

(2016) 05 AHC CK 0106

In the Allahabad High Court

Case No : Civil Revision No. 341 of 1997

M/s Gangotri Sahkari Avas Samiti Limited

APPELLANT

Vs

M/s Pushpa Sahkari Avas Samiti Ltd. & Others

RESPONDENT

Date of Decision : 20-05-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115(3), 47

Citation : (2016) 7 ADJ 256 : (2016) 5 AllWC 4868 : (2016) 118 ALR 66 :
(2016) 2 ARC 455 : (2016) 133 RD 259 : (2016) 2 RJ 1313

Hon'ble Judges : Pramod Kumar Srivastava, J.

Bench : Single Bench

Advocate : A.K. Goyal, Ravi Kant Advocates, for the Appellant; A.K. Gupta,
Pankaj Bhatia, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Pramod Kumar Srivastava, J.— Heard the arguments of learned counsel for the parties.

2. This revision has been filed against the order dated 21.07.1997 passed by Civil Judge, Allahabad, in Execution Case No. 43/1997 (M/s Pushpa Sahkari Avas Samiti Ltd. v. M/s Gangotri Sahkari Avas Samiti Limited) by which objection of judgment debtor (/defendant no.-1 of original suit) under Section 47 CPC for setting aside the execution proceeding was rejected.

3. Original suit no. 501/1995 M/s Pushpa Sahkari Avas Samiti Ltd. v. M/s Gangotri Sahkari Avas Samiti Limited & Others was filed for following reliefs:

(a) That by a decree for permanent injunction the defendant no. 1 may be restrained from booking allotting, entering into agreement for sale in respect of any part of disputed property with any prospective purchaser till the defendant no. 1 in view of its assurance and of offers and promises fails to execute registered agreement for sale in respect of half of the property of 24, Louthier Road, George Town, Allahabad in favour of plaintiff on the same terms and

conditions as continued in registered agreement for sale dated 4.9.1993 by the co-owners of the said property in favour of the defendant no. 1.

(b) That by a decree for mandatory injunction the defendant no. 1 may be directed to execute registered agreement for sale in favour of the plaintiff in respect of equal half share of Bangalow and building no. 24. Louthier Road, George Town, Allahabad on the terms and conditions contained in the registered agreement for sale dated 4.9.1993 executed by the co-owners of the said properties in favour of the defendant no. 1 else the same may be executed by the court in favour of the plaintiff on behalf of the defendant no. 1.

(c) That cost of the suit may be awarded to the plaintiff against the contesting defendants.

(d) That any other and further relief with the Hon"ble court may deem fit and property be also awarded to the plaintiff against the defendant."

4. In original suit no. 501/1995 compromise dated 04.09.1996 was filed jointly by the plaintiff and defendant no.-1, which was verified and accepted by the trial court, and then suit was decided in terms of compromise, and said compromise was formed the part of decree. Said decree was never challenged and had become final.

5. The decree of original suit was admittedly passed on basis of compromise, which was part of the decree; which is reproduced as under:

(1) That the defendant No. 1 acknowledges and under takes to pay Lacks Rs. 38, 38,000/- (Rupees Thirty Eight Lacks and Thirty Eight Thousand) only to the plaintiff within six months from the date of this compromise. The payment of the said amount by the defendant no. 1 to the plaintiff shall have the effect of settling entire claim of the plaintiff as against the defendant no. 1 in full and final.

(2) That the defendant no. 1 has not agreed to sell as yet and undertake not to agree for sale take any advance or actually transfer the land of 24, Louthier Road, George Town, Allahabad in favour of any person for a period of six month without the payment of Rs. 38,38,000 (Rupees thirty eight lacks and thirty eight thousands) to the plaintiff as shown with red lines in the plan annexed to this compromise and measuring 2224 sq. yards (two thousands two hundred and twenty four sq. yards). If the defendant no. 1 still negotiates agrees to sell or actually sells the property as shown in the enclosed plan i.e. 2224 sq. yards (two thousands two hundred and twenty four sq. yards). Without making payment of Rs. 38, 38,000/- (Rupees Thirty Eight Lacks and Thirty Eight Thousand) to the plaintiff within six months, the said transaction/ transactions shall be wholly void.

(3) That the payment of Rs. 38, 38,000/- (Rupees Thirty Eight Lacks and Thirty Eight Thousand) shall be made by the defendant no. 1 to the plaintiff at the outset within the aforesaid period through banker's cheque accordingly to the convenience of the defendant no. 1.

(4) That in case of the defendant no. 1 fails to pay the aforesaid amount within the said period then the plaintiff shall have absolute right to deal the land shown with the red line in the attached plan with compromise measuring 2224 sq. yards (two thousands two hundred and twenty four sq. yards) and the defendant no. 1 shall cease to have any right title or interest of the aforesaid land.

(5) That the suit for injunction as per relief (a) and (b) contained in the plaint shall stand decreed in favour of the plaintiff against the 4 defendant no. 1 only the extent of Land measuring 2224 sq. yards (two thousands two hundred and twenty four sq. yards) shown by red lines in the attached plan or the property in despite i.e. no. 24 Louthier road, George town, Allahabad, as shown in the attached plan with red lines.

(6) That in the event of non compliance of the total terms of the compromise or otherwise by the defendant no. 1, the plaintiff shall be entitled to independently deal with the said land marked with the red line i.e. 2224 sq. Yards (two thousands two hundred and twenty four sq. yards) thereof for unpaid amount as prospective purchaser from the owner of the said property i.e. defendants no. 2 to 13 in its own right on the same terms and conditions contained in the agreement for sale dated 4.9.1993 and the plaintiff in respect of the said land without any payment to the owners shall be treated as the second party (proposed purchaser) of the said land in place of the defendants no. 1.

(7) That the plaintiff on being required by the defendant no. 1 shall sign the agreement for sale or sale deed in favour of prospective purchaser in respect of any portion as the land shown with red lines in the enclosed plan i.e. 2224 sq. yards (two thousands two hundred and twenty four sq. yards only) along with the defendant no. 1 provided the consideration there of shall go to and be payable to the plaintiff to the extent of Rs. 38, 38,000/- (Rupees Thirty Eight Lacks and Thirty Eight Thousand) and not more and after the liquidation as payment of the said amount i.e. Rs. 38,38,000/- (Rupees Thirty Eight Lacks and Thirty Eight Thousands) by the defendant no. 1 to the plaintiff, the defendant no. 1 shall be at liberty to deal with the property in any manner it likes and there after in that event the plaintiff shall cease to have any concern whatsoever with any part or parcel of the land regarding 24, Louthier Road, George Town, Allahabad.

(8) That the cost of the suit shall be borne by the plaintiff and the defendant no. 1 equally.

(9) That the defendant no. 2 to 14 are the proforma defendants and they may be exempted from signing this compromise as there is no controversy between the plaintiff and the defendants nos. 2 to 14.

6. Then plaintiff/deed-holder (hereinafter referred to as DH) had filed Execution Case No. 43/1997 against the defendant no.- 1/ judgment-debtor (hereinafter referred to as JD) for execution of decree passed in original suit no. 501/1995 on basis of compromise-deed dated 04.09.1996.

7. In Execution Case No. 43/1997 the defendant no.-1/ JD had moved objection under section 47 CPC (paper no. 3-C) for setting aside the proceedings of execution case on ground of infringement of terms of decree.

8. After accepting the objection of the DH-plaintiff and affording the opportunity of hearing to parties execution court had rejected the said objection of JD by its impugned order dated 21.07.1997. Aggrieved by this impugned order dated 21.07.1997, the JD had preferred present revision.

9. Learned counsel for the revisionist contended that impugned order has been passed without considering the terms of compromise decree. He submitted that it was condition of the decree that decretal amount would be paid by sale of the property in question, but the plaintiff-DH had never joined the defendant no. 1-JD for the same, and filed the execution case before lapse of period of six months. He contended that in fact, the DH was neer willing to discharge his part of obligation under the decree, therefore the decree in question cannot be executed. He cited AIR 1956 SC 359 and AIR 1972 SC 726 and contended that before execution of a decree DH must prove his ability and willingness for execution.

10. Learned counsel for the respondent refuted the arguments of learned counsel for the revisionist and submitted that JD (/defendant no.-1) had never paid amount of Rs. 10 lacs, as said by him and calculated the same as payment. The JD had never paid the amount under decree to DH-plaintiff, within time fixed in the decree, and even after that when time of payment was extended by court to him. He contended that although bigger amount was paid by DH, but it was agreed in compromise that the dispute would be put to end on payment of full amount of Rs. 38,38,000/- by JD to DH, but that amount was not paid by revisionist , so his prayer for quashing the proceedings of execution through objection u/s 47 CPC was rightly rejected by lower court. There is no error or illegality in lower court's order, so revision should be dismissed.

11. At the outset, the point of premature filing of execution case is taken. The compromise decree was passed on 06.09.1996, and time for fulfilling obligation of decree was six months, but the execution case was filed within six months. The executing court had considered this point and held that during pendency of the execution said period of six months had already been expired, so the execution cannot be rejected.

12. Section 115 (3) CPC, as amended by "The Code of Civil Procedure (Uttar Pradesh Amendment) Act, 2003" (U.P. Act No. 14 of 2003), reads as under:

"(3) the superior court shall not, under this section, vary or reverse any order made except where-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause

irreparable injury to the party against whom it was made."

13. In present case, if the impugned order is allowed to stand, it would neither dispose off finally any case or proceeding relating to any rights of revisionist, nor it would occasion irreparable loss or any failure of justice to him, because none of the rights of the revisionist-JD is going to be decided and no actual proceeding of execution case is going to be performed before the expiry of six months period from the decree. After completion of six months" period the opportunity of hearing is being afforded to JD, and none of his case or right is going to be prejudiced by any order executing court passed before said period of six months. Under the decree six months period was granted to revisionist-JD for payment, which he had not paid. Impugned order has been passed after six months and no failure of justice or irreparable injury is going to occasion to revisionist. Therefore such arguments are found unacceptable in this revision.

14. In *Jai Narain Ram Lundia v. Kedar Nath Khetan*, AIR 1956 SC 359 Hon"ble Apex Court had held as under:

"There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a case each party might well be left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course, an executing Court cannot do. The only question therefore is whether the decree in the present case is of this nature. We are clear that it is."

15. Relying this judgment again in *Chen Shen Ling v. Nand Kishore Jhajharia*, AIR 1972 SC 726 the Hon"ble Apex Court had held:

"It is clear from what we have stated that the decree imposes mutual obligation on both the appellant and respondent in such a way that the performance by one is conditional on the performance by the other and accordingly no execution can be ordered unless the party seeking execution not only offers to perform his part but when objection was taken, satisfy the executing court that he was in a position to do so."

16. The main contention of learned counsel for the revisionist was that revisionist-JD was ready to pay balance amount provided that DH signed the sale-deeds of land in dispute, which were to be executed by JD; but DH had refused to sign the sale-deeds, hence JD-revisionist was unable to pay the decretal amount which was to be arranged by sale of the land as per terms of compromise. He also contended that the payment offered by JD of Rs. 10,00,000/- through cheque was deliberately refused by DH, which is proof of unwillingness of intention of DH-plaintiff to perform obligation under the decree. For these reasons the execution should have been set aside, but executing court had not considered these points and passed erroneous impugned order, so revision should succeed.

17. In view of above mentioned rulings this argument may be acceptable only when it is found that DH had refused to co-operate the sale of land as agreed in compromise-deed that formed part of decree. The DH had specifically stated that he had not refused to sign sale-deed and full amount was never paid to him.

18. In present case, paragraph-3 of the compromise-deed, which formed part of decree, read as: "That payment of Rs. 38,38,000/- (Rupee thirty eight lacks thirty eight thousand only) shall be made by defendant no. 1 to the plaintiff at the outset within the aforesaid period through banker's cheque according to convenience of the defendant no. 1."

19. There is no averment on part of JD-revisionist that he had offered any banker's cheque to DH-plaintiff. Any other type of cheque was against the terms of decree in question. The executing court had afforded additional opportunity of depositing such amount to JD-revisionist, and passed an order for postponing the proceedings of execution so that JD-revisionist may deposit said amount in court, but the same was not deposited. This fact was discussed by lower court in impugned order. It was held by it that said amount could have been deposited by JD-revisionist in court, which was not done. In these circumstances the contentions of revisionist side are found factually incorrect that JD-revisionist had been willing to discharge his obligation under the decree but could not succeed due to alleged noncooperation of DH.

20. The learned Civil Judge had scrutinised the facts, evidences, circumstances, adduced arguments and thereafter passed impugned order which is speaking. The lower court had held that decree in question should be executed, and the objections raised by JD-defendant no.-1 are baseless. The impugned order is based on facts, and finding is apparently correct.

21. The impugned order under challenge in revision is based on finding of fact. In Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659 the Apex Court had held:

"14. Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision under Section 115 is not linked with a substantive right.

15. Language of Sections 96 and 100 of the Code which deal with appeals can be compared with Section 115 of the Code. While the former two provisions specifically provide for right of appeal, the same is not the position vis-à-vis Section 115. It does not speak of an application being made by a person aggrieved by an order of subordinate court. As noted above, it is a source of power of the High Court to have effective control on the functioning of the subordinate courts by exercising supervisory power.

16. An appeal is essentially continuation of the original proceedings and the

provisions applied at the time of institution of the suit are to be operative even in respect of the appeals. That is because there is a vested right in the litigant to avail the remedy of an appeal.

17. Right of appeal is statutory. Right of appeal inhered in no one. An appeal is continuation of the proceedings; in effect the entire proceedings are before the Appellate Authority and it has the power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four Judge Bench in *Hari Shankar v. Rao Girdhari Lal Chowdhury* that the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone."

22. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction. It is not an appeal wherein scrutiny of evidence is possible; neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible.

23. It is apparent that the impugned order does not suffer from any factual or legal infirmity. The Court below was obliged to pass order on basis of available material before it; and it had passed such order following the due procedure of law. No illegality, jurisdictional error appears to have been committed by learned Civil Judge, which may attract interference of revisional Court in the matter. There is no justification for substituting the factual findings of court below that appears to be reasonable, and can be one of the conclusions on basis of available facts.

24. It is within jurisdiction of trial court to allow or reject the application under Section 47 CPC. In present matter the trial court had exercised its jurisdiction after appreciating the available facts and circumstances. The reasoning given by lower court, on which the finding is based, are factual, which are apparently acceptable and correct. There appears no factual, legal or jurisdictional error in passing of the impugned judgment. Therefore, this revision is dismissed.

25. Let a copy of this order be communicated to lower Court immediately with direction to expedite the proceedings of old execution case.