

(1951) 11 AHC CK 0018

In the Allahabad High Court

Case No : Execution First Appeal No. 115 of 1948

L. Lahori Ram Sahgal, J.D.

APPELLANT

Vs

L. Prabhu Dayal, D.H.

RESPONDENT

Date of Decision : 02-11-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148
Limitation Act, 1908 — Article 182

Citation : AIR 1953 All 120

Hon'ble Judges : Sapru, J;Mootham, J

Bench : Division Bench

Advocate : Gopi Nath Kunzru and G. Kumar, for the Appellant; B.R. Avasthi, for the Respondent

Final Decision : Allowed

Judgement

Sapru, J.—This is an Execution First Appeal which has been filed by the judgment-debtor and the circumstances in which it arises are stated below:

2. On the 11th October 1940, the property in respect of which execution of a decree for the specific performance of a contract of sale is claimed was sold by Swami Badalgiri to Lala Lahori Ram Sahgal with the condition that, if within four years and a half Badalgiri would pay the price, namely, Rs. 6000/-, the purchaser would execute a deed in his favour reconveying the property in question. On the 18th of November, 1944, Badalgiri brought, on the basis of the above contract, a suit for the specific performance of that contract of sale. It was decreed on the 28th of July 1945 and in order to facilitate an understanding of the case we are quoting below the operative portion of this decree as translated by the learned second civil Judge of Saharanpur:

"The plaintiff's suit for specific performance is decreed and the defendant is ordered to execute a deed in favour of the plaintiff re-conveying the properties in question to the plaintiff after receiving Rs. 6000/- from the latter within two months of this date. If the defendant does not execute this deed within the time

allowed, the plaintiff will be entitled to have the sale deed executed through Court in execution department....."

Thereafter on the 17th of September 1945, a notice was given by the decree-holder, Badalgiri, demanding execution of the decree and intimating that he would be present in Hardwar on the 27th of September 1945 with the requisite sum of Rs. 6000/- and that Lahori Ram should be ready to execute the sale-deed before the Sub-Registrar on that date. On the 26th of September 1945, Lahori Ram replied that he would be present on the 27th and meet him at Hardwar. On the 27th of September, 1945. Lahori Ram went, as required, to Hardwar and remained at the Sub-Registrar's office till 4 p.m. but Badalgiri did not turn up.

Lahori Ram did not execute any deed as the condition precedent to its execution was not fulfilled by Badalgiri who, as has been said before, was absent on that date. Badalgiri's case is that he did attend the Sub-Registrar's office but this is not borne out by any evidence in this case and has not been believed by the learned Judge. On the 26th of October 1945, Badalgiri transferred the decree to the respondent in the suit viz. Prabhu Dayal and the latter's name was thereafter entered as the transferee of the decree. On the 7th July 1947, Prabhu Dayal deposited the sum of Rs. 6000/- in court which had been agreed upon by the parties for the reconveyance of the property and on the 10th July 1947, Prabhu Dayal filed the application out of which this appeal arises for its execution.

3. The defence of Lahori Ram was that, according to the decree of the 11th October 1940, money should have been paid within two months and that it was on the fulfilment of that condition that he was bound to execute the decree for specific performance. He, therefore, pleaded that there had been no failure on his part to execute it, he having been present at the Sub-Registrar's office. The decree-holder having failed to pay the sum of Rs. 6,000/- to get the sale deed executed in his favour within a period of two months provided by the decree when he was ready and willing to execute it. had no right left to obtain the sale-deed by putting the decree in execution.

4. The defence of the judgment-debtor did not find favour with the lower Court. The learned Judge rejected the objections raised by the judgment-debtor and held that the application for execution was in order. He thought that the terms of the decree clearly showed that its execution, was to be governed by Article 182 of the Indian Limitation Act and that it was for the defendant i.e. the appellants before us to execute the deed within two months, He further held that the failure of the defendants i.e., the appellants before us to execute, the deed within the time allowed and his continuance in enjoyment of the usufruct could not bar the present application. In other words, he was of the opinion that on a correct interpretation of the terms of the decree Badalgiri or his transferee could execute it even after the lapse of two months allowed by it. Dissatisfied with the decision, the judgment-debtor Lahori Ram has come up in appeal to this Court and the question before us is whether the order of the learned Judge is correct.

5. From a perusal of the operative portion, of the decree which has been quoted by us in the opening part of our judgment, it is quite clear that the right of the decree-holder to invoke the assistance of the court in executing the decree would have come into existence only if within a period of two months of the decree the decree-holder had moved in the matter by tendering to the judgment-debtor the sum of Rs. 6,000/- and on such a tender having been made the judgment-debtor had failed to execute the sale-deed within that period of two months. We are not prepared to construe the decree to mean that an obligation had been cast by it upon the judgment-debtor to execute the sale-deed within a period of two months, no matter whether the decree-holder had or had not paid the sum of Rs. 6,000/- within that period. The broad facts that stand out in this case are that within the two months allotted by the decree, the sum of Rs. 6,000/- which was to be paid, before the reconveyance was to be executed by the judgment-debtor, was not paid up and has indeed not been paid up even upto this date, for payment in court cannot be regarded as a tender of the purchase money to the judgment-debtor. We are not prepared to agree with the view that the decree had put the judgment-debtor under an obligation to obtain a sum of Rs. 6,000/- from the decree-holder within the aforesaid period of two months. It is difficult to understand how such an obligation could have been imposed upon the judgment-debtor without means being afforded of carrying it out and obviously in this case no such means had been afforded to the judgment-debtor.

6. It has been argued that the limit of two months prescribed in the decree was intended solely for the judgment-debtor and that so far as the decree-holder is concerned, he could, under Article 182 at any time within three years, deposit the money and get the sale-deed executed through the court. It is further urged that the court could extend the time for payment and that, in effect, it must be deemed to have done so. No doubt under Article 182 of the Limitation Act the decree-holder can execute a decree within three years of an executable decree. This is, however, begging the question. For the fact is that in the present case, however, there is, in our opinion, no executable decree. The decree would not be executable unless a sum of Rs. 6,000/- was. paid by the decree-holder. The judgment-debtor appellant was under no obligation to execute the sale-deed unless he had been paid up Rs. 6,000/-. In other words, there was no decree capable of execution until Rs. 6000/- had been paid. The decree was to become executable only on compliance of its terms. Failure to comply with the terms would make the decree inexecutable. The decree-holder not having fulfilled the terms of the contract had no right to get the decree executed.

7. It was urged that the court could extend the time for payment and it must be deemed to have done so in this case by implication. Even assuming that the court could extend the time the position has to be faced in this case that there is no application in writing supported by an affidavit explaining the delay in the payment of Rs. 6000/- on the part of the decree-holder. No facts were placed before the court to justify any extension of time u/s 148 or any other Section of the CPC or the Limitation Act.

8. We were referred to the case of -- " Khorshed Ali Bepari and Another Vs. Probhat Chandra Das, . In that case, in a decree for specific performance of a contract of sale the defendant was directed to execute a "kobala" in favour of the plaintiff for the sale of the properties by accepting the balance of the price from the plaintiffs within a month. On failure to deposit that price the court was empowered to execute and register a kobala of the sale of the properties on behalf of the defendant. The decree-holder did not pay the amount due nor was the kobala executed within the time specified in the decree.

On those facts, the view which found favour with the Calcutta Court was that upon the terms of the decree as it stood, the plaintiff decree-holders had the right to deposit the balance of the purchase money and requisite stamp and registration fee and get a conveyance executed and registered through the agency of the court. It was held that the only limitation imposed by the decree-holder in that behalf was the one under the law prescribing the time within which the decree must be put into execution. No reasons are given for this conclusion. We may with respect say that we dissent from this case and are unable to agree with its reasoning which we have found it difficult to follow.

9. In the case of Abdul Shaker Sahib Vs. Abdul Rahiman Sahib and Another, the Bench deciding it took the view that where the plaintiff is given a decree for specific performance of a contract of sale with a condition of paying a certain amount to the defendant within a specified time, the decree is in the nature of a preliminary decree, the original court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases extension of time. The learned Judges who decided the case further held that it was open to the vendor to file a fresh suit for rescission of the contract or in the same suit apply to rescind the contract--the contract not being determined by mere failure of the plaintiff to pay the amount within the specified time.

Reference may be made to the observations in that case of Schwabe, C. J. "that it is a well-established principle that persons who desire assistance of the Court for equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the court ought not to exercise its powers".

In the case before them they held on the facts brought out that the delay should be excused, for on the evidence, the plaintiffs had been put off for some time by the first defendant.

10. In the case of -- " AIR 1943 111 (Nagpur) the decree which was sought to be enforced was in the following terms:

"It is ordered and decreed that the plaintiffs shall deposit in Court a sum of Rs. 3500/-plus Rs. 82/8/- less the costs incurred by them in the suit, within a Period of one month from today. Thereafter, within fifteen days the defendant, through the Sarbarkars shall execute a proper reconveyance deed in favour of the

plaintiffs, shall get the same registered and shall deliver the same to the plaintiffs. The defendant shall also at the same time place the plaintiffs in possession of the house. Should the defendant fail to do so within the time specified, the plaintiffs may apply to this Court to get a reconveyance deed duly executed on behalf of the defendant....."

The plaintiff decree-holder having found himself unable to pay within the period stated in the decree and the plaintiff decree-holder having shown that the delay was due to unavoidable circumstances and having produced money within a few days of the time fixed in the decree, the court came to the conclusion that the court had power to extend the time.

11. Dealing with the above state of things Stone C. J. and Vivian Bose, J. observed as follows:

"Where a decree for specific performance does not state what is to happen if payment is not made by the successful plaintiff within the time fixed, the result of the plaintiffs being out of time will not be to cause the sanction automatically to fall".

The conclusion that they came to was that--"Once the plaintiffs were out of time in producing the purchase money the opponents could have moved the Court to rescind the decree, and the court, in considering that motion would rescind if it thought that the facts were such as to justify the taking away from the plaintiffs the relief that they got, because of their default. On the facts here present of course the court would have no such thing. Indeed normally on such a motion the court would not, for any default, there and then dismiss the suit, in other words, rescind the decree but would give further time".

From the cases referred to above even on the assumption that Section 35 of the Specific Relief Act has no application to the facts of the present case and that it was open to the court to extend the time, the question whether time should have been extended was one to be decided in the light of the facts brought out in the case. It was not as if the court was bound to extend time. For the proper exercise of its discretion proper material should have been placed before the court. We proceed, therefore, to consider whether such materials had been placed before the court in this case.

12. I have pointed out that on the 17th of September 1945 notice was sent by Badalgiri to Lahori Ram asking him to attend the office of the Sub-Registrar at Hardwar on September 27, 1945, and to execute the sale-deed in accordance with the terms of the decree. The position established in this case is that Lahori Ram did attend the Sub-Registrar's office on that date but BadaJgiri did not. The period for payment of the amount fixed in the decree was two months and Lahori Ram would be justified, on receiving this information that Badalgiri would be attending the Sub-Eegistrar's office with the money. In these circumstances, having been informed by Badalgiri that he was coming with the money there was no point in Lahori Ram requiring Badalgiri to pay the money and have the sale-

deed "executed within two months.

13. There can be no doubt that Lahori Ram's version is correct. Apparently Badalgiri could not get the sale deed executed within two months because he did not have the money to pay for the reconveyance of the property. The learned counsel has cited a number of cases on the point that it is open to the court to extend time. Even accepting the argument that time could be extended, the question is whether this is a fit case in which time should have been extended. I think not, for Badalgiri, disqualified himself by his conduct from claiming an extension of time and no explanation for the delay is forthcoming from the side of the respondents.

14. In these circumstances I think that the judgment of the learned judge is erroneous. I would allow the appeal, set aside the judgment and decree of the lower court and dismiss the plaintiff's suit with costs.

Mootham, J.

15. I agree that this appeal must be allowed.

16. The respondent's contention is that he is entitled to execute the decree which he obtained on the 28th July 1945, at any time within the period allowed by the law of limitation; in other words he says that provided he within that period, pays to the appellant a sum of Rs. 6,000/- he can compel the latter to convey to him the property specified in the decree. The contract in respect of which the appellant has obtained a decree for specific performance was entered into on the 11th October 1940. It provided, "inter alia", that if within four and a half years from that date the vendor should pay the sum of Rs. 6,000/- to the purchaser the latter would execute a reconveyance of certain property in the vendor's favour.

The suit for specific performance was instituted on the 18th November 1944, and the decree, as I have said, was made on the 28th July 1945. The vendor's right of repurchase would, under the agreement, have expired in April 1945, and what in effect, therefore the respondent is contending is that by virtue of the decree the period within which the property may be repurchased has been extended by three years--indeed, if appropriate stops in aid of execution are taken the period for repurchase can presumably be extended by twelve years. I do not think this is the legal position.

17. It, appears to me that the plain meaning of the decree is not merely that the appellant shall reconvey the property if within two months the respondent pays to him the sum of Rs. 6,000/-, but also that the respondent must pay that sum within that period if he wishes to have the property reconveyed to him. If the respondent failed to pay the sum of Rs. 6,000/- within the prescribed period the decree did not (in the absence of a clear proviso to that effect) automatically become null and void, but it was open to the appellant to apply to have the decree rescinded or to the respondent to apply to the court for an extension of

the time for payment : -- "Abdul Shakur Sahib v. Abdul Rahman Sahib", (1); -- "Moorti Parasnathji v. Gulab Chand", (2). No-question of treating the decree as one which could be executed at any time within three years appears to me to arise, for the decree was not capable of being executed unless the respondent paid to the appellant the sum of Rs. 6,000/- within the prescribed period as the court might allow on an application being made for that purpose. In this case, the money was in fact paid into court by the respondent on the 7th July 1947, exactly two years after the decree. No application was made to the court for an extension of the time for payment, and I may add that there appears to be no ground whatever in this case for extending the time for payment for so long a period.

18. On the question of fact whether the failure to execute a reconveyance was due to default on the part of the appellant I entirely agree with the conclusion reached by my brother.

19. The appeal must therefore be allowed, with costs.