution was registered. On 17.3.1978 opposite party appeared pursuant to the notice under Order 21, Rule 22, CPC and filed the application under Section 4 of the Partition Act. On 26.4.1978 objection to the maintainability of the said petition was rejected but that application under Section 4 of the Partition Act was kept pending for consideration on merit. Because of grant of stay Order by this Court in Misc. Appeal preferred against the order dated 26.4.1978 the execution proceeding was adjourned from date to date awaiting further intimation. On 9.1.1980 intimation was received from the High Court regarding dismissal of Misc. Appeal No. 102 of 1978 and Civil Revision No. 297 of 1978. On 6.2.1980 the Court intimated to both the parties for taking up execution proceeding on 13.2.1980. On the later date copy was served on DHR and the case was posted to 28.2.1980 for hearing of the petition (under Section 4 of the Partition Act). On 28.2.1980 two orders were passed vide Order No. 31 and 32. Those two orders read as hereunder:

'Order No. 31 : Perused the order in Misc. Appeal No. 102/78 and CR No. 297. The Misc. Appeal and Civil Revision have been dismissed. Heard the Advocate for the Jdr. No. 2. Jdr. No. 2 is to deposit Rs. 925/- towards value of the property as per allotment sheet prepared by the Civil Court Commissioner and Rs. 17/- towards cost of the trees in favour of the plaintiff- DHR by the date fixed.

Sd/- Subjudge.

Order No. 32 : Adv. for JDR files hazira. Adv. for DHR files a petition for time to file stay order from Hon'ble Court on the ground that he has filed for hearing in Double Bench in Hon'ble Court, Copy served. Put up on 13.3.80 for orders.'

PO is on CL.

Sd/-SDJM I/c.

Thereafter on 13.3.1980, 17.3.1980 and 20.3.1980 the following orders were passed by the executing Court.

Dt. 13.3. 1980:

'Adv. for JDR files hazira. Adv. for DHR files a petition for time to bring stay order from Hon'ble Court. Copy served. Let the (it should be 'him') file the stay order. Till then the proceeding is to progress. JDR is to take steps accordingly by 20.3.80.

Sd. D. Misra,

S.J. Bhadrak.

Dt. 17.3.80:

'JDR Sk. Sirajuddin tenders chalan for Rs. 992/-towards cost of the suit. The original record has been sent to Hon'ble High Court on 15.3.80 for reference in AHO 10/79. Let the chalan be checked and passed.

Sd/-S.J.

Later: Adv. for JDR files a petition to direct the Nazir to receive the on the ground that the time for depositing the amount in the treasury has been passed. Heard. Prayer is allowed. Nazir to receive the amount today.

Sd/- S.J.

Dt. 20.3.80:

Chalan No. 92 Dt. 18.3.80 showing deposit of Rs. 992A towards cost of the property is received. Adv. for JDR files hazira. The original execution record has been sent to Hon'ble High Court for reference in AHO No. 10/79, Adv for DHR files a petition for time to bring stay order from Hon'ble High Court. Copy served. Heard. Let them file the stay order. Till then the proceeding shall progress, Put up on 27.3.80 for steps.

Sd/-S.J.

8. Bone of contention of the petitioner is that in view of the above quoted order dated 28.2.1980 the required amount along with the cost should have been deposited on 13.3.1980 and not thereafter.

9. As already noted contention of the opposite party in that connection is that order dated 28.2.1980 vide Order No. 31 does not stipulate any specific date or time for depositing the amount. Therefore, by use of the word 'date fixed' the executing Court kept the matter pending for fixing a date towards deposit of the money. When on the self same date (28.2.1980) the petitioner (decree holder) sought for time to bring stay order the case was adjourned to 13.3.1980 and not for the purpose of depositing the amount by the opposite party. However, on 13.3.1980 when the Court recorded that petitioner had again applied for time to bring stay order, he allowed the executing proceeding to proceed and fixed a date i.e. 20.3.1980 to take steps accordingly thereby directing the opposite party to deposit the amount in furtherance of Order No. 31 dated 28.2.1980.

10. In the case of Naguba Appa (supra), the Apex Court held that 'mere filing of an appeal does not suspend the decree for pre-emption and unless that decree is altered in any manner by the Court of appeal the pre-emptor is bound to comply with its directions'. In the case of Duttatraya (supra), it was held by the Apex Court that in a decree for pre-emption when it incorporates reciprocal obligations of the decree-holder to deposit the money within stipulated time and delivery of possession by the opposite party, then in such a case on the application of the opposite party, if the superior Court stays the proceeding relating to delivery of possession, then that stay order also automatically extends the time relating to deposit of money. In the case of Sulleh (supra) it was held by the Apex Court that

when the decree of pre-emption under appeal with stipulation of the trial Court for deposit of the consideration amount within certain period was not stayed, by the appellate Court, then the period of deposit could not have been extended and the claim of the pre-emptor should have been dismissed in view of the provision under Order 20 Rule 14, CPC. In the cases of Dr. Ram Kumar (supra), Shivashankar Dayal (supra) and Panni Lal and Ors. (supra) similar view have been expressed by Rajasthan High Court, and Punjab and Haryana High Court against the order of grant of extension of time for payment of the consideration amount.

11. Sub-rule (1) of Rule 14 in Order 20, CPC reads as hereunder:

'(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall :

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that no payment into Court of such purchase-money, together with the costs (if any), decreed against the plaintiff,

on or before the day referred to in Clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.'

12. Posted with the fact situation, legal provision and the ratio as noted in the preceding paragraphs this Court finds that the principle of Actus duriae neminem gravabit is applicable to the present case. In other words 'an act of the Court shall prejudice no man'.

13. In the case at hand indeed the fact senario indicates that petitioner has lost several battles in the legal forum to defeat the claim of pre-emption, claimed by the opposite party. Still he feels that the war is not over and accordingly he has taken opportunity of the deposit made by the opposite party on 20.3.1980 to be not inconfirmity with the order passed on 28.2.1980 and also the above noted provision in Sub-rule (1) of Rule 14 of Order 20, CPC. It is apparent on the face of

the record that-direction was given to the opposite party to deposit only Rs. 992/-. That was not a complete direction, but direction in part inasmuch as Court reserved the order relating to fixing the time of deposit. However, on 13.3.1980 direction was given to deposit Rs. 992/- only. Though it would have been appropriate for the executing Court to pass order for deposit of the entire sum in accordance with Sub-rule (1) of Rule 14. Be that as it may, opposite party is not at fault or guilty of defying or committing delay in deposit beyond the direction of the executing Court. Similarly this Court also does not find it to be a case of grant of extension of time to make deposit of the consideration money because on 28.2.1980 no time limit was fixed. Therefore, in this case, this Court finds not a case of breach of law by the opposite party to defeat his claim under Section 4 of the Partition Act. On the other hand, it is seen that on the application under Section 4 of the Partition Act the executing Court passed the order in part i.e., by deciding maintainability of the application, then allowing it on 28.2.1980 and thereafter fixing the quantum and directing for its deposit by 20.3.1980. If that way provision in Sub-rule (1) of Rule 14 has not been complied, if that is to be so regarded, then also with the relevancy of repetition, this Court is of the opinion that mistakes and omissions committed by the Court should not defeat the claim of the opposite party on such technical ground, when his rights and assertion under Section 4 of the Partition Act has been confirmed in series of cases fought from the trial Court (executing Court) till this Court in several rounds but on different grounds.

14. The above being the fact situation, the orders of the Courts below in the above context is not found to be illegal, unjust or due to any error in exercise of the jurisdiction in any manner as incorporated under Section 115, CPC and therefore, the revision is dismissed. It is for the executing Court to channelise the procedure relating to payment of the cost in accordance with law.

LCR be immediately sent back to the Court below.