

(1978) 05 KL CK 0009

In the High Court Of Kerala

Case No : Ex. Second Appeal No. 93 of 1976

Narayana Pillai Krishna Pillai

APPELLANT

Vs

Ponnuswami Chettiar Subbalekshmi Ammal

RESPONDENT

Date of Decision : 22-05-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Specific Relief Act, 1963 — Section 22(1), 22(2)

Citation : AIR 1978 Ker 236

Hon'ble Judges : G. Balagangadharan Nair, J

Bench : Single Bench

Advocate : P.C. Chacko and P. Krishna Moorthy, for the Appellant; M. Krishnan Nair, for the Respondent

Final Decision : Dismissed

Judgement

G. Balagangadharan Nair, J.—The short question in this appeal by the judgment-debtor is whether the courts below were wrong in allowing the respondent-decree holder's prayer for possession of property in execution of the decree for specific performance of a contract for sale, when the decree did not give any express relief of delivery of possession. The appellant had contended that as the plaint did not ask for such a relief and the decree had not granted it, the execution court had no jurisdiction to order delivery of possession and it could only refer the respondent to a fresh suit for possession on the strength of the sale-deed executed by the court in his favour in execution of the decree. This contention failed before the courts below.

2. Counsel for the appellant argued that it was beyond the jurisdiction of the execution court to deliver possession of the property in the absence of an enabling provision in the decree, even though the respondent has now become owner of the property and has thereby obtained a right to secure possession on the strength of his title. Relying upon AIR 1948 406 (Nagpur) , counsel maintained that this has always been the law and that in any case it is the law u/

s 22 of the Specific Relief Act, 1963, whatever might have been the position before.

3 AIR 1948 406 (Nagpur) which decided to quote the head note:

"Where in a suit for specific performance of a contract to sell a house, there is no prayer for delivery of possession and the decree passed in the suit does not direct delivery of possession of the property, the executing Court has no jurisdiction to deliver possession in execution u/s 47 (C. P. C.) on the ground that relief for possession is incidental to the relief for specific performance" definitely supports the appellant.

4. Now there is no dispute that by the suit contract the appellant agreed not only to sell the property to the respondent but also to put him in possession of it. It was this contract of which the court decreed specific performance, the contract to execute the sale-deed and give the respondent possession of the property. On the failure of the appellant, the court executed the sale-deed on his behalf in favour of the respondent. On the terms of the contract of sale and u/s 55(1)(f), T. P. Act, the appellant was bound to give possession of the property to the respondent. It was incidental to the relief of specific performance that besides the conveyance possession should also be given to the respondent; in other words that relief was a mandate to the respondent to do both and thus complete the specific performance. If he defaults in either it is for the court to do it for him at the respondent's instance and as the court has already executed the sale-deed what remains is to carry out the appellant's unfulfilled obligation to put the respondent in possession of the property. As the right to obtain possession is thus Implicit in the decree, the absence of a specific relief for delivery of possession is immaterial. When the court thus puts the respondent in possession of the property it is but executing the decree for specific performance which is within its jurisdiction. The learned Judge who decided AIR 1948 406 (Nagpur) omitted to take note of the rights of the parties to a decree for specific performance but had merely gone by the general principle that the power of the executing court is conditioned by the reliefs granted by the decree. With respect I disagree from the view taken in that decision.

5. While AIR 1948 406 (Nagpur) has not been followed in any case brought to my notice, it has been expressly dissented from in a number of cases by various High Courts, which were relied on by counsel for the respondent. An earlier case Atal Behary Acharya Vs. Barada Prasad Banerji, , which itself followed a still earlier case Deonandan Prasad Singh v. Janki Singh (1920) 5 Pat LJ 314 : AIR 1920 Pat 89 of the same court has taken the view which I have indicated above. The head note which correctly represents the decision in AIR 1931" Pat 179 reads thus :

"Incidental to the relief to which a plaintiff is entitled in a decree for specific performance arising on a contract for sale, the Court has a right to grant possession of the property. A contract for sale includes not only the execution of

the necessary document but also putting the vendee in possession of the property. Therefore if there is an omission in the plaint or in the decree about possession the executing Court is not debarred from granting the plaintiff the possession of the property."

The Patna High Court has maintained this position in subsequent decisions -- Sri Sri Janardan Kishore Lal Singh Deo and Another Vs. Girdhari Lal Sunda, (which follows Atal Behary Acharya Vs. Barada Prasad Banerji, and Parmeshwar Mandal Vs. Mahendra Nath Tewari and Others, (which follows AIR 1920 Pat 89 relied upon in Atal Behary Acharya Vs. Barada Prasad Banerji, I might however add that Parmeshwar Mandal Vs. Mahendra Nath Tewari and Others, arose in a suit and not in execution.

6. The Calcutta High Court has taken the same view as is illustrated by Kartik Chandra Pal Vs. Dibakar Bhattacharjee, and Subodh Kumar Banerjee Vs. Hiramoni Dasi and Others, . In Kartik Chandra Pal Vs. Dibakar Bhattacharjee, the learned Judges noted "that no special form of decree in a suit for specific performance is supplied by the Civil P. C." and held that "The Court when allowing the prayer for specific performance vests the executing court with all the powers which are required to give full effect to the decree for specific performance." This case was followed in Subodh Kumar Banerjee Vs. Hiramoni Dasi and Others, where another Bench observed that

"Thus unless there is a contract to the contrary, giving delivery of possession to the buyer by the seller is an incident of a contract for sale and when there is a decree directing the contract to be specifically performed it includes a direction upon the vendor to give delivery of possession to the purchasers."

7. The Allahabad view is the same: Pt. Balmukand Vs. Veer Chand, which followed Arjun Singh Vs. Sahu Maharaj Narain, , which itself had relied upon the decision of the Patna High Court Atal Behary Acharya Vs. Barada Prasad Banerji, . In Pt. Balmukand Vs. Veer Chand, it was held :

"The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of Section 55(1)(f), T. P. Act. Delivery of possession is a necessary ingredient and part of transfer of ownership" and "We do not think that it is necessary in a suit for specific performance either to separately claim possession or it is necessary for the Court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by Section 55, T. P. Act."

8. In Venkatesh v. Parappa (1966) 1 Mys LJ 799 , the High Court of Mysore sustained an order of delivery of possession even where there was a prayer for

possession in the plaint but the decree was in general terms for specific performance and observed that Pt. Balmukand Vs. Veer Chand, ; Subodh Kumar Banerjee Vs. Hiramoni Dasi and Others, and Sri Sri Janardan Kishore Lal Singh Deo and Another Vs. Girdhari Lal Sunda, fully supported the view taken by the Courts below.

9. It is unnecessary to multiply cases except to refer to S.S. Rajabathar Vs. N.A. Sayeed, , where a learned judge has discussed practically the entire case law and taken the view indicated earlier. The learned Judge dissented from AIR 1948 406 (Nagpur) and agreed with the view represented by Atal Behary Acharya Vs. Barada Prasad Banerji, and other like cases discussed above. S.S. Rajabathar Vs. N.A. Sayeed, is of further interest because it pointed out, as did Arjun Singh Vs. Sahu Maharaj Narain, on which AIR 1948 406 (Nagpur) relied, had no application as it was concerned only with the question whether a suit for possession by a plaintiff who had obtained a sale deed in execution of a decree for specific performance was barred under Order 2, Rule 1, C. P. C.

10. The result is that the preponderance of judicial opinion is in favour of the competency of the executing court to grant delivery of property even where no such relief is granted by a decree for specific performance of the contract of sale and that AIR 1948 406 (Nagpur) stands in isolation.

11. The question can be viewed in another aspect also. As observed earlier the Civil P. C. does not prescribe any particular form in which decrees for specific performance should be drawn. It is settled law as pointed out in H. I. Trust v. Haridas Mundhra, : AIR 1972 SC 1826 that "the court which passes a decree for specific performance retains control over the decree even after the decree has been passed". The effect of the decisions quoted with approval by the Supreme Court in para. 22 of the judgment is that the contract between the parties is not extinguished by the decree for specific performance, that the decree is not a final decree and that the suit must be deemed to be pending even after the decree and that it is virtually in the nature of a preliminary decree. The Supreme Court also quoted with approval passages from Fry on Specific Performance (6th Edn. p. 546) and from Halsbury's Laws of England, (3rd Edn. Vol. 36, 351-52) of which the following extracts could be helpfully reproduced:

"It may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase money" (Fry)

"Ancillary relief may be obtained after judgment in an action for specific performance where such further relief becomes necessary (Halsbury) (In this decision the Supreme Court rescinded a decree for specific performance of a

contract for the sale of shares, owing to the refusal of the seller to perform his part of the contract, even though Section 28 of the Specific Relief Act 1963 provides only for rescission of decree for specific performance for the sale or lease of immovable property).

12. In view of this legal position the court can grant the relief of possession to the respondent as the appellant has not fully performed his part of the contract in that he has not handed possession to the respondent. I might also refer to the following passage from *Kartik Chandra Pal Vs. Dibakar Bhattacharjee*, (para 111 :

"It may be noticed further that a decree in a suit for specific performance has been considered to be somewhat in the nature of preliminary decree which cannot set out in the fullest detail all the different steps which are required to be taken to implement the main portion of the order directing specific performance of the contract. The executing court is in such a case vested with authority to issue necessary directions."

13. Counsel for the appellant however contended that a suit for specific performance of a contract of sale, even if it be of immovable property is not a suit for land and the court is for that reason incompetent to deliver possession of the property. He sought to support this contention by referring to the observations of Mahajan and Mukherjee JJ. in *Moolji Jaitha & Co. v. K. S. & W. Mills*, AIR 1950 FC 83. The respondent company brought a suit alleging that certain lands belonged to it and not to the appellants who had been its secretaries and treasurers and that the lands happened to stand in the name of the appellants only as benamidars or trustees of the respondent whose interests they were bound to protect. The two relevant prayers claimed in the plaint were: (a) That it may be declared that the lands belonged to and are the properties of the respondent and that the appellants have no beneficial interests therein and (b). That the appellants may be ordered to execute all such documents and deeds and do such acts as may be necessary for transferring the said lands to the name of the respondent. The suit was brought on the original side of the High Court of Bombay. Apart from the merits, the appellants contested that the court had no jurisdiction to try these prayers as the suit was not a "suit for land" within Clause 12, Letters Patent which prescribes the ordinary original jurisdiction of the court. The trial Judge upheld the objection but his view was reversed on appeal by a Bench of the Bombay High Court, The Federal Court by a majority (Kania C. J., Patanjali Sastri and Fazl Ali JJ.) dismissed the appeal taken by the defendants, Mahajan and Mukherjee JJ. dissenting. In the course of the judgment Mahajan J. said:

"In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a suit for land; but if the suit is simpliciter for specific performance i.e. for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that the decree in it would operate on the land." Page 110 (Para 102) and

Mukerjee J. :

"As I have said already, the principles of equity may assist us in determining the essential nature of a particular suit or action. Thus the remedy by way of specific performance was fashioned by the Equity Courts for the purpose of giving a more complete relief in the way of enforcing a contract. In its essence, it is a suit to enforce a contract and its nature is not changed simply because it relates to immovable property." Page 125, Para 170.

14. Apart from the contention raised by counsel for the respondent that these observations are mere obiter of the minority judges and are not therefore binding, on which I prefer to say nothing, what is to be emphasised is that they were merely concerned with the content of the expression "suit for land" in order to determine the jurisdiction of the High Court and not with the question of the effect of a decree for specific performance or the Court's power to deliver possession of the property which on behalf of the disobedient vendor it has sold to the plaintiff. The decision in AIR 1950 FC 83 has no application.

15. What remains to consider Is the appellant's alternate contention based on Section 22 of the Specific Relief Act 1963. That section reads :

"22. Power to grant relief for possession, partition, refund of earnest money, etc.--(1) Notwithstanding anything to the contrary contained in the Civil P. C. 1908 (5 of 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 the may be entitled, including the refund of earnest money or deposit paid or made to 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.

(3) The power of the Court to grant relief under Clause (b) of Sub-section (1) shall be without prejudice to its powers to award compensation u/s 21." The suit out of which the appeal arises was instituted after the 1963 Act came into force and it is urged that Sub-section (2) is an absolute bar to the grant of the relief of possession as the respondent had not claimed it in terms of Clause (a) of Sub-section (1). Counsel contends that the appellant was in possession of the property and" it was therefore an "appropriate case" within Sub-section (1) where the respondent could have claimed recovery of possession and that not having been done the bar under Sub-section (2) operates. The answer to this

contention has to be found in the true meaning and significance of the expression "in an appropriate case" in Sub-section (1). It had been settled by judicial decisions that a plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking, the right to possession accrues only when specific performance is decreed. Where the defendant is in possession and the plaintiff could ask for possession and that position has been settled, it is legitimate to think that the Legislature contemplated a different situation when it framed the expression "in an appropriate case". On that aspect I find myself, with respect, in agreement with the following discussion in *Gyasa Vs. Smt. Risalo*, :

"The expression "in an appropriate case" 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 contract for the transfer of the immovable property. That is to be done where the circumstances demand it. The relief for specific performance of the contract of sale embraces 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 for possession being inherent in the relief for specific performance of the contract for sale. It cannot, however, be disputed that in certain circumstances relief of possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession e.g., where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant." And

"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 for such a person is not bound by the contract sought to be enforced. It appears that Section 22 of the Specific Relief Act was enacted to get over such technical difficulties and to avoid multiplicity of suits. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter 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)(f) of the T. P. 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."

In my view the property being in the possession of the judgment-debtor, as in that case, Section 22(2) is no bar to delivery of possession of the property to the

decree-holder. I reject the appellant's argument on this point.

The judgment of the courts below are confirmed and the appeal is dismissed with costs.