

(2011) 12 J&K CK 0029

In the Jammu And Kashmir High Court

Case No : C. Rev. No. 82 of 2011 and CMP No. 297 of 2011

Ghulam Mohammad Bhat

APPELLANT

Vs

Abdul Rahim Sheikh and Others

RESPONDENT

Date of Decision : 17-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 2012 J&K 86

Hon'ble Judges : Mohammad Yaqoob Mir, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon'ble Mr. Mohammad Yaqoob Mir, Judge

1. Respondents No.1 to 3 are the sons and respondent No.4 is the daughter of one Ghulam Ahmad Sheikh. The said deceased Ghulam Ahmad

Sheikh has left behind property including the land covered by survey No.306/51 Khewat No.65 situated at Parimpora Srinagar. Respondents

No.2 to 4 out of said survey number have sold land measuring 1 kanal 19 marlas 111 sqft. to the petitioner through registered sale deed executed on 6.10.2004.

2. The respondent No.1 claimed to have first right to purchase, so filed suit for right of prior purchase which has been decided by the Court of

Additional District Judge, Srinagar on 23.2.2008 in ex-parte because the petitioner and respondents No.2 to 4 despite proper service had first

failed to appear but then Mr. N. A. Kuchay Advocate had appeared but then again remained absent. Noticing the same position, trial court has

recorded that there was no option but to proceed in ex-parte. The trial

culminated in decreeing the suit in ex-parte in favour of the respondent

No.1(plaintiff) with a condition that he will deposit the consideration amount (purchase money) of Rs.70,000/ within one month from the date of

decree. On payment thereof, defendants (petitioner and respondents No.2 to 4) shall deliver possession of the suit land to the respondent

No.1(plaintiff) whose title thereto shall be deemed to accrue from the date of payment. In case of default in deposit of the purchase amount, the

suit shall be dismissed with costs.

3. The respondent No.1(plaintiff) seem to have satisfied the stipulation i.e. has deposited the purchase money and thereafter when possession was

not delivered to him, he has filed execution petition which has been decided on 01.06.2011. While disposing of the execution petition, learned trial

court has recorded that the decree sought to be executed has been passed on 23.2.2008 and the same has attained finality, the decree holder

having discharged his obligation by depositing the consideration amount is entitled to get the decree executed in the manner and mode laid down.

Petitioner (judgment debtor No.4) has been restrained from alienating the subject of the decree, warrant of attachment has been issued directing

the Nazir Tamilat Srinagar to deliver peaceful possession of the subject matter of the decree to the decree holder (respondent No.1). In the

process Nazir has also been given option to seek assistance of the Tehsildar concerned for identification of the subject matter and for causing

requisite entries in the revenue records regarding delivery of possession.

4. In compliance to the said order dated 01.06.2011, possession as per reports is shown to have been delivered to the respondent No.1 (decree

holder.

5. Dissatisfied with the order dated 01.06.2011, instant revision petition has been filed. According to learned counsel for the petitioner, firstly

father of the petitioner and then petitioner has been in possession of the land in question. The petitioner otherwise was the tenant of the land as is

also supported by the statements of the witnesses recorded by the trial court even in ex-parte. The position of the petitioner having been in

possession of the suit property prior to the execution of the sale deed is supported by the contents of the sale deed wherein it is recorded that the

petitioner has been in possession of the same from the long time, therefore,

petitioner has some other rights as well. It being so, the delivery of possession was to be directed in accordance with Order 21 Rule 36 of the CPC which has not been followed.

6. Keeping in view the contentions of the learned counsel for the petitioner, the important question which emerge for consideration at first instance

is as to whether revision petition is maintainable in view of specific bar contained in Proviso to Section 115 of the Code of Civil Procedure. For

facility of reference said Proviso is reproduced herein below:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit

or other proceedings, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit

or other proceedings.

7. In the context of said Proviso, the position has been made clear by the Hon'ble Apex Court in the judgment reported in Shiv Shakti Coop.

Housing Society, Nagpur Vs. Swaraj Developers and Others, captioned Shiv Shakti Co-op. Housing Society Nagpur Vs. M/S Swaraj

Developers and others. It shall be useful to quote following portion from para 32:

32. A plain reading of S. 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for

revision would have given finality to suit or other proceeding. If the answer is yes then the revision is maintainable. But on the contrary, if the

answer is no then the revision is not maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the

revision will not be maintainable.....

Now applying the position of the Proviso and the law as has been laid down by the Hon'ble Apex Court to the present case, it is to be seen that if

the order impugned dated 01.06.2011 would have been in favour of the petitioner, would that terminate the execution proceedings in entirety.

Answer has to be no because learned counsel for the petitioner of his own showing has submitted that the mode prescribed for delivery of

possession in the case is provided under Order 21 Rule 36 CPC which would mean that in any case if the order would have been in favour of the

petitioner, the proceedings would not get terminated. If at all Order 21 Rule 36 CPC would apply, same would provide for another method and

mode for execution. Now it is crystal clear that in the background of submissions and the averments of the revision petition, in any case if the order would have been in favour of the petitioner, same would not terminate the execution proceedings. It being so, the revision petition can be safely held to be not maintainable., dismissed accordingly along with connected CMP Copy of the order be send to the court below for information.