
(2012) 04 MAD CK 0024

In the Madras High Court

Case No : C.R.P. (NPD) No. 3005 of 2010 and M.P. No. 1 of 2010

Durisamy and others

APPELLANT

Vs

V.P. Periyasamy Gounder and others

RESPONDENT

Date of Decision : 02-04-2012

Acts Referred:

Citation : (2012) 4 LW 729

Hon'ble Judges : V. Periya Karuppiyah, J

Bench : Single Bench

Advocate : D. Krishnakumar, for the Appellant; M.S. Krishnan, M/s. Sarvabhauman Associates for R1 to R4, No appearance for R5 and R6, for the Respondent

Final Decision : Dismissed

Judgement

V. Periya Karuppiyah, J.—This revision is filed against the fair and decretal order passed by the learned Subordinate Judge, Rasipuram, in

REP. No. 45 of 2008 (REP. No. 17 of 2008 on the file of Sub-Court, Namakkal) in O.S. No. 43 of 1984 dated 07.08.2010 in ordering delivery

of possession of the petition mentioned items 2 to 5 dated 07.08.2010. The petitioners herein were the respondents 2 to 4, and the respondents 1

to 4 herein were the petitioners and the respondents 5 and 6 herein were the respondents 5 and 6 before the lower Court.

2. The case of the petitioners (respondents 2 to 4) before the lower Court are briefly stated as follows:

By virtue of the sale agreement dated 10.6.1983, O.S. No. 43 of 1984 has been filed before the Sub Court, Namakkal, for specific performance

of contract. The Sub-Court, Namakkal in its judgment and decree dated 15.7.1985 decreed the suit. Thereafter, the plaintiffs filed Execution

petition in E.P. No. 57 of 2001 and got the sale deed executed. It is under the circumstances the plaintiffs filed execution petition for delivery of

possession. Pending the same the first defendant died. Therefore, his legal representatives, the 5th and the 6th respondents were impleaded as

parties. As the first plaintiff died, his legal heirs 3 to 5 plaintiffs were impleaded as parties. Since the sale deed was executed as per Execution

petition in E.P. No. 57 of 2001, it has become necessary to deliver possession of the property. Hence, the execution petition has been filed

seeking delivery of possession.

3. The objections raised by the 4th respondent in the counter affidavit which was adopted by the 2nd and 3rd respondents are as follows:

The decree has not been ordered against this respondent. The decree would not legally bind on the 2nd and 4th respondents. A suit in O.S. No.

59 of 2009 has been filed for partition and separate possession and it is pending and an application for interim stay petition is also pending.

Without knowing the result of the case, any order passed is not sustainable. Further, against the judgment of the appeal filed in A.S. No. 862/1985

against the decree passed in O.S. No. 43/1984, SLP No. 37267 of 2008 is also pending. Suppressing the said fact, the execution petition has

been filed. Hence, this execution petition filed against Order 21 Rule 35 C.P.C. has to be dismissed with costs.

4. The counter statement filed by the 6th respondent is as follows:

A suit in O.S. No. 48 of 2009 has been filed for partition by this respondent before the Sub Court, Namakkal, and the said suit was transferred to

the file of this court and it was dismissed on 8.8.2007 on the ground of non-payment of batta. A petition in I.A. No. 27 of 2009 filed, to restore

the same is pending. This respondent is not a party to that suit. Hence, the suit O.S. No. 43 of 1984 would not bind this respondent in any manner.

Further, SLP No. 37267/2008 is pending and hence, the decree has not reached its finality. The petition is not maintainable under Order 21 Rule

35 CPC. The decree is not for delivery of possession and therefore, the execution Court is not having jurisdiction to order delivery of possession.

Hence, the petition may be dismissed with costs.

5. The lower Court had considered the claim of the petitioners/decreed holders and came to the conclusion that the petitioners/decreed holders were

entitled to delivery of possession and accordingly, delivery of the property mentioned in the schedule was ordered by the lower Court. Aggrieved

by the said order passed by the lower Court, the petitioner's/respondent 2 to 4 had preferred this revision.

6. Heard Mr. D. Krishnakumar, learned counsel for the petitioners and Mr. M.S. Krishnan, learned senior counsel appearing for the respondents

1 to 4.

7. Learned counsel for the petitioners would submit in his argument that the lower Court was thoroughly misled on the points and misconceived the

entire issue and had ordered delivery of possession of the suit properties which is not in accordance with the tenor of the judgment rendered by the

Honourable Apex court reported in Babu Lal Vs. Hazari Lal Kishori Lal and Others, and in 2001 VII AD 513 (SC) He would further submit in

his arguments that the decision of this Court rendered in 1974(1) MLJ 166 (Rajabather V. Syeed) along with other judgments of Allahabad High

Court reported in AIR 1950 Alla 415(D.B.) (Arjun Singh v. Sahu Maharaj Naraian) and AIR 1954 Alla 643(D.B.) and Atal Behary Acharya Vs.

Barada Prasad Banerji, would lay down that the granting the relief of possession can't be ordered, even when the said relief was not asked for in

the plaint filed for specific performance. He would further submit in his argument that the judgment rendered by the Honourable Apex court

reported in 2001 VII AD 513 (SC) . In support of his argument He would further submit in his arguments that the provisions of section 22(2) of

the Specific Relief Act 1963 is very clear and the relief of possession of the property could be ordered only upon the amendment of the prayer if

such prayer was not already sought for in a suit for specific performance. He would also submit that admittedly the decree was not ordered with

the relief of possession and therefore, the mandatory provisions of section 22(2) has to be followed as per the dictum laid down both in Babu Lal

Vs. Hazari Lal Kishori Lal and Others, and 2001 VII AD 513 (SC) . The judgment reported in S. Sampooram and A. Srinivasan Vs. P.V.

Kuppuswamy and Others, would also refer to the judgment of the Honourable Apex Court reported in 2001 VII AD 513 (SC) but the said

principle was not applied since the relief of possession was already asked for in the plaint and was granted in the decree. He would also submit

that the judgments of this Court reported in 1974(1) MLJ 166 (Rajabather V. Syeed) as relied on by the lower Court and also the various other

judgments of Allahabad High Court and Patna High Court, were distinguished in the order passed by the Honourable Apex court reported in 2001

VII AD 513 (SC) and therefore, they are not applicable to the present case. He would further submit that when there was no relief sought for

possession of the property in the plaint, it would specifically attract the provision of section 22 (2) of the Specific Relief Act and therefore, the

order passed by the lower Court for delivery of possession without any relief sought for and the decree for possession ordered, cannot be

sustained. Therefore, he would request the Court to interfere with the order passed by the lower court and to set aside the same.

8. Learned Senior counsel Mr. M.S. Krishnan would submit in his arguments that the suit was filed by the plaintiff in the year 1984 and the decree

was passed on 15.7.1985 and in pursuance of the said decree of specific performance, the sale deed has been executed by the execution court

and the title to the said property passed to the decree holder by virtue of the execution of sale deed. He would also submit, that even though the

decree was silent in respect of delivery of possession, the passing of title would entitle the decree holder to get possession as normally done in the

court auction procedure. He would further submit in his arguments, that the incorporation of delivery of possession expressly in the decree is

unnecessary as per the dictum laid down by this Court reported in K.M. Rajendran Vs. Arul Prakasam and another, . He would also submit in his

arguments that the judgments of Allahabad and Patna High Court have come to the conclusion, that the decree, though does not contain the order

of possession, the court can order delivery of the property while decreeing the suit for specific performance. He would also submit that the decree

for specific performance would also comprise the relief of possession and the decree holder, who obtained the sale deed in pursuance of the

specific performance decree is entitled to exercise his right over the said property comprised in the sale deed and therefore, the possession of the

said property is incidental to the said sale. He would also submit in his argument that the judgment of the Honourable Apex Court reported in Air

Babu Lal Vs. Hazari Lal Kishori Lal and Others,) and the judgment of this Court as cited by the petitioners" counsel in S. Sampooram and A.

Srinivasan Vs. P.V. Kuppaswamy and Others, would also approve the claim for delivery of possession in a decree for specific performance,

though there was no specific clause for recovery of possession.

9. He would further submit in his argument that the judgment of Hon"ble Apex Court reported in Babu Lal Vs. Hazari Lal Kishori Lal and Others,

would explain clearly that in appropriate cases the relief of possession could be combined in one suit and the possession need not be asked in all

the cases and, therefore, the facts and circumstances of this case would squarely attract the said judgment and the facts and circumstances

discussed in the judgment of the Hon"ble Apex Court reported in 2001 VII AD 513 (SC) are not applicable to the facts and circumstances of the

present case. He would also submit that the petitioner was, admittedly, in possession of the suit property, after the execution of the sale deed and if

for any reason, the respondent has been directed to go for a separate suit for possession against the petitioner, it would again put the decree holder

to get his relief after a long period. He would again submit that the hypothetical approach of the petitioner is certainly against the cause of justice

and therefore, the claim of the petitioner was rightly rejected by the lower Court and this Court may not interfere with the order passed by the

lower Court and thus, the Revision Petition may be dismissed.

10. I have given anxious thoughts to the arguments advanced on either side.

11. The facts which are necessary for the disposal of the point in issue, would be that the plaintiffs obtained a decree for specific performance

against the defendants in respect of the suit property and they had launched the execution proceedings for the execution of sale deed by the

defendants or by the Court; and, accordingly, the execution Court ordered execution of sale deed in pursuance of the specific performance decree

passed in favour of the plaintiffs. Thereafter, they had also launched the execution proceedings seeking for delivery of possession of the said

property despite they have not asked for the relief of possession in the plaint and no decree for possession has also been passed. The lower Court

had ordered delivery of possession rejecting the objections raised by the petitioners herein that the suit filed by them for partition of properties is

pending before the Court.

12. The main contention raised by the learned counsel for the revision petitioners

would be that the order passed by the lower Court in ordering delivery, when there was no decree for possession of the suit properties, passed by the trial Court and therefore it is not sustainable in view of

Section 22 of Specific Relief Act (hereinafter referred as Act). For the purpose of appreciating the contention of the revision petitioners, the

provisions of Section 22 of the Act have to be extracted. Section 22 of the Act would run as follows:

22. Power to grant relief for possession, partition, refund of earnest money, etc.-

(1) Notwithstanding anything to the contrary contained in the

Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an

appropriate case, ask for-

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for

specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section(1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the

plaint on such terms as may be just for including a claim for such relief.

13. The other contention of the learned counsel for the revision petitioners would be that the Hon'ble Apex Court in its judgment reported in 2001

VII AD 513 (SC) has categorically laid down that the plaintiffs in the suit for specific performance cannot seek for possession when they failed to

pray for the relief of possession in the suit. The relevant passage relied upon by the learned counsel for the revision petitioner would run as follows:

17. It may be seen that sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further reliefs mentioned in

clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific

performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the

court unless it has been specifically claimed. Thus it follows that no court can

grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for.

In the said dictum, it has been categorically laid down that the relief of possession of a land or other immovable property, subject matter of the agreement for sale in a suit for specific performance cannot be claimed or granted by the Court unless the possession of such immovable property was specifically prayed for. It has been further found by the Hon''ble Apex Court in the said judgment that the suit filed by the plaintiffs was not a suit for land, since possession was not asked for in the said suit. It has been categorically found by the Hon''ble Apex Court that the suit for specific performance in simplicitor is not a suit for land under the meaning of Clause 12 of the Letters Patent and thus, it has been found that the suit for specific performance of a contract for sale of immovable property was found to be a suit on a personal contract in between parties. The reliance placed by the learned counsel for the plaintiffs reported in 2001 VII AD 513 (SC) was applicable only in the appropriate cases which were mentioned in Section 22 of the Act and, therefore, it was found that the relief of possession should have been asked for in the plaint by the plaintiffs. He would submit that so far as the present case on hand is concerned, it is not attracted under the cases mentioned in Section 22 and hence, the said dictum is not applicable. The further contention is that the ruling given in the judgment reported in Babu Lal Vs. Hazari Lal Kishori Lal and Others, in between Babu Lal Vs. M/s, Hazari Lal Kishori Lal alone is applicable since the present case is not coming under the definition of an appropriate case. The relevant passage which was relied upon by the learned counsel for the respondents/plaintiffs in the said judgment would be as follows:

13. The expression in sub-section (1) of Section 22 ""in an appropriate case"" is very significant. The plaintiff may ask for the relief of possession or partition or separate possession ""in an appropriate case"". As pointed out earlier, in view of Order 2 Rule 2 of the Code of Civil Procedure, some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that

the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could not be combined in one suit. Similarly, a case may be visualised where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed or such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simplicitor, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of Section 55(1) of the Transfer of Property Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.

16. It may be pointed out that the Additional Civil Judge had decreed the suit for specific performance of the contract. The High Court modified the decree to the extent that the sale deed was to be executed by respondents Nos. 6 to 9 together with petitioner. In short, the decree was passed by the High Court not only against respondents Nos. 6 to 9 but also against the subsequent purchaser i.e., the petitioner and thus the petitioner was himself the judgment-debtor and it cannot be said that he was a third person in possession and, therefore, relief for possession must be claimed. The contention on behalf of the petitioner is that the relief for possession must be claimed in a suit for specific performance of a contract in all cases. This argument ignores the significance of the words "in an appropriate case". The expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the

transfer of the immoveable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale. Besides, the proviso to sub-sec(2) of S. 22 provides for amendment of the plaint on such terms as may be just for including a claim for such relief "at any stage of the proceedings".

14. As far as the present case is concerned, we could see that the relief of Specific Performance was asked for by the respondents/plaintiffs in the year 1984 and the suit was decreed and the execution was launched and the sale deed was executed thereafter by the execution Court. For a decree made in 1985, the delivery of possession was ordered in the year 2010. As per the dictum laid down by the Hon"ble Apex Court in the aforesaid judgment, the provisions made in Section 22 of the Act are found intended for avoiding multiplicity of proceedings. If really, the plaintiffs are directed to go for filing a separate suit for possession from the date of execution of the sale deed, it would certainly defeat the ends of justice and it would be against the tenor of the judgment rendered by Hon"ble Apex Court. According to the said judgment, the provisions of Section 55(1) of the Transfer of Property Act was referred to and the execution of the sale deed by the Court would provide the decree holders, the title as well as the possession of the property. It has also been categorically found by the Hon"ble Apex Court that the right to possession is incidental to the Specific Performance of Contract of sale. Rightly, it has also been ordered that the necessary amendment could be permitted at any stage of proceedings even at the stage of execution in order to avoid multiplicity of proceedings. As per the aforesaid dictum, the respondents/plaintiffs is at liberty to amend the plaint as well as the decree, even at the stage of execution.

15. The petitioners cannot have any say in amending the plaint as well as the decree which was passed against the defendants. Therefore, they have no locus standi to object if the respondents/plaintiffs are asking for any amendment in the plaint as well as in the decree. Therefore, while relying upon the dictum rendered in 2006 2 MLJ 350 in between N.K. Jinnah Vs.

K.P. Krishnan, the lower Court should permit the respondents/ plaintiffs to amend the plaint as well as the decree including the prayer for possession of the said property in accordance with the judgments of Hon''ble Apex Court made in Babu Lal Vs. Hazari Lal Kishori Lal and Others, Therefore, this Court finds that the order passed by the lower Court is liable to be interfered with, but with certain directions. Since the procedure as contemplated u/s 22 of the Act is meant to advance the cause of justice and it is only an enabling provision in order to avoid multiplicity of proceedings, it has become necessary for this Court to direct the respondents/plaintiffs to amend the plaint in order to add the relief for possession as contemplated in the provisions of Section 22 of the Act and shall the decree shall also consequentially be amended and thereafter to claim delivery of possession against the judgment debtors. It has been categorically mentioned in the said judgment of Hon''ble Apex Court in para 20, that the amending the plaint can be done at any stage which includes the stage of execution.

16. Therefore, this Court is inclined to interfere with the order passed by the lower Court and set aside the same with a direction to permit the respondents/plaintiffs to amend the plaint and, the decree for the relief of possession, and thereafter, to continue the execution petition filed by the respondents/ plaintiffs, in view of the long period lapsed due to the pendency of proceedings. The lower Court is also directed to keep the execution proceedings pending awaiting the amendment of the plaint as well as the decree and after receiving the amended decree, to continue the said proceedings and to pass suitable orders thereon. With the aforesaid directions, the order passed by the lower Court is set aside and the Civil Revision Petition is ordered accordingly. No costs. Consequently, connected miscellaneous petition is closed.