

(2009) 09 JH CK 0027

Jharkhand High Court

Case No: Writ Petition (C) No. 1502 of 2005

Md. Hanif Khan

APPELLANT

Vs

Naresh Prasad

RESPONDENT

Date of Decision: Sept. 11, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151, 47
- Contract Act, 1872 - Section 55
- Specific Relief Act, 1963 - Section 16, 28

Citation: AIR 2010 Jhar 73 : (2010) 58 BLJR 45

Hon'ble Judges: D.G.R. Patnaik, J

Bench: Single Bench

Advocate: Satya Narayan Prasad and Sujeet Narayan Prasad, for the Appellant; V. Shivnath Sweety Topno and Anita Sinha, for the Respondent

Final Decision: Allowed

Judgement

D.G.R. Patnaik, J.

Challenge in this writ application is to the order dated 13.01.2008 passed by the Sub-Judge-IX, Ranchi in Miscellaneous Case No. 1/2000 filed by the petitioner/defendant whereby the prayer of the petitioner made u/s 47 read with Section 151 of the CPC for dismissing the Execution case No. 9/98, was rejected.

2. Counter affidavit has been filed on behalf of the respondents.

3. Heard learned Counsel for the petitioner and learned Counsel for the respondent.

4. Facts of the petitioner's case in brief is as follows:

An agreement dated 06.09.1990 was entered into by and between the plaintiff/respondents and the petitioner/defendant along with his sister under which the plaintiff had agreed to purchase 231/2 decimals of land in Plot No. 115 and 11

decimals in Plot No. 163, 164 and 166, total measuring 341/2 decimals situated under Khata No. 21 at village Samlong, P.S.- Namkum, District-Ranchi.

The plaintiff filed Title suit No. 94 of 1990 in the court of Sub-Judge-V, Ranchi against the defendant/petitioner for specific performance of contract and to execute and register the deed of sale.

During the pendency of the suit, the parties had effected a compromise between themselves and on the basis of the compromise petition, had jointly approached the trial court for a decree in terms of the compromise.

The trial court, after considering the terms contained in the compromise petition and the statements of the parties, decreed the suit on compromise by making the compromise petition as part of the decree. The terms and conditions of compromise as noted in the decree, included inter-alia -

(i) That the plaintiff had agreed to purchase 201/2 decimals of land from the defendant @ Rs. 13,500/- per katha of land and the defendant had agreed to execute the sale deed and get the same registered.

(ii) That the parties had agreed that the sale deed will be executed in pursuance of the agreement, within one month from the date of decree and the purchaser shall get the sale deed executed by the defendant within the period stipulated.

The decree was signed and declared by the trial court on 2.2.09.1994.

5. The plaintiff/decreed holder, filed an Execution Case No. 9/98 in the court of the Sub-Judge-V at Ranchi for execution of the compromise decree against the defendant/petitioner, on 27.08.1998. Along with the petition for execution, the plaintiff/decreed holder had also filed draft copy of the proposed sale deed for a total of 0.121/2 acres of land in Plot No. 115 of Khata No. 21 for a total consideration of Rs. 87,750/-.

6. In the execution proceeding, one Amulya Ratan Manjhi had appeared as an intervener claiming that he, having entered into an agreement for sale of part of the suit land with the plaintiff and having paid the consideration amount in advance, is entitled for the sale deed to be executed in his favour by the defendant/judgment debtor. The executing court allowed his intervention petition inspite of the objections raised by the plaintiff/decreed holder and had also allowed the intervener to file the draft sale deed, and deposit the proportionate consideration amount.

7. The defendant/judgment debtor appeared in the execution proceeding and filed his petition u/s 47 read with Section 151 of the CPC praying for dismissal of the execution proceeding on the ground that it was barred by limitation and that the plaintiff/decreed holder, did not show his readiness and willingness to purchase the suit property within the period stipulated in the compromise decree and on the further ground that the execution case is inconsistent with the compromise decree

in as much as in the execution case the plaintiff/decreed holder had claimed for execution and registration of sale deed in respect of 24 decimals of land whereas in the compromise decree the area of total land was 201/2 decimals.

8. The plaintiff/decreed holder/respondent contested the petitioner's prayer by filing his rejoinder. After considering the rival submissions of the parties, the learned court below vide its impugned order, rejected the petitioner's prayer for dismissing the execution proceeding.

9. Assailing the impugned order, learned Counsel for the petitioner would raise the following grounds:

(i) The compromise decree as passed in Title Suit No. 94/1990, was a conditional decree under which the purchaser/decreed holder was required to deposit the consideration amount for 201/2 decimals of land or atleast express his readiness and willingness to pay the consideration amount, where-after the sale deed was to be executed by the petitioner and the entire transaction was to be concluded within one month from the date of decree. Despite the specific period of one month specified in the decree, the decree holder did not get the sale deed executed by paying or depositing the consideration amount within the period of one month. As such, the decree had become voidable and could not be enforced by way of Execution Proceeding in view of the provisions of Section 55 of the Indian Contract Act.

(ii) Since time was the essence of the compromise decree, it is deemed to be rescinded due to non-compliance within the stipulated period and therefore can not be enforced under law in view of the provisions of Section 28 of the Specific Relief Act.

(iii) Even otherwise, in terms of the compromise decree, the purchaser/decreed holder had promised to purchase the entire 201/2 decimals of land whereas on the one hand prayer in the execution case was made for enforcing the compromise decree in respect of 24 decimals and that too in installments, the first installment for purchase of 101/2 decimals and second installment, for the remaining land on an unspecified future date.

(iv) The executing court ought to have confined within the limits of the scope of the compromise decree and could not have extended time to the decree holder since such extension had not been prayed for or granted by the court which had passed the decree.

10. Per contra, the stand taken by the respondent is that it was the petitioner/judgment debtor who had filed and refused to cooperate with the plaintiff/decreed holder for execution of sale deed and had intentionally delayed the matter on one pretext or the other and consequently, the decree holder was constrained to file the execution case.

Learned Counsel for the respondents would want to explain that the prayer in the execution proceeding as made by the decree holder, was for execution of sale deed and registration thereof in respect of 201/2 decimals of land situated under various plot numbers and it was on account of typographical error that the area of land has wrongly been mentioned as 101/2 decimals in the draft sale deed and the error has been rectified with the permission of the court.

Learned Counsel would argue that in the suit for specific performance of contract, the matter was set at rest by the compromise decree dated 09.09.2004. Against the decree, the judgment debtor did not prefer any appeal and hence the decree became executable as it exists. The executing court is bound to execute the decree as it exists and it cannot go behind the decree. It is further stated that the allegation that the decree holder did not cooperate by showing his readiness and willingness to purchase the suit land, is false and misleading and further, the provisions of Section 55 of the Indian Contract Act and Section 28 of the Specific Relief Act makes a decree un-executable.

11. From the facts undisputed, it transpires that the suit filed by the plaintiff/respondents against the petitioner/defendant for specific performance of the contract was decreed, in terms of the compromise effected between the parties, by the court of Sub-Judge-V, Ranchi. As per the terms of agreement, which was made part of the decree, the plaintiff/respondent had agreed to purchase 201/2 decimals of land from the petitioner for a consideration of Rs. 13,500/- per katha of land and the defendant/petitioner had agreed to execute the sale deed and get the same registered. The entire transaction was to be completed within one month from the date of decree.

12. Apparently, time was stipulated as the essence of the contract, as per the conditions in the agreement.

The compromise decree was not executed within the stipulated period of one month and had continued to remain unexecuted even till more than four years from the date of decree.

The plaintiff decree holder did not choose to obtain extension of the period from the trial court which had passed the decree and neither did he file the execution proceeding promptly after expiry of the one month stipulated period. Instead, he chose to file the execution proceeding after more than four years from the date of decree.

13. Amongst the grounds on which the execution proceeding has been objected to are basically, that the execution proceeding is barred by limitation in as much as that the time for execution of the decree was stipulated in the terms of compromise itself which had formed part of the decree and the decree holder having not made any effort to get the decree executed within the period stipulated nor to get the period extended by order of the trial court, the attempt to get the decree executed

after a lapse of more than four years, is not tenable under the law.

14. I find force in this ground and the arguments advanced by the learned Counsel for the petitioner. The decree was essentially for specific performance of contract in terms of the agreement entered into between the parties and the period of one month from the date of decree was stipulated for the performance of the contract. If for any reason, the performance was not made within the period stipulated, then the decree holder ought to have sought for extension of the period from the trial court for making payment of the consideration amount and get the sale deed executed, from the same court which had passed the decree.

It may be noted here that the court which had passed the decree, was the court of Sub-Judge-V whereas the execution proceeding has been filed in the court of Sub-Judge-IX apparently indicating thereby that both the courts were not one and the same.

15. The petitioner has taken the objections to the execution of the decree on the basis of the provisions of Section 16 and Section 28 of the Specific Relief Act and had also pleaded the ground that the plaintiff/decreed holder did not come forward to pay the consideration amount or even to show his readiness or willingness to pay the consideration amount at all and therefore the contract for specific performance should be deemed as un-enforceable against the petitioner/judgment debtor. In the counter affidavit of the Respondent/decreed holder it appears that except a denial of the judgment debtor's allegation, there is no specific statement that the decree holder had demanded the judgment debtor to perform his part of the contract by expressing his readiness and willingness to pay the consideration money, within the period stipulated in the contract or issued any demand notice to the judgment debtor. No explanation is coming from the decree holder/respondents as to why he did not purchase the stamp papers and then ask for the execution of the sale deed within the period stipulated in the decree.

16. For better appreciation of the grounds, reference to the provisions of Section 16 of the Specific Relief Act (in short "the Act") may be made.

This Section, in so far it is relevant, is as under:

16. Personal, bars to relief. - Specific performance of a contract cannot be enforced in favour of a person -

(a) to (b)

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation. - For the purpose of Clause (c), -

- (i) Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

17. Section 28 of the Act reads as follows:

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 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 decrees 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 either so far as regards the party in default or either so far as regards the party in default or altogether, as the justice of the case may require.

18. From a bare reading of the provisions of Section 16, it would be manifest that the averment of readiness and willingness of the purchaser to perform his part of the contract is a sine-qua-non for the grant of relief for specific performance.

19. The provisions of Section 28 of the Act lays down that after a decree for specific performance of contract for the sale of immovable property has been made and the purchaser decree-holder does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money which the Court has ordered him to pay, the vendor judgment-debtor may apply in the same suit in which decree is made, to have the contract rescinded.

20. In the case of [V.S. Palanichamy Chettiar Firm Vs. C. Alagappan and Another](#), a similar issue came up before the Court for consideration in which extension of time was prayed for by the decree holder, after five years of the date of decree. Upon considering the facts of the case, the Court had held that though the executing court, being the same court which had passed the decree, had the discretion to extend the time, but considering the delay of more than five years, it had observed that equity demands that discretion be not exercised in favour of the decree holder and no extension of time be granted to them to comply with the decree.

21. In the present case, the facts are almost similar in as much as though the decree as per the terms of agreement, was executable within a period of one month from the date of decree, but the same was not executed even beyond four years of date of decree. The decree holder did not choose to get the period extended, by the court which had passed the decree and after more than four years, he filed the execution

case seeking execution of the decree. The judgment-debtor/petitioner though did not file any separate petition for rescinding the contract but had objected to the execution on the ground of limitation expressing thereby that the agreement for specific performance had become voidable at the option of the judgment-debtor and he is not therefore liable to perform his part of the contract.

22. From the facts as it would appear, the execution proceeding was not filed in the same court which had passed the decree. As such, the executing court was bound to confine itself within the scope of the decree itself and it had no jurisdiction therefore to grant any extension of the time for performance of the contract under the decree.

23. It appears from the impugned order of the court below that though the petitioner had raised the several grounds objecting the initiation and continuance of the execution proceeding, the learned court below has not discussed the several grounds, including the ground that even the prayer for execution of the decree was not in consonance with the decree itself in as much as the decree was for execution of the sale deed in respect of 201/2 decimals of land whereas the prayer for execution was made for 24 decimals and furthermore, there was no stipulation in the decree that the purchase of land would be in installments by making part payment of the consideration amount against part of the suit lands.

24. For the reasons discussed above, I find merit in this writ application. Accordingly, the same is allowed. The impugned order of the learned court below dated 13.01.2008 (Annexure-9) is hereby set aside. The execution proceeding vide Execution Case No. 9/98 is hereby dismissed.