

(2017) 11 DEL CK 0390

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 915 Of 2014

Roomal & Sh. Jodha (Both Deceased) Through Lrs & Ors
Through Attorney

APPELLANT

Vs

Sri Niwas (Deceased) Through Lr Sh.Anil Aggarwal

RESPONDENT

Date of Decision : 16-11-2017

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Section 47, Order 21 Rule 15
Specific Relief Act, 1963 — Section 28(1), 28(3), 28(3)(b), 28(4)

Citation : (2017) 11 DEL CK 0390

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : J.M.Kalia, Deepak Khadaria

Final Decision : Disposed Of

Judgement

Jayant Nath, J

1. This petition is filed under Article 227 of the Constitution of India seeking to impugn the orders of the Executing Court dated 16.05.2014, 05.07.2014

and 22.08.2014.

2. The case has a long chequered history starting from 1961. The controversy centers around a piece of land in the Abadi Zamroodpur, Delhi. The

purchasers/respondent agreed to buy a parcel of land from the judgment debtors/petitioners on 13.01.1961. A suit for specific performance was

instituted on 18.09.1961. The suit was decreed on 2.2.1973 in favour of one of the purchasers whereas for two purchasers who were minors, the suit

was dismissed. Two appeals were filed before this court being RFA No. 52/1973 and RFA No. 80/1973 challenging the said decree dated 2.2.1973.

These two RFAs were disposed of on 14.01.1985 passing a decree of specific performance in favour of the decree holders (respondent) including the two minors. The plea of the petitioners/judgment debtors were rejected. The petitioners were ordered to execute the sale deed within one month from that date failing which the trial court was to execute the conveyance deed at the cost of the petitioner. Unfortunately, enforcement of the said decree is yet to see the light of the day. In 1985, the petitioners filed another suit challenging the locus standi of execution of the agreement. A stay of the execution proceedings was granted in 2005. The said suit was thereafter dismissed. The first appeal and the second appeal which were filed were also dismissed. RSA No. 281/2007 was dismissed by this court on 03.05.2011 on account of which the execution petition in question was revived.

Hence, the Executing court has now proceeded with the execution.

3. In the meantime, decree holder No.2 and 3 have entered into a settlement with the LR's of the judgment debtors/petitioners. Hence, now only one of the decree holders, namely, the respondent is pursuing the execution petition.

4. By the impugned order dated 16.05.2014, the Executing Court noted that only decree holder No.1 who is entitled to 1/3rd share in the suit property

is pursuing the case. Hence for full implementation of the decree, the court held that 1/3rd portion of the land has to be handed over to the decree

holder/respondent. The Executing Court also passed a direction that the decree holder No. 1 is at liberty to choose any 1/3rd portion out of the suit

property bearing municipal No. 26. measuring 817.9 sq. yards and he shall file a site plan along with an appropriate application showing his 1/3rd

portion. Thereafter, the court shall take appropriate steps to execute his title documents in favour of the decree holder and shall also hand over

possession of that portion to the decree holder. The petitioners filed a review petition against the said order dated 16.05.2014 which was dismissed on

05.07.2014. By order dated 22.08.2014, the decree holder was directed to file a draft title document with respect to the 1/3rd portion shown in the site

plan which was filed by the decree holder/respondent. These three orders, namely, order dated 16.5.2014, order dated 5.7.2014 and order dated

22.8.2014 are challenged in this petition.

5. I have heard learned counsel for the parties.

6. Learned counsel for the petitioner has relied upon the judgments of the

Supreme Court in the case of Jagdish Dutt and Another vs. Dharam Pal & Ors., AIR 1999 SC 1694 and A. Abdul Rashid Khan vs. P.A.K.A. Shahul Hamid and Ors., 2000 (10) SCC 636 and upon the judgment of Bombay High Court in the case of Vasudeo Dagadulal and Ors. Vs. Kankoochand Hirachand Visashrimali and Ors., AIR 1951 Bom. 226 to contend that there is no decree for partition passed in favour of the decree holder/respondent. It is urged that the mechanism of partition hence cannot be gone into by the executing court.

7. Learned counsel for the respondent, however, submits that partition can be done by the executing court. He also submits that reliance of the petitioners on the judgment of the Bombay High Court in the case of Vasudeo Dagadulal and Ors. Vs. Kankoochand Hirachand Visashrimali and Ors. (supra) is misplaced.

8. In the above factual scenario reference may be had to the judgment of the Supreme Court in Babu Lal vs. M/s. Hazari Lal Kishori Lal and Others (1982) 1 SCC 525. Some of the observations of the Supreme Court in the said judgment on the acts of the sellers of land to delay and defeat the decree in favour of the purchasers are noteworthy and extremely relevant in this case. The Supreme Court stated as follows:

“2. The present petition is a typical example of the desperate effort of the judgment-debtor to ward off the execution of the decree till the bailiff knocks at the door.”

“..

“23. There has been a protracted litigation and it has dragged on practically for about 13 years and it will be really a travesty of justice to ask the decree-holders to file a separate suit for possession. The objection of the petitioner is hyper technical. The executing court has every jurisdiction to allow the amendment.”

Having made the above observations the Supreme Court then held as follows:-

“26. Sub-section (3) of Section 28 clearly contemplates that if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree, the Court may on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to. Sub-clause (b) of Sub-section (3) of Section 28 contemplates the delivery of

possession or partition and separate possession of the property on the execution of such conveyance or lease. Sub-section (4) of Section 28 bars the filing of a separate suit for any relief which may be claimed under this section.

27. In *Hungerford Investment Trust Ltd. v. Haridas Mundhra and Ors.* : [1972]3SCR690 dealing with Section 28(1) of the Specific Relief Act, 1963

this Court observed:

The Specific Relief Act, 1963, is not an exhaustive enactment and under the law relating to specific relief a Court which passes a decree for specific

performance retains control over the decree even after the decree had been passed. Therefore, the Court, in the present case, retained control over

the matter despite the decree and it was open to the Court, when it was alleged that the party moved against had positively refused to complete the

contract, to entertain the application and order rescission of the decree if the allegation was proved.

The reasoning given by this Court with regard to the applicability of Sub-section (1) of Section 28 will equally apply to the applicability of Sub-section

(3) of Section 28.â??

9. Reference may also be had to the judgment of the Supreme Court in *Hungerford Investment Trust Limited vs. Haridas Mundhra and Others*,

(1972) 3 SCC 684 where the Supreme Court held as follows:-

21. The question then is whether the application was maintainable under any other provision of the law. The Specific Relief Act, 1963, is not an

exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act ""to define and amend the law

relating to certain kinds of specific relief"". It does not purport to lay down the law relating to specific relief in all its ramifications. In *Ramdas Khatau*

and *Co. v. Atlas Mills Co. Ltd.*, it was held that the Specific Relief Act, 1877, was not exhaustive. In *Rahmath Unnissa Begum v. Shimoga Co-*

operative Bank Ltd. AIR 1951 Mys 59 the Court said that the Specific Relief Act, 1877, is founded on English equity jurisprudence and that it is

permissible to refer to English Law on the subject wherever the Act did not deal specifically with any topic (See also *Firm Kishore Chand Shiva*

Charan Lal v. Budaun Electric Supply Co. Ltd.) Although a matter on which the Act defines the law it might generally be exhaustive, the Act as a

whole cannot be considered as exhaustive of the whole branch of the law of specific performance.

22. It is settled by a long course of decisions of the Indian High Courts that the Court which passes a decree for specific performance retains control

over the decree even after the decree has been passed. In *Mahommadalli Sahib v. Abdul Khadir Saheb* (1930) 59 Mad LJ 351 it was held that the

Court which passes a decree for specific performance has the power to extend the time fixed in the decree for the reason that Court retains control

over the decree, that the contract between the parties is not extinguished by the passing of a decree for specific performance and that the contract

subsists notwithstanding the passing of the decree. In *Pearisundari Dassee v. Hari Charan Mozumdar Chowdhury* ILR (1888) 15 Cal 211 the Calcutta

High Court said that the Court retains control over the proceedings even after a decree for Specific performance has been passed, that the decree

passed in a suit for specific performance is not a final decree and that the suit must be deemed to be pending even after the decree. The same view

was taken in *Someshwar Dayal v. Widow of Lalman Shah*. In *Anandilal Poddar v. Gunendra Kr. Roy Ray*, J. speaking for the Court, said that the

Court retains control over the matter even after passing a decree for specific performance and that virtually, the decree is in the nature of a

preliminary one. In *Tribeni Tewary v. Ramratan Nonia*, it was held that the Court retains seising of the case notwithstanding the fact that a decree for

specific performance has been passed and that the decree is really in the nature of a preliminary decree. Fry in his book. *Fry on Specific Performance*

states the Law in England as follows:

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 instatement, where a vendor refuses or is unable to execute a proper conveyance of the property, or a

purchaser to pay the purchase money....

There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself:

(i) He may obtain (on motion in the action) an order appointing a definite time

and place for the completion of the contract by payment of the un-paid purchase-money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and, if the

Other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects....

(ii) He may apply to the Court by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party

moved against has positively refused to complete the contract, its immediate rescission may be ordered: Otherwise, the order will be for rescission in

default of completion within a limited time....

23. In Halsbury's Laws of England the law is stated as under:

Ancillary relief may be obtained after judgment in an action for specific performance where such 'further relief becomes necessary....

Either party may also obtain an order rescinding the contract in default of completion within a fixed time.

24. As the Court retained control over the matter despite the decree, it was open to the Court, when it was alleged that the party moved against has

positively refused to complete the contract to entertain the application and order rescission of the decree if the allegation was proved. We, therefore,

think that the application of the Appellant was competent.

10. Hence, the legal position that follows is manifest. The Court which passes the decree for specific performance retains control over the decree

even after the decree has been passed. Ancillary relief could be obtained after the judgment in an action for specific performance.

11. In these facts, Section 47 would also get attracted. Section 47 of the CPC which reads as follows:-

47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was

passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the

decree and not by a separate suit.

(2) omitted by Act 104 of 1976. effective from 1-2-1977

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be

determined by the court

12. Reference may be had to the judgment of the Supreme Court in *Government of Orissa vs. Ashok Transport Agency and Others*, (2002) 9 SCC 28

wherein it was held as follows:-

“51. Under Section 47 of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives

relating to the execution, discharge or satisfaction of decree have got to be determined by the court executing the decree and not by a separate suit.

The powers of Court under Section 47 are quite different and much narrower than its powers of appeal, revision or review. The exercise of powers

under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under

Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that decree is not

capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a

decree inexecutable after its passing. In the case on hand, the decree was passed against the defendant - M/s. Orissa Mining Corporation (Alloys)

Ltd., which was subsidiary of Orissa Mining Corporation Ltd., and later merged with it as its chrome division which was taken over by the

Government of Orissa, without seeking leave of the Court to continue the suit against the Government of Orissa upon whom interest of the defendant

devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke Section 47 of the Code and entail dismissal of

execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law

on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject

of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.”

13. Hence, questions arising between the parties where a decree for specific performance has been passed have to be determined by the court

executing the decree and not by a separate suit. In the present case, the disputes pertain to the parties who are before the trial court when the decree

was passed. Hence all the disputes have to be settled by the executing court.

The respondent cannot be relegated to the position of having to file a fresh suit for partition having already been granted a decree more than 40 years ago.

14. As noted above, it would be travesty of justice if after having pursued this litigation for 40 years the respondent is now told that he has to file a separate suit for partition of the property before he can enjoy the fruits of the decree that was passed in favour of his predecessor on 2.2.1973.

15. I may now look at the judgments cited by learned counsel for the petitioner. Reference may be had to the judgment of the Supreme Court in the case of A.Abul Rashid Khan (D) Ors. vs. P.A.K.A. Shahul Hamid & Ors (2000) 10 SCC 636. That was a case where a suit for specific

performance with alternative plea of partition was also raised . The property in question was agreed to have been sold by some of the LRs of the

deceased owner in favour of respondent No.1. In that case, respondent Nos. 2 and 3, the sisters had not executed the agreement to sell. In those

facts, the Supreme Court held as follows:

14. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint

property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in

the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree

could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in

dispute that the Appellants have 5/6 share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6th share was rightly

decreed by the High Court which requires no interference.

15. So far the other part of the High Court's order by which it decreed the alternative relief of Respondent No.1 for partition of the suit property in six

equal share by metes and bounds and delivering separate possession over these such shares, on the face of it is erroneous and cannot be sustained, in

a suit for specific performance. The vendee on the date of filing this suit has yet not become the owner of this property, as he merely seeks right in

the said property though the decree of specific performance. When the sale deed itself has yet to be executed, whose right in the property has yet not

matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposit the balance

consideration and the sale deed is actually executed. This apart how could be any partition in the property, without other co-sharer joining, who are not

part of the disputed agreement. No issue is framed between them. No evidence led. Hence, we find that the High Court was not right in decreeing

this alternative prayer of partition in this suit.

16. Hence, the facts of the above case are quite different. The suit was to enforce 5/6th share in the property. The other co-sharer were not parties to

the proceedings. The suit had been filed simultaneously for specific performance of the agreement and also for partition. The above judgment would

have no application to the present case.

17. Reference may also be had to the judgment of the Supreme Court in Jagdish Dutt & Anr. vs. Dharam Pal & Ors. (supra). In that case the Court

while dealing with an issue pertaining to a decree passed in favour of a joint family held as follows:-

“7. When a decree is passed in favour of a joint family the same has to be treated as a decree in favour of all the members of the joint family in

which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners

assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the

interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is

undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to

before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest

of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case

where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a

joint decree holder can seek for execution of a decree in the whole and not in part of the property, A joint decree can be executed as a whole since it

is not divisible and it can be executed in part only where the share of the decree

holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree holders and dispute between joint decree holders is foreign to the provisions of Section 47, CPC. Order XXI, Rule 15, CPC enables a joint decree holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree holder will have to work out his rights in an appropriate suit for partition and obtain necessary relief thereto. Various decisions cited by either side to which we have referred to do not detract us from the principle stated by us as aforesaid. Therefore, a detailed reference to them is not required.â??

18. The facts of the present case are also different than the facts of the above-noted cases. There is no joint family involved in this case. The respondent (plaintiff in the suit, namely, Shri Srinivas) and the two minors had entered into an Agreement to Sell with the petitioners (two defendants) Shri Roomal and Shri Jodha the owners of the property. The appellate court passed a decree of specific performance in favour of the plaintiffs (respondents herein). It is after the decree for specific performance was passed that sometimes in 2011-12 the legal heirs of the judgment debtor/petitioner have settled the dispute with decree holder Numbers 2 and 3 by virtue of a settlement deed. The Decree Holder No.1 (respondent) is now the sole person pursuing the Execution Petition. Hence, in this case, the share of the decree holder is not in dispute. The case falls within the exception stated in the above judgment. This judgment would not apply to the facts of the case.

19. However, I cannot help noticing that the executing court in the present case has sought to partition the property leaving it at the discretion of the decree holder/respondent as to whichever 1/3rd area he may choose to pick up. The partition would necessarily have to be as per law and cannot be left to the wishes of the respondent. To that extent, I quash the order of the Executing Court dated 16.05.2014, 05.07.2014 and 22.08.2014. The Executing Court may take steps as per law for partition of the property and for execution of the conveyance deed as per the decree as per law.

20. The petition stands disposed of. Trial Court record be sent back.