

(1991) 08 AHC CK 0038

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 10341 of 1989

Mohammad Yasin and another

APPELLANT

Vs

Mohammad Yasin and others

RESPONDENT

Date of Decision : 23-08-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, 115, 47
Constitution of India, 1950 — Article 226

Citation : AIR 1992 All 55

Hon'ble Judges : M.P. Singh, J

Bench : Single Bench

Advocate : Aditya Narain, for the Appellant; J.K. Srivastava, Standing Counsel and Sidheshwar Prasad, for the Respondent

Final Decision : Allowed

Judgement

1. Petitioners were the plaintiffs in a suit for specific performance of an agreement for sale.
2. Mohd. Bashir and Abdul Ghafoor were the predecessor in interest of respondents Nos. 1 to 13. They were the owners of the open piece of land in dispute. They executed an agreement to sell on 23-1-73 in favour of the petitioners. On the same day by means of another deed they permitted the petitioners to construct the boundary wall around the said land. It was done by the plaintiff. Subsequently Mohd. Bashir and Abdul Ghafoor expressed their unwillingness to execute the sale deed. This led the petitioners to file the suit in the year 1977 for specific performance of the contract for sale.
3. The defendants filed their written statements. The execution and genuineness of the agreement to sell was challenged. The properties sought to be transferred were in two different parts belonging to two different persons, so the sale deed could not be executed. The defendants have raised certain construction over the land. The land ceased to be an open piece of land. No consideration had passed.

4. Under the orders of the trial Court, the Amin submitted his report showing two tin-sheds which appeared to be new.

5. The suit was decreed on 29-11-1980. The defendants' first appeal was dismissed on 8-9-1986 by the 1st Addl. District Judge. The High Court dismissed the second appeal on 10-12-1987. The decree became final.

6. In the meantime the petitioners had filed an execution case No. 3 of 1986. The respondents filed their objection u/s 47, C.P.C. They raised two objections (1) the properties sought to be transferred are two different properties belonging to two different persons and the decree for execution of contract for sale cannot be executed (2) there was no open land on the date of the agreement. There were already constructions on the same. The delivery of the possession of the open piece of land could not be given to the decree holder on account of the existing constructions.

7. These two objections were not pressed before the trial Court. Issues were not framed (c)n these points. Even before the first appellate Court no such point was argued. When the respondents filed their objection u/s 47, C.P.C. the second appeal was pending in the High Court. These points were not argued even in the second appeal.

8. A copy of the judgment of the High Court dismissing the respondents' second appeal has been filed as Annexure-10 to the writ petition in which it has been stated that--

"From a perusal of the tenor of the judgment of the lower appellate Court, it is clear that only two submissions had been advanced before it. The first was that the defendants are ready to pay back the advance amount along with 24% per annum interest..... The second submission raised by the learned counsel for the appellant was that the plaintiffs were the owners of two plots Nos. 32/116F and 32/116 E and they could not enter into joint transaction of agreement to sell dated 23-1-73. "Both these points raised before the appellate Court as well as in the High Court have been decided against the defendants. The decree has attained finality. The executing Court cannot go behind the decree.

9. The only point raised before the executing Court was that the decree passed by the Court below was defective one as the land in dispute was in two parts belonging to two different persons and the sale deed could not be executed. This objection was rejected on 19-12-87 against which the respondents filed a revision before the learned Addl. Distt. Judge, Varanasi.

10. The respondents raised new points before the revisional Court. The revision was allowed and the order of the executing Court was set aside. The case was remanded to the executing Court. The learned executing Court was directed to decide the following questions :

(1) Who has raised the construction in dispute.

(2) Whether the construction was made before the filing of the suit or after it? and

(3) Whether the construction standing on the land will be deemed to be transferred in favour of the decree-holder or they would be removed by the judgment-debtor at his own cost or the same is to be removed through Court?

11. Heard Sri Aditya Narain Singh, learned counsel for the petitioners and Sri Sidheshwari Prasad, learned counsel appearing on behalf of the respondents.

12. Sri Sidheshwari Prasad appearing on behalf of the respondents stated that the sale deed of the open piece of land could not be executed unless the construction standing over it was demolished. According to him either the construction were to be demolished or the defendant could be paid money by way of compensation. Unless it was done the decree could not be executed.

13. He has referred to a decision reported in *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others*, . In that case the controversy raised was that the defendants were not in a position to implement the conditions imposed on them by the decree because the Marwari Brothers' firm was dissolved by the agreement between the parties before the Federal Court's decree and it was no longer in existence. The executing Court refused to go into this question, but the Supreme Court took the view that the Court had jurisdiction to investigate whether the Marwari Brothers' firm had been dissolved and on account of the dissolution the decree has become inexecutable. In para 23 of the said judgment it has been made clear that the executing Court has to see that the defendants give to the plaintiff the very thing that the decree directs and not something else. If there is a dispute about its identity or substance, the executing court can determine the same. The facts of the instant case are entirely different. No such situation has arisen in this case.

14. Here neither there is any dispute with regard to identity or substance of the properties regarding which the sale-deed is to be executed. The only objection raised by the learned counsel for the respondents is that the decree was for open piece of land and since the constructions have been raised it ceased to be land. Therefore, the decree became . The defendant had full opportunity to get a decision on this point from the Court passing the decree. Neither any issue was framed on this point nor any finding was invited by the defendants from the Courts below, the case of *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others*, is wholly irrelevant to the controversy in hand.

15. Another case referred to by him is reported in *Mohd. Ismail Vs. Ashiq Husain*, . In that case it was held that in execution of decree for demolition, the executing Court can order for removal or demolition of the construction made during the pendency of the suit. The case reported in AIR 1934 Lah 978 *Narain Singh v. Imamdin* was relied upon. The Court further clarified the position that where the constructions were made before the institution of the suit, the rule laid down in AIR 1927 Rang 82 *Kauk Sike v. Ong Hock Sein* was to be followed. In

that case the judgment-debtor was allowed time to vacate the land and if he so desired, he could carry away the material of the building.

16. In that case the Court further clarified that where it appears to the executing Court that the cost of removal or demolition would exceed the cost of the material after demolition of the construction, it could be left open to the decree-holder to decide what he shall do with the construction after he was given the possession. He can permit the judgment-debtor to remove the construction standing on it.

17. In case of Mohd. Ismail Vs. Ashiq Husain, is of no assistance to the respondents. Learned counsel for the decree-holder relying upon the same judgment has made an offer to the judgment-debtor to remove the construction in case if he so desires sufficient time has been granted to the learned counsel for the judgment-debtor to seek instructions but he is not in position to make a clear statement in the Court today. He only insists that Rs. 50,000/- may be awarded to the judgment-debtor as compensation for which the decree-holder is not prepared. Under these circumstances I cannot direct the decree-holder to pay this amount. The offer, thus made by the decree-holder does not survive any further.

18. Learned counsel for the respondents further contended that he had raised the point in the written statement that the construction was already in existence on the date of the agreement. There was no replication by the plaintiff. The parties were not at variance on this point. So no issue was struck by the trial Court. He has raised this point in the grounds of appeal filed before the first appellate Court but the same has not been considered. Mere taking a ground in the memorandum of appeal is nothing. There should have been material on record to show that this point was pressed before the first appellate Court but it was not decided. Had it been a fact then the judgment-debtor would have raised this point in second-appeal also and would have argued that. I have already referred to the finding of the High Court which shows that this point even was not brought to the notice of the Court which dismissed the defendant's second-appeal. This is entirely a new point and cannot be permitted to be raised in the execution proceeding.

19. Learned counsel then referred to a decision reported in Shakuntla Devi and Another Vs. Harish Chandra and Another, . Special reference was made to paras 9 and 10 of the judgment. In that case it was held that when a Court finds that a contract has been entered into and there has been breach of the same it was not desirable to order for specific performance of the contract when it would be just and proper to award compensation to the aggrieved party even without specific prayer. This argument is based only on the equitable consideration. Looking to the facts of the present case I am not inclined to pass any such order in favour of the judgment-debtor.

20. Relying upon a decision reported in AIR 1957 SC 388 Beant Singh v. Union of

India, it has been contended by the learned counsel for the respondents that this Court is not sitting as a Court of appeal and cannot substitute its own judgment. It can only look into the jurisdictional error and error apparent on the face of record. This settled principle of law is not disputed. The order of the revisional Court suffers from error apparent on the face of record in as much as it has issued direction to the executing Court to decide the points which were beyond the decree itself. Accordingly the order of the revisional Court became vitiated.

21. After hearing the learned counsel for the parties and perusing the record I am of the view that the revisional Court has erred in the exercise of its jurisdiction in passing the order of remand. The directions contained in the order amounts to permitting the executing Court to go behind the decree which is not permissible. The directions, thus issued are wholly irrelevant and beyond the power of the revisional Court.

22. Learned counsel for the petitioner has referred to a decision reported in *Duraisami Mudaliar Vs. Ramasami Chettiar and Another*, , according to which, where Court directs a decree for possession of a vacant piece of land, it can direct its officers to remove the superstructure on it and deliver the vacant possession to the decree-holder. The power to remove the super-structure on the land was incidental power, necessary and ancillary to the power to deliver possession of the property. If, however, there be any construction within the meaning of Order 21, Rule 97 of the Code of Civil Procedure, that has got to be specifically dealt with under the said provision.

23. If the defendants have raised any construction during the pendency of the suit or after the decree, the executing Court without any difficulty could order removal or the demolition of the constructions so made, but if the superstructure was put up before the institution of the suit and was not ordered to be removed as part of the decree, proper course in such a case would be to direct the judgment-debtor to remove the super structure so put by him so as to effectuate the vacant delivery of the suit site to the decree-holder. This case has followed the earlier case of *Mohd. Ismail Vs. Ashiq Husain*, decided by this Court. Relying on the same, an offer was given to the judgment-debtor, but he was not prepared to remove the constructions.

24. For the reasons given in the preceding paragraphs, I am of the view that the order of remand passed by the revisional court was wholly uncalled for and is not in accordance with law. It suffers from error apparent on the face of record. The revisional court had to confine itself only to the question whether the executing court has passed an order in consonance with the decree.

25. In the result the writ petition succeeds and is allowed. The order dated 24th May, 1989 passed by the Addl. District Judge is set aside. He is directed to dispose of the revision within three months from the date of the filing of the certified copy of this order before him in accordance with law.

26. Petition allowed.