
(1980) 12 PAT CK 0018
In the Patna High Court
Case No : C.R. No. 1935 of 1980

Shri Kishun Dubey

APPELLANT

Vs

Kamla Prasad Tiwary and Others

RESPONDENT

Date of Decision : 05-12-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Criminal Procedure Code, 1973 (CrPC) — Section 115, 47

Citation : (1981) 29 BLJR 633

Hon'ble Judges : Sia Saran Sinha, J

Bench : Single Bench

Judgement

Sia Saran Sinha, J.—This revision application is directed against the judgment of the Subordinate Judge, Gopalganj, by which he dismissed Misc. Case No. 74 of 1975, filed u/s 47 of the CPC (C. P. C.) by the petitioner.

2. There was Partition Suit No. 46 of 1961 between the petitioner and the opposite parties. A preliminary decree was passed in that suit. Subsequently a final decree too was passed. The petitioner, it is undisputed, has challenged the final decree before this Court in appeal which is still pending.

3. After the passing of the final decree the opposite parties filed an execution case for delivery of possession according to the final decree. This Execution case was No. 11/24 of 1973/74. The petitioner sought to obtain stay of delivery of possession in the execution case from this Court but could not succeed. Ultimately, after getting a pleader commissioner nominated by the District Judge, the executing Court issued writ of delivery of possession to the pleader commissioner by Order No. 77 dated 23-6-1975 of the executing Court record. It is undisputed, and is apparent also from the said order as also the writ of delivery of possession, that the delivery of possession was to be effected by 22-7-1975.

4. The pleader commissioner submitted a report dated 1-12-1975 to the effect that the delivery of possession was finally effected on 24-8-1975. When this

report of the pleader commissioner was submitted, the above miscellaneous case u/s 47 of the Code was filed by the petitioner alleging inter alia, that the report was collusive and fictitious and that in fact, no delivery of possession had been effected. A prayer, therefore, was made that the writ of delivery of possession be not accepted and the final decree be not deemed to have been satisfied. Evidence was adduced before the executing Court and on a consideration of the same the executing Court held that the report submitted by the pleader commissioner was genuine. The prayer of the petitioner was, therefore, rejected, and this is how the petitioner has taken this matter before this Court.

5. Three contentions were raised before this Court by learned Counsel for the petitioner. The first was that the order of the Court appointing a pleader commissioner for effecting delivery of possession was illegal and this itself vitiated the report of the pleader Commissioner. The second point urged was that the delivery of possession not having been effected by the pleader commissioner by the date fixed in the writ, the effecting of the delivery of possession, even if any, subsequent to the date was illegal, as by that time the writ of delivery of possession had become unexecutable in law. The third contention was that the evidence adduced showed that the pleader commissioner had submitted a fictitious and collusive report and the finding to the contrary given by the executing Court was wrong. Mr. Mazhar Hussain, learned Counsel for the opposite party, refuted all these contentions.

6. Order No. 77 dated 23-6-1975 was passed at a time when the Code of Civil Procedure, as amended by the CPC (Amendment) Act, 1976, (No. 104 of 1976) had not come into force. There was no provision in the earlier Code prior to the amendment on the lines as envisaged in Rule 10-B of Order 26 C. P. C, which provides, inter alia, that where any question arising in a suit involves the performance of any ministerial act, which cannot, in the opinion of the Court, be conveniently performed before the Court, the Court may, if, for reasons to be recorded, it is of opinion that it is necessary or expedient, in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the Court. The Code of Civil Procedure, as it then existed, provided for issue of commissions in certain circumstances enumerated in Order 26, namely, for examination of witnesses, for local investigation, to examine accounts and to make partitions. The provisions for appointment of commissioner to make partition are laid down in Order 26 Rule 13 of the Code. This provision of the old Code obviously cannot come into play as in the instant case the pleader commissioner was appointed by the executing Court not for the purpose of making partition but simply for delivery of possession as per final decree already passed.

7. The question arises whether in such a situation an executing Court, before amendment of the Code, referred to above, was debarred from appointing a pleader commissioner for effecting delivery of possession. The provisions for delivery of possession in respect of immovable property, as in the instant case,

were contained in Order 21 Rule 35 of the Code. Rule 35(1) of Order 21 speaks of the party to whom the possession is to be delivered. Clause (2) of Rule 35 states about the manner in which delivery of possession shall be effected. Clause (3) of Rule 35 states that where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession. What generally happens in a Civil Court when a party applies for delivery of possession is that a writ is issued to a peon of the Court. In certain circumstances the Civil Court issues writ of delivery of possession over to the Nazir, who is accompanied by the peon. When writ of delivery of possession is entrusted to an Officer of the Court, that officer acts as the agent of the Court on its behalf. If this be the position as it is, there was no illegality in the executing Court issuing writ of delivery of possession to the pleader commissioner and the contention to the contrary raised by learned Counsel for the petitioner is negated.

8. Coming to the second contention raised by learned Counsel for the petitioner, his arguments are weighty indeed and they must prevail. The writ of delivery of possession describing the Commissioner, Shri Rabi Shankar Singh as bailiff was issued to him on 25-6-1975. Order 21 Rule 24(3) lays down in specific terms that in every such process a day shall be specified on or before which it shall be executed. Then follows Rule 25(1) of Order 21 which states that the officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay. or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court. Accordingly, the writ of delivery of possession specified 22-7-1975 as the date by which the delivery of possession was to be effected. In spite of this specific date fixed in the writ of delivery of possession, writ of delivery of possession was effected by the pleader commissioner on 24-8-1975, about more than a month thereafter. Obviously, this was beyond the direction of the Court as given in the writ. Learned Counsel for the opposite parties. however, pointed out certain orders of the Court dated 22-7-1975, 18-8-1975, 17-9-1975, 11-11-1975 and 1-12-1975, and contended that the date specified in the writ initially as 22-7-1975 should be deemed to have been extended further by these orders. It is difficult to accept this contention. Although to Commissioner claimed to have effected delivery of possession finally on 24-8-1975, he made abnormal delay in submitting the report as it was received in Court on 1-12-1975. No intimation was sent by the Commissioner to the Court as to the reasons for the delay, much less, as contended by learned Counsel for the petitioner, he ever made any request to the Court for extension of the date of delivery of possession. It was in such a

situation that by the orders referred to above the Court simply extended the date and adjourned the case awaiting report from the pleader Commissioner, without extending the date of delivery of possession as initially mentioned in the writ of delivery of possession in any of these orders. The pleader Commissioner on being appointed by the Court to effect delivery of possession acted merely as agent of the Court. An agent has to function within the four corners of the writ. The writ directed delivery of possession to be effected on 22-7-1975. No fresh orders were issued to the pleader Commissioner by the Court much less on the writ of delivery of possession extending the date of delivery of possession. In such a situation the action of the pleader Commissioner in effecting delivery of possession on a date much beyond 22-7-1975 cannot be supported in law.

9. Learned Counsel for the petitioner relied in this connection on a decision reported in *Smt. Mathuri and Ors. v. The State of Punjab* AIR 1963 S.C. 986. wherein their Lordships of the Supreme Court observed that "where the last date for execution of the warrant of delivery of possession was sometime in April, 1960, they were not executable in law on 7-6-1960," In the facts and circumstances of this case this contention of learned Counsel for the petitioner, therefore, prevails, and it is found that on 24-8-1975, when the pleader Commissioner claimed to have effected delivery of possession, the writ of delivery of possession issued to him was not executable in law and, therefore, he had no jurisdiction whatsoever to effect delivery of possession.

10. Coming to the third contention raised by learned Counsel for the petitioner on merits, in view of my finding on contention No. 2 it is not necessary to decide this point, although the facts and circumstances of this case, particularly the abnormal delay, without any satisfactory reason therefor, raises serious doubt about the genuineness of the report of the pleader Commissioner.

11. The petitioner initially filed a civil revision. It was then converted into a miscellaneous appeal. The Stamp Reporter reported against its admissibility. The matter was considered in order No. 2 dated 1-11-1977 and the application was allowed to be treated as appeal. Learned Counsel felt difficulty in course of argument about the maintainability of the appeal in view of the amendment introduced in Section 47 of the Code. He, therefore, prayed for converting the appeal into revision. Learned Counsel for the opposite party did not oppose this prayer. For the ends of justice this prayer of learned Counsel for the petitioner was allowed and the appeal was allowed to be converted into civil revision.

12. The submission of Mr. Mazhar Hussain, learned Counsel for the opposite party, was that the civil revision was not maintainable u/s 115 of the Code. I find it difficult to accept this contention. The Subordinate Judge appears to have acted in exercise of his jurisdiction illegally and with material irregularity and this is a fit case which, for the ends of justice, requires interference. The contention of Mr. Hussain is, therefore, negated.

13. The result is that the civil revision is allowed and the impugned order is set

aside. Consequently, the miscellaneous case filed by the petitioner must succeed and the report of the pleader Commissioner is held to be not acceptable in law. It cannot, therefore, have the effect of the final decree being satisfied. The executing Court will, however, be at liberty to effect delivery of possession in accordance with law. There will be no order as to costs.