
(2018) 03 MP CK 0010
In the Madhya Pradesh High Court
Case No : M.P. NO.1791 OF 2017

Sitabai & Others

APPELLANT

Vs

Mansingh

RESPONDENT

Date of Decision : 08-03-2018

Acts Referred:

Constitution of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 7 Rule 11, Order 22 Rule 11
Specific Relief Act, 1963 — Section 28

Citation : (2018) 03 MP CK 0010

Hon'ble Judges : VIVEK RUSIA, J

Bench : Single Bench

Advocate : B.I. Mehta, J.B. Mehta, L.N. Verma

Final Decision : Dismissed

Judgement

The petitioner (hereinafter referred to as the defendants) have filed the present petition being aggrieved by order dated 20.11.2017 by which

application under Order 7 Rule 11 of the C.P.C. filed in Civil Execution Case No.202-A/19962011 has been dismissed.

2. Respondent, Mansingh (hereinafter referred to as plaintiff) filed the civil suit No. 202-A/1996 against defendants seeking relief of specific

performance of contract dated 2.12.1992 and 11.6.1993, which was decided vide judgment and decree dated 22.4.1999 by way of compromise

between the parties on following terms and conditions :

(i) That the plaintiff shall pay Rs.90,000/- along with interest from 11.6.1993 to 31.12.2000, in total 2,04,000/-.

(ii) Out of the aforesaid amount, Rs.1,10,000/- shall be paid by 31.12.1999 and remaining Rs.94,000/- shall be paid on 31.12.2000 and the defendant

shall execute a registered sale-deed for the land measuring 72 x 80 Sq.ft. along with 5 Horse Power Electric Motor in running condition.

(iii) In violation of any of the conditions by the plaintiff, the defendant No. 1 and 2 shall be entitled for taking possession after 31.12.1999 along with

compensation of Rs.15,000/- per annum from the date of filing of the suit till possession.

3. According to the defendants debtor, when the plaintiff had failed to pay amount of Rs.1,10,000/- and Rs.94,000/- within the time given in decree, then

he filed Execution Case for obtaining possession of land bearing Survey No.86/3, 106 area 3.74 Acres and Rs.75,000/- towards compensation for the

period of 5 years. The plaintiff filed the reply to the said application by submitting that Rs.61,000/- was paid on 15.1.2000 and Rs.76,000/- was paid on

1.11.2000, therefore, the execution case is liable to be dismissed. By order dated 17.10.2012, the Executing Court had issued certain directions to the

plaintiff to pay balance amount.

4. Being aggrieved by the aforesaid order, the defendant filed the W.P. No.642/2013. Vide order dated 10.9.2015 the said writ petition was allowed by

setting aside the order dated 17.10.2012 by directing Executing Court to re-examine the entire matter. The learned Writ Court has observed that the

Executing Court cannot extend the time for payment of the installments and was only required to examine as to whether the requisite amount in terms

of the consent decree was paid by the plaintiff or not.

5. After the aforesaid order, the learned Executing Court vide order dated 22.12.2006 has held that the plaintiff has only paid Rs. 1,37,000/- meaning

thereby failed to perform his part, therefore, he is only entitled to get refund of the said amount from the defendants. Since the defendants have

already deposited the said amount in the CCD on 16.11.2012, the plaintiff may receive the said amount after filing an application and finally closed the

execution proceedings.

6. The plaintiff had already filed an execution proceeding under Order 22 Rule 11 of the C.P.C. on 10.3.2011 on the ground that he has performed his

part for execution of judgment and decree dated 22.4.1999, therefore, the defendant be directed to execute the sale-deed and handover the land and

electric motor and starter (in running condition).

7. After notice, the defendants filed the application under Order 7 Rule 11 of the

C.P.C. on the ground that the second execution proceeding is not maintainable as the High Court vide order dated 22.12.2016 has already held that the plaintiff has failed to prove the payment of balance consideration within the time.

8. The plaintiff filed the detailed reply to the said application by submitting that some fraud was played with him, he was made to aware that he has succeeded in the execution proceeding and the defendant has lost his case. He was not aware about the order dated 22.12.2016 as he never appeared on 22.12.2016. Therefore, he has been deprived of hearing in the execution case. The decree has not been executed so far and the provision of Order 7 Rule 11, C.P.C. would not apply, hence, the application is liable to be rejected.

9. The learned Executing Court by order dated 20.11.2017 has rejected the application under Order 7 Rule 11 of the C.P.C. on the ground that the earlier execution proceedings has not been closed despite passing order dated 22.12.2016 because the High Court has directed the Executing Court to decide the same after hearing both the parties and on the basis of evidence, therefore, the present execution proceedings are not barred by principles of res judicata and non-maintainability and fixed the case for evidence of decree-holder.

10. Being aggrieved by order dated 20.11.2017, the defendants have filed the present petition before this Court.

11. Shri B.I. Mehta, learned senior counsel appearing for the defendants/petitioners, submitted that the Executing Court cannot go behind the judgment and decree. As per terms and conditions of the decree, the plaintiff was required to pay certain amount within specific period, failing which, the defendants were held entitled to obtain the possession along with compensation. This Court vide order dated 10.9.2015 has already held that the Executing Court was required to examine whether the amount was paid by the plaintiff within the time as contained in the consent decree. Thereafter, vide order dated 22.12.2016, the Executing Court has already held that the plaintiff has failed to perform his part by not paying the entire amount as per the consent decree and entitled to take back the amount of Rs.1,37,000/- from the defendants. Thereafter, nothing remains for the Executing Court to decide and the execution proceedings have been closed. Hence, the second execution proceedings are not maintainable at the instance of the

plaintiff.

12. Shri L.N. Verma, learned counsel appearing for the respondent/plaintiff, has argued that the decree passed in the suit for specific performance is

in the nature of preliminary decree and unless the final decree is passed u/s. 28 of the Specific Relief Act, the suit is deemed to be pending even after

decree is passed. The decree-holder can apply for extension of time before the same Court for payment of balance amount. In support of his

contention, he has placed reliance over the judgment of Apex Court passed inÂ Bhupender Kumar V/s. Angrej Singh : (2009) 8 SCC 766 and Raman

Kutty VS Avara : AIR 1994SC 1699. He further submitted that when the judgment is passed without jurisdiction and fraud has been committed on

Court, then the said order does not operate as res judicata. In support of his contention, he has placed reliance over the judgment passed by the Apex

Court in case of Raju Ramsingh V/s. Mahesh : (2008) 9 SCC 54. Shri Verma further submitted that the defendants have obtained the order dated

26.12.2016 by playing a fraud that to, behind the back of the plaintiff. The plaintiff has paid the entire amount to the defendants and which was liable

to be decided after taking evidence on the issue. The plaintiff had no knowledge about the order dated 22.12.2016 as his counsel Shri Hardia did not

inform him. The order-sheet dated 22.12.2016 does not contain his signatures, but when he appeared in his execution proceedings, then his signature

has been obtained by the Clerk in earlier execution proceedings filed by the defendants. Hence, the learned Executing Court has rightly rejected the

application and no interference is called a writ petition under Article 227 of the Constitution of India.

13. The plaintiff filed the suit for specific performance of agreement dated 2.12.1992 and 11.6.1993. At the time of filing of the plaint, the plaintiff was

in possession over the suit land. Vide judgment and decree dated 24.2.1999, the suit was disposed of by way of consent decree. The plaintiff was

required to pay Rs.2,04,000/- along with interest up to 31.12.2000 to the defendants No.2 and 3. Out of the said amount, Rs.1,10,000/- was required to

be paid by 31.12.1999 and remaining Rs.94,000/- was required to be paid by 31.12.2000 and get the sale-deed registered. In the event of non-

compliance of any of the aforesaid conditions by the plaintiff, the defendants No.1 to 3 was held entitled to get the possession of the land measuring 70

x 80 Sq.ft. after 31.12.1999 along with compensation @ Rs.15,000/- per annum for the period of 5 years.

14. That according to the plaintiff, he has already paid Rs.61,000/- on 15.1.2000 and Rs.12,000/- on 13.4.2000 and further Rs.73,000/- on 1.11.2000

and the defendants had executed a receipt of the aforesaid amount. The Apex Court in the case of Smt. Soya Ray V/s. Gostha Gopal Day : AIR 1988

SC 981, has held that the time fixed in the compromise decree is not extendable, in failure to making the payment within the stipulated time, the default

clause in the agreement would follow but in this case decree was passed in a suit for partition. In the present case decree was passed in a suit filed

for specific performance of contract in which sec 28 of the Specific Relief Act would apply.

15. When the order dated 22.12.2016 was passed, the execution application filed by the plaintiff on 10.3.2011 was already pending and in which, the

defendants were appearing. The first time, the defendants filed an application under Order 7 Rule 11 of the C.P.C. on 28.8.2017. By order dated

22.12.2016, the Executing Court has decided the issue that the plaintiff has paid only the amount of Rs.1,37,000/- and violated the terms and conditions

of the consent decree. The learned Executing Court ought to have decided both the execution proceedings together, because in the execution case

filed the plaintiff was pending at that time, in which, he has pleaded that he has performed his part as per consent decree. After passing the order

dated 22.12.2016, the execution proceedings has not been closed so far and was fixed on 13.1.2017 for the purpose of handing over of possession.

The respondent has filed the order-sheet dated 13.1.2017 to show that the execution proceedings are still pending.

16. The provision of the sec. 11 of CPC applies to the execution proceeding as held by Supreme Court of India in case of MohanLal Vs Benoy

Krishna : AIR 1953 SC 65 and Kamala Bai Vs Mangilal : (1987) 4 SCC 585 but the provisions of Order 7 Rule 11 of the C.P.C. would not apply in an

execution proceeding in a given facts and circumstances, where a judgment and decree was passed on compromise between plaintiff and defendant.

The plaintiff as well as defendants both have filed the execution proceedings, therefore, both the execution proceedings are liable to be decided

together. The execution proceedings cannot said o closed unless the findings in respect to the satisfaction of the judgment and decree are recorded by

the court. The execution proceedings initiated by the plaintiff are still pending. The Court is required to pass the order after adjudicating whether the decree has been satisfied or not.

17. For better appreciation, the provisions of Section 28 of the Act is quoted herein below :

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.-

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub- section (1), the court-

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub- section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:-

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the

property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

18. As per Section 28 of the Specific Relief Act, the decree is preliminary in nature and the suit would continue under the control of Civil Code till

either party moves for passing a final decree. Section 28 gives power to the Court to grant order of rescission of agreement till the sale-deed is

executed and the Court has power to extend the time to pay the amount or perform the condition of the decree. The Apex Court in some what similar

circumstances, in the case of Bhupinder Kumar Vs. Angrej Singh (2009) 9 SCC 766, has held that a decree of specific performance is a preliminary

decree and Court granting decree does not lose jurisdiction till a final decree is passed nor it becomes functus officio. In case the command of decree

is not complied with or sufficient cause is shown for not complying with such terms of decree, even when application for extension of time is made by

the decree holder, the Court has jurisdiction to refuse the extension of time and further grant relief of rescission of contract. The relevant parts of

judgment are extracted below, for ready reference :-

20. In Kumar Dharendra Mullick (supra), this Court, after analysing earlier decisions, has concluded that : (SCC p.264a-c) ""When the Court passes

the decree for specific performance, the contract between the parties is not extinguished. The court does not lose its jurisdiction after the grant of the

decree for specific performance nor does it become functus officio. The decree for specific performance is in the nature of a preliminary decree and

the suit is deemed to be pending even after the grant of such decree. Hence, the court retains control over the entire matter even after the

decree. Section 28 gives power to grant order of rescission of the agreement which itself indicates that till the sale deed is executed, the trial Court

retains its power and jurisdiction to deal with the decree of specific performance. Therefore, the court has the power to enlarge the time in favour of

the decree-holder to pay the amount or to perform the conditions mentioned in the decree for specific performance.

21. It is clear that Section 28 gives power to the court either to extend the time for compliance with the decree or grant an order of rescission of the agreement. These powers are available to the trial court which passes the decree of specific performance. In other words, when the court passes the decree for specific performance, the contract between the parties is not extinguished. To put it clearly the decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the decree.

22. Sub-section (1) of Section 28 makes it clear that the court does not lose its jurisdiction after the grant of decree for specific performance nor it becomes functus officio. On the other hand, Section 28 gives power to the court to grant an order of rescission of the agreement and it has the power to extend the time to pay the amount or perform the conditions of decree for specific performance despite the application for rescission of the agreement/ decree. In deciding an application under Section 28(1) of the Act, the court has to see all the attending circumstances including the conduct of the parties.

23. If we apply the above principles to the facts of the present case, the order of the executing court and the High Court cannot be faulted with. The suit for specific performance is in the nature of a discretionary remedy and on equity, the appellant was not entitled to get the decree executed since he failed to place relevant materials about his inability to tender or deposit the decreed amount.

19. In the case of V.S. Palanichamy Chettiar Firm vs. C. Alagappan and another, (1999) 4 SCC 702, while dealing with the power of the Executing Court in the matter of extension of time, the Apex Court has looked into the law laid-down in that respect in the case of Sardar Mohar Singh vs. Mangilal, (1997) 9 SCC 217, and has further held in consonance to the law earlier laid-down that even specific performance is an equitable relief and he who seeks equity can be put in terms to ensure that equity is done to the opposite party even while granting the relief. Taking into consideration all these aspects, the Apex Court in paragraphs 16 and 17 of the report has held thus :

16. In view of the decision of this Court in Ramankutty Gupta's case when the trial court and the executing court are same, executing court can

entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor

judgment-debtor can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of decree.

19. That the decree of specific performance of contract is based on the equity . The plaintiff has paid substantial amount of sale consideration to the

defendant , he is in possession of the land . According to his he has paid entire amount to the defendant after the judgment and decree . Under sec 28

of the Specific Relief Act he can still apply for extension of time to pay the amount if court come to the conclusion that the amount under judgment

and decree has not been paid so far. That rescission of a contract even after grant of decree, in terms of provisions of Section 28 of the Act,

amounting to modification of decree granted by the Trial Court. The very intention of the legislature is also to confer power on the Trial Court to

modify the decree as is discerned from the language of Section 28 of the Act.

20. In view of the facts of the case and law laid down by the Supreme Court of India , the learned trial Court has not committed any error while

passing the order dated 20.11.2017. Hence, no interference is called for by this Court in exercise of Article 227 of the Constitution of India.

21. Accordingly, this petition fails and is hereby dismissed.

No order as to costs.