

(2009) 12 CAL CK 0002

Calcutta High Court

Case No: G.A. No. 114 of 2007 and C.S. No. 316 of 2006

Hansraj Jain Karta of
Hansraj Jain and Sons
and Others

APPELLANT

Vs

Santanu Chaudhuri
and Others

RESPONDENT

Date of Decision: Dec. 8, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47
- Specific Relief Act, 1963 - Section 21, 22, 22(1), 28
- Transfer of Property Act, 1882 - Section 55, 55(1)

Citation: 114 CWN 572

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Moloy Ghosh, Mr. Pradip Dutta and Ms. Rajashree Kajaria, for the Appellant;
Samit Talukdar and Mr. Pallab Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.

The defendants claim by way of the present petition that this is a suit for land and since the property in question lies beyond the jurisdiction of this Court on its Original Side, the Court was incompetent to receive the action. The defendants seek revocation of the leave granted under clause 12 of the Letters Patent and for a direction that the plaint relating to the suit be taken off the file. There is an alternative prayer for dismissal of the suit.

2. Since the averments in the plaint are the only decisive material to be considered in a demurer application, the plaint has first to be seen. At paragraph 3 of the plaint it is stated that the defendants are absolute owners and in possession of about 45

cottah of land on Ballygunge Circular Road outside the jurisdiction. At the following paragraph the plaintiffs assert that an agreement for sale was entered into between the parties at a place within jurisdiction whereby the defendants were to sell about 20 cottah of the land at an agreed consideration. At paragraph 5 of the plaint, the plaintiffs claim to have made part payment of a sum of Rs.81.75 lakh against receipts issued by the defendants. At the next paragraph, the plaintiffs plead that a table discussion was held between the parties at a place within jurisdiction in March, 2004 where the terms of the agreement were acknowledged; such terms were subsequently reduced to writing in the agreement for sale. Paragraph 8 speaks of the agreement for sale having been executed within jurisdiction. Certain other part payments claimed to have been made are recorded in the ninth paragraph. The principal relief claimed is as follows:

A decree for specific performance of the agreement referred to in paragraphs 4, 6, 7 and 8 hereof directing the defendants to execute and register a Sale Deed in respect of 20 Cottahs of their property situated at 52/4, Ballygunge Circular Road, Kolkata - 700 019 in favour of the plaintiffs in terms of the said declaration being annexure "B" hereto; In default the Registrar, Original Side, be directed to prepare and execute the necessary conveyance;

3. The other reliefs sought are the usual ancillary ones for the appointment of a receiver, injunction, costs and further relief.

4. The defendants refer to paragraph 7(i) of the plaint where there is a reference to the balance portion of the 45 cottah Ballygunge Circular Road land and an assertion that such balance land was to be jointly developed by the plaintiffs and the defendants under a joint venture agreement that was to be executed later. The defendants say that in addition to the suit generally being a suit for land, the claim relating to the development of the property would undoubtedly amount to seeking an interest in land. It is contended that a suit in furtherance of a development agreement may be instituted only before a Court within whose jurisdiction the immovable property is situate.

5. In support of their primary ground for challenging the receipt and continuation of this action in this Court, the defendants refer to section 22 of the Specific Relief Act that provides as follows:

"22. Power to grant relief for possession, partition, refund of earnest money, etc.-(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 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 he may be entitled, including the refund of any earnest money or deposit paid or made by 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 subsection (1) shall be without prejudice to its powers to award compensation u/s 21."

6. It is the defendants' argument that a suit for specific performance of the present kind would invariably involve a claim for possession. The defendants refer to a judgment reported at [Babu Lal Vs. Hazari Lal Kishori Lal and Others](#), where in connection with execution proceedings launched on the basis of a decree for specific performance, the Supreme Court appears to have held that a relief for possession was in-built in a decree for specific performance of an agreement for sale of an immovable property. The defendants rely on paragraphs 13 and 16 of the report and the Supreme Court's observation that the relief of possession is inherent in the relief for specific performance of a contract of sale of such nature:

"13. The expression in sub-section (1) of section 22 "in an appropriate case" is very significant. The plaintiff may ask for the relief of possession or partition or separate possession "in an appropriate case". As pointed out earlier, in view of Order 2 Rule 2 of the Code of Civil Procedure, some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could not be combined in one suit. 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 or such a person is not bound by the contract sought to be enforced. 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) of the Transfer of Property 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."

"16. It may be pointed out that the Additional Civil Judge had decreed the suit for specific performance of the contract. The High Court modified the decree to the extent that the sale deed was to be executed by respondents 6 to 9 together with the petitioner. In short, the decree was passed by the High Court not only against Respondents 6 to 9 but also against the subsequent purchaser i.e. the petitioner and thus the petitioner was himself the judgment debtor and it cannot be said that he was a third person in possession and, therefore, relief for possession must be claimed. The contention on behalf of the petitioner is that the relief for possession must be claimed in a suit for specific performance of a contract in all cases. This argument ignores the significance of the words "in an appropriate case". The expression only 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 a contract for the transfer of the immovable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced 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 of possession being inherent in the relief for specific performance of the contract of sale. Besides, the proviso to sub-section (2) of section 22 provides for amendment of the plaint on such terms as may be just for including a claim for such relief "at any stage of the proceeding"."

7. The defendants also rely on the reference in the report to section 28 of the Specific Relief Act which provides for rescission in certain cases of contracts for sale or lease of immovable property despite a decree for specific performance. The defendants suggest that in view of section 55 of the Transfer of Property Act and the duty of a vendor to make over possession of the immovable property sold, it would be unwise to divorce possession from a decree for specific performance of a contract for sale of an immovable property.

8. The defendants suggest that the full import of section 22 of the Specific Relief Act was not addressed in a subsequent judgment reported at 2001 VII AD 513 (SC). The defendants submit that to such extent the judgment in *Adcon Electronics* passed sub silentio. They refer to a judgment reported at [Municipal Corporation of Delhi Vs. Gurnam Kaur](#), and the passage from Salmond on Jurisprudence (12th ed.) that is quoted therein to explain the concept of sub silentio.

9. The defendants rely on a Special Bench judgment reported at [Sm. Dhiraj Bala Karia Vs. Jethia Estate Pvt. Ltd.](#), where it was held that section 22(1) of the Specific Relief Act is procedural in nature and possession or partition and separate possession of the property are ancillary or consequential to the passing of a decree

for specific performance of a contract to transfer immovable property. The judgment was rendered in the context of the quantum of Court fees payable in a suit where a combined relief for execution and registration of the sale deed and delivery of possession was sought.

10. The defendants claim that if the plaintiffs were already in possession and had sought mere specific performance of the agreement to sell the land, it would be irrelevant as to whether the property was within or outside jurisdiction as such a suit would not involve either an adjudication of title or delivery of possession. The defendants rely on a judgment reported at [Hazra Medical Stores Private Ltd. Vs. Biswanath Sarkar and Others](#), for such purpose.

11. On the basis of the development agreement pleaded in the plaint, the defendants rely on a judgment reported at (1994) 2 Cal LT 166 (A. S. Overseas Private Limited v. Sri Sri Iswar Chinta Haran Shiv Thakur). It was held in such case that on a meaningful reading of the plaint it appeared that the plaintiff therein had sought an adjudication of its right under the agreement, which included the right to demolish and construct upon the premises. The Court opined that the right to demolish or construct implied a right to possess and made a suit for enforcing such a development agreement a suit for land.

12. Finally, the defendants refer to another Special Bench judgment reported at [Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others](#), for the principle recognised therein that where there are contrary decisions of the Supreme Court rendered by Benches of equal strength, the High Court, in theory, being bound by each one, is, in effect, bound by none and not necessarily obliged to follow the one later in point of time, but may follow the one which, according to it, is better in point of law. The defendants say that though the Special Bench judgment has been expressly overruled in [Hameed Joharan \(d\) and Others Vs. Abdul Salam \(d\) by L.rs. and Others](#), such aspect of the Special Bench view was not touched or adversely commented on. However, the defendants suggest that the relevant observation in the Special Bench judgment should not be regarded as a binding precedent in view of the entire decision having been eclipsed, but it should be regarded as submission of the defendants. The defendants implore that the seemingly more exhaustive discussion in the Babu Lal judgment be preferred to the Adcon Electronics dictum. The defendants emphasise that if a decree for specific performance contains an in-built mandate for possession, these plaintiffs may carry the decree that may be passed here to the Alipore Court for execution and claim therein that they need not file a second suit for possession before seeking to set foot on the land.

13. The defendants refer to the leave obtained by the plaintiffs under Order II Rule 2 of the Code of Civil Procedure, 1908 at the time of institution of the suit. They submit that implicit in such leave being sought and obtained was the plaintiffs' admission that possession formed an integral part of the cause of action and since possession of the land could not be claimed in this Court, liberty was being reserved to claim for

possession elsewhere. The defendants urge that the bar under Order II of the Code for a fresh action would arise only if the plaintiff did not include the whole of the claim which the plaintiff was entitled to make in respect of the cause of action.

14. The plaintiffs contend that the defendants' argument is fundamentally flawed. They say that it is only upon a decree for specific performance being obtained or an agreement for sale being perfected and registered that the decree-holder or purchaser would thereafter be entitled "to claim possession. The plaintiffs suggest that to claim possession would amount to jumping the gun as such claim would arise only if the decree for specific performance of an agreement to sell an immovable property was obtained. A claim for possession, according to the plaintiffs, can, in law, not be made before the entitlement thereto is established upon either a decree for specific performance of the agreement being made or the agreement for sale being otherwise completed and registered.

15. The plaintiffs refer to paragraphs 15 and 16 of the Adcon Electronics judgment and commend such view of the Supreme Court to be accepted since this case dealt with the aspect of suit for land in a suit for specific performance of an agreement to sell an immovable property while the Babu Lal judgment dealt with an entirely different matter. Paragraph 15 and relevant part of paragraph 16 of the Adcon Electronics case record as follows:

"15. From the above discussion it follows that a "suit for land" is a suit in which the relief claimed relates to title to or delivery of possession of land or immovable property. Whether a suit is a "suit for land" or not has to be determined on the averments in the plaint with reference to the reliefs claimed therein; where the relief relates to adjudication of title to land or immovable property or delivery of possession of the land or immovable property, it will be a "suit for land". We are in respectful agreement with the view expressed by Mahajan, J. in Moolji Jaitha case.

"16. In a suit for specific performance of contract for sale of immovable property containing a stipulation that on execution of the sale deed the possession of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is part of the decree of specific performance of contract. ..."

16. To begin with the defendants' last argument first, it would be presumptuous to conclude that the leave that the plaintiffs obtained under Order II Rule 2 of the Code at the inception of the suit related to a claim for possession. For good or bad, the basis for obtaining such leave has not been clearly spelt out in the plaint. It is equally possible that the plaintiffs reserved a claim for damages on account of the defendants' alleged failure to execute the conveyance. Such a claim would be a part of the plaintiffs' cause of action in the suit and unless simultaneously claimed or liberty reserved pursuant to leave obtained, would be barred.

17. At paragraph 10 of the plaint the plaintiffs' immediate grievance is summarised in three lines: that the defendants had failed to convey the property or any part thereof in the plaintiffs' favour. The opening sentence of paragraph 15 of the plaint specifies the scope of the action: it is limited to the enforcement of the agreement to sell the land. The principal relief is for specific performance of the agreement for sale and execution and registration of the conveyance in respect of the 20 cottah of land. The development agreement or the plaintiffs' rights relating thereto are not central to the suit or relevant in the context of the only relief claimed.

18. In fact, as the plaintiffs correctly point out, paragraph 7(i) of the plaint may be mistaken. The plaintiffs have appended a copy of the agreement to the plaint. Clause (v) of the terms records that the first defendant had agreed to develop the rest of the property measuring 25 cottah (apart from the 20 cottah of the land agreed to be sold). The plaintiffs submit that since the agreement is referred to in the plaint and a copy thereof is annexed thereto as part thereof, the apparent conflict between the pleading and the document has to be resolved by reference to the document unless it is specifically averred that the relevant clause in the agreement is mistaken or it was intended to imply otherwise than what is apparent therefrom. There are authorities aplenty in support of such principle dating back to a century and more.

19. In Babu Lal a subsequent purchaser sought to resist the bailiff who had been directed to deliver possession to the decree-holders in pursuance of a decree for specific performance of the earlier agreement to sell the immovable property. The special leave petitioner before the Supreme Court had resisted an interlocutory application for injunction taken out by the plaintiffs in the suit Court by furnishing an undertaking that the construction that the subsequent purchaser had begun was being made at his own peril and that he would demolish the construction and restore the land to its original position if the earlier purchasers obtained a decree. The interlocutory application was dismissed by recording the undertaking. The trial Court subsequently dismissed the suit but the appellate Court decreed it. In second appeal the High Court affirmed the decree in the plaintiffs' favour and required the subsequent transferee to be joined in the conveyance so as to pass on the title which resided on him to the earlier purchasers. After the decree the subsequent purchaser declined to honour his undertaking to demolish the construction. The decree-holders applied for execution which was resisted by the subsequent purchaser by resorting to an application u/s 47 of the Code. The subsequent purchaser claimed, inter alia, that the decree was inexecutable as no relief for possession had been claimed in the suit. The executing Court accepted such objection which was affirmed in appeal. The decree-holders went up by way of a second appeal to the High Court which held that the decree-holders were also entitled to possession.

20. Before the Supreme Court, section 22 of the Specific Relief Act was cited and it was argued that unless a relief for possession was claimed in a suit for specific performance the same could not be made or granted at a subsequent stage. Sub-section (2) of section 22 was relied upon for such purpose. It was in such context that the Supreme Court considered the matter. The law as it stood prior to the amendment to section 22 of the Act was noticed. The divergent views of various High Courts were referred to in the judgment. The Supreme Court observed that section 22 enacted a rule of pleading; that to avoid multiplicity of proceedings a plaintiff may claim a decree for possession in a suit for specific performance though the right to possession accrued only when the suit for specific performance was decreed. The Supreme Court's view on the amendment was that a statutory provision had been incorporated to enable the plaintiff to ask for possession in the suit for specific performance itself; and, it empowered the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the stipulated time, the defendant should execute the deed and put the plaintiff in possession.

21. The Supreme Court's reading of the expression "in an appropriate case" in section 22(1) of the Act was that not even, case would be appropriate for possession or other reliefs referred to in sub-section (1) to be specifically claimed. The view expressed was that the expression "in an appropriate case" only indicated that it was not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for sale of an immovable property.

22. Sub-section (2) of section 22 prohibits a Court from granting the reliefs covered by clauses (a) or (b) of sub-section (1) unless it is specifically claimed. The proviso to sub-section permits the plaintiff to amend the plaint at any stage and include a claim for such relief.

23. Paragraph 16 of the Adcon Electronics case lays down the principle that in a suit for specific performance of a contract for sale of an immovable property where the agreement itself contains a stipulation that on the execution of the deed the possession of the property would be made over to the purchaser, it is implied that the delivery of possession is a part of the decree for specific performance of such contract. Such principle is in apparent conflict with the dictum in Babu Lal that the relief of possession is inherent in the relief for specific performance of a contract for sale of an immovable property. But in the present context, while considering the immediate issue as to whether this is a suit for land, the Adcon Electronics judgment is the more relevant. The Babu Lal judgment did not turn on the principle that the relief of possession is inherent in the relief for specific performance of a contract for sale of an immovable property. What weighed with the Supreme Court in that case was that Babu Lal was a party to the conveyance and had been directed to be as such by the modified decree of the second appellate forum and that he remained

bound by his undertaking to demolish the construction that he put up if the previous purchaser obtained a decree in the suit. Adcon Electronics limited the consideration as to whether a suit was a suit for land to assessing whether the agreement sought to be specifically enforced entitled the plaintiff to possession immediately upon or simultaneously with the conveyance being executed. Though it was not noticed in Adcon Electronics as to whether the right to possession inheres in a decree-holder who had been granted specific performance of an agreement for sale of an immovable property, it has been laid down that only if the agreement stipulated possession upon conveyance would the performance of such an agreement for sale of an a suit for land. If there was no undertaking furnished to Court the Babu Lal case that implied a positive representation to make over possession, there may have been a more convincing argument of conflict between Babu Lal and Adcon Electronics.

24. A decree for specific performance that the plaintiffs may obtain in this suit may not empower the plaintiffs to carry the decree to the Alipore Court and claim possession in execution proceedings. A claim for possession cannot be included by the plaintiffs by amending the plaint relating to this suit, for that would undoubtedly make this a suit for land. Since the plaintiffs have not claimed possession and have merely claimed specific performance of the agreement for sale of 20 cottah of land and the execution and registration of the deed relating thereto, this is not a suit for land.

25. GA No. 114 of 2007 fails, but there will be no order as to costs.

Urgent certified photostat copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.