

GAHC010243322023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/348/2023

NAZRUL ISLAM
S/O LATE AZAYEB UDDIN AHMED, R/O SATSIA KHAMAR, P.S.-LAKHIPUR,
DIST-GOALPARA, ASSAM

VERSUS

KHALILUR RAHMAN (SINCE DECEASED REPRESENTED BY HIS LRS),
FATEMA BEWA AND 4 ORS.
W/O KHALILUR RAHMAN, R/O VILL-SATSIA KHAMAR, P.O.-
KHALISABHITA, P.S.-LAKHIPUR, DIST-GOALPARA, ASSAM

2:OMAR FARUK
S/O KHALILUR RAHMAN
R/O VILL-SATSIA KHAMAR
P.O.-KHALISABHITA
P.S.-LAKHIPUR
DIST-GOALPARA
ASSAM

3:KHALIDA BEGUM
D/O KHALILUR RAHMAN
R/O VILL-SATSIA KHAMAR
P.O.-KHALISABHITA
P.S.-LAKHIPUR
DIST-GOALPARA
ASSAM

4:KHURSIDA BEGUM
D/O KHALILUR RAHMAN
R/O VILL-SATSIA KHAMAR
P.O.-KHALISABHITA
P.S.-LAKHIPUR
DIST-GOALPARA
ASSAM

5:RAHUL AMIN
S/O KHALILUR RAHMAN
R/O VILL-SATSIA KHAMAR
P.O.-KHALISABHITA
P.S.-LAKHIPUR
DIST-GOALPARA
ASSA

Advocate for the Petitioner : MR S HOQUE,

Advocate for the Respondent : ,

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

16.08.2024

Heard Mr. S. Hoque, learned counsel for the petitioner. The respondent has refused to accept the notice and chooses not to contest this petition and as such, none has appeared for the respondent.

2. In this petition, under Article 227 of the Constitution of India read with Section 151 of the Code of Civil Procedure (C.P.C.), 1908, the petitioner namely, Nazrul Islam, the petitioner has put to challenge the correctness or otherwise of the impugned order dated 22.03.2023, passed by the learned Munsiff No. 1, Goalpara (trial court), in T.S. No. 08/2012.

3. It is to be noted here that vide impugned order dated 22.03.2023, the learned trial court has dismissed the petition filed by the petitioner for amendment of Judgment and Decree of the Petitioner/Plaintiff/Decree Holder.

4. The background facts leading to filing of the present petition are briefly

stated as under:-

“The petitioner as a plaintiff has instituted a suit, being Title Suit No. 08/2012, before the learned Munsiff No. 1, Goalpara, wherein a prayer was made for a decree of specific performance of contract and recovery of possession of the suit land after executing and registering the sale deed.

During the pendency of the suit, the respondent/defendant namely, Khalilur Rahman suffered demise and the legal heirs of the defendant were substituted in the case. Thereafter, the learned trial court had passed the said judgment, holding that the plaintiff/petitioner is entitled to specific performance of agreement (Exhibit-1) and therefore, direction was given to the legal heirs of the defendant to execute the sale deed within 60 days, after obtaining sale permission from concerned authority and thereafter, the decree was prepared in favour of the plaintiff/petitioner on 31.03.2015.

Thereafter, the plaintiff/petitioner/decreed holder filed an Execution Case, before the learned trial court for execution of the decree, vide Title Execution Case No. 02/2019 and thereafter, the petitioner came to know that in the aforesaid judgment, no decree for possession was granted by the learned trial court. Though such prayer was made in the pleading, but the learned trial court has not passed any order for delivery of possession of the suit land in the judgment for which no decree of recovery of possession of the suit land was prepared.

Thereafter, the petitioner, having failed, necessity of amendment of the judgment dated 31.03.2015, of the suit and also requirement of passing an order for delivery of possession of the suit land to the plaintiff on execution of the sale deed has filed a petition for amendment of Judgment and Decree, before the learned trial court, under Section 152 of the C.P.C. read with Section 28(3) of the Specific Relief Act, 1963, vide Petition No. 143/2023, wherein the respondent/defendant made oral objection on the ground that the matter has already been disposed of and thereafter, the learned trial court had passed the impugned order dated 22.03.2023, and rejected the amendment petition of the plaintiff/petitioner.”

5. Mr. Hoque, learned counsel for the petitioner submits that the learned trial court has committed grave error in law as well as in fact by rejecting the prayer for amendment of the judgment made in Petition no. 143/2022, in Title Suit No. 08/2012 and as such, the impugned order dated 22.03.2023, is bad in law. Mr. Hoque, further submits that the learned trial court had held that Section 152 of the C.P.C. and Section 28 of the Specific Relief Act are not applicable in the case of the petitioner. Mr. Hoque also submits that the reason reflected in the impugned order is that the learned predecessor did not grant the prayer for delivery of possession, although there was a specific prayer for delivery of possession and that Section 28 of the Specific Relief Act specifically mentioned regarding delivery of possession of partition and separate possession of the property on the execution of such conveyance or lease and therefore, while the learned trial court gave all the benefits to the petitioner, whatever the petitioner was entitled to and the petitioner in his suit also prayed for the delivery of possession and the learned trial court granted relief under the said suit, meaning thereby he was also entitled to the said

delivery of possession, as the conditions mentioned in Section 28(1) of the Specific Relief Act is satisfied, but, the learned trial court either by stay or by omission had left out to place the said term of delivery of possession in the said judgment. Mr. Hoque also submits that Section 152 of the C.P.C. gave power to the trial court to correct some accidental slip or omission at any stage for the omission occurred in the judgment. Further Mr. Hoque submits that the omission or missing of some term of delivery of possession was the accidental slip of the then learned trial court and while the court allowed the execution of sale deed and/or direct the defendant or his legal heirs to execute the sale, meaning thereby, the consequence of the said order was also entitled by the petitioner i.e. to recovery of possession. Mr. Hoque also submits that without delivery of possession only execution of sale deed will not serve the purpose of the suit and therefore, by invoking the aforesaid two provisions and also in exercise of the power under Article 227 of the Constitution of India, it is contended to allow the petition. Mr. Hoque has referred following decisions in support of his submission:-

(i) Benoy Gopal Saha & Ors. vs. Legal Heirs of Subinoy Poddar & Ors. reported in 2017 (2) GLT 1166;

(ii) Manickam @ Thandapani & Anr. vs. Vasanta reported in 2022 0 Supreme (SC) 395

6. Having heard the submission of learned counsel for the petitioner, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned order dated 22.03.2023, passed by the learned Munsiff No. 1, Goalpara, in T.S. No. 08/2012.

7. It appears that the petitioner has instituted the title suit, being Title Suit No. 08/2012, with the following prayers:-

- “(a) That, the suit be decreed directing the defendant to execute and registered the sale deed in question in favour of the Plaintiff in respect of the property in the Schedule below.
- (b) For a decree of recovery of possession of the scheduled property after executing and registering the Sale Deed.
- (c) That the Defendant may be directed to execute and registered the Sale Deed within a time specified by the Hon'ble Court, failing which the said Deed be executed and registered according to the provisions of Order XXI Rule 34(5) and 6 (a) of the C.P.C.
- (d) That, the Defendant be directed to execute and registered the Sale Deed by obtaining Sale permission from the authority concerned.
- (e) That, alternatively the Defendant may be directed to refund the money of Rs. 80,000/- (Rupees Eighty Thousand) to the Plaintiff along with an interest of Rs. 12% per annum.
- (f) For any other relief (s) as per Law and equity.
- (g) For the cost of the Suit.”

8. It also appears from the judgment passed by the learned trial court, which is annexed with the petition as Annexure – 2, had granted following reliefs :-

“35. The suit is decreed on contest with the following relief :

- a) Declaration that plaintiff is entitled to specific performance of the agreement - Exhibit 1.
- b) Direction to legal heir of the deceased defendant Khalilur Rahman be directed to execute the sale deed within a period of sixty days after obtaining sale

permission from concerned authority.

c) In the event of legal heir of deceased defendant Khalilur Rahman failing to execute the registered sale deed within sixty days, the Registered sale deed be executed and registered according to the provisions of Order XXI Rule 34(5) and 6(a) of Code of Civil Procedure.

d) Costs of the suit.

36. Prepare decree accordingly within fifteen days.

37. Given under my hand and seal of the court on this 31st day of March, 2015.”

And on the basis of the aforementioned judgment and order, a decree which is annexed with the petitioner, as Annexure - 3, was prepared.

9. It also appears that the learned trial court has rejected the petition on the ground that neither Section 152 of the C.P.C. nor Section 28 of the Specific Relief Act is applicable here in this case.

10. It is to be noted here that Section 152 of the C.P.C. read as under:-

"152. Amendment of judgments, decrees or orders- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

11. As pointed out earlier, the petitioner, in his petition, clearly stated for decree for recovery of possession of the schedule property after executing and registering the sale deed and the learned trial court has also framed two issues, being issue No. 5 & 6, that whether the plaintiff is entitled to any relief and what reliefs the plaintiff are entitled. But, while passing the order, the learned trial court

has not passed any order in respect of recovery of possession of the land.

12. But, given the nature of omission in the judgment here in this case, as contemplated in Section 152 of the C.P.C., may not be corrected by the court either of its own motion or on the application of any of the parties. What is contemplated in the section is clerical or arithmetical mistakes or errors arising therein from any accidental slip or omission.

13. Since in spite of specific pleading of the petitioner and in spite of framing two issues, the learned trial court had omitted to pass any decree for recovery of possession of schedule property and unless such a decree is passed the entire relief being granted to the petitioner would be rendered ineffective. However, the position in the cases under Specific Relief Act is quite different. Sub-Section 3 of Section 28 of the Specific Relief Act provides that:-

“(3) If the purchaser or lessee paid the purchase money or the 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 and
- (b) The delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.”

14. It is also to be noted here that Sub-Section 4 of Section 28 of the Specific Relief Act reads as under:-

“(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.”

15. While dealing with similar issue in the case of **Binoy Saha** (supra) a co-ordinate bench of this court has held as under:-

9. It is not the case of the appellant/judgment debtor that the respondent/decreed holder failed to deposit the sale consideration in the court within the time frame stipulated therein the judgment and decree. Under such circumstances, the submission of the learned counsel cannot be accepted inasmuch as for the purpose of Section 28 under the Specific Relief Act, 1963, the trial Court never ceases the control over the decree. In Ramankutty Guptan, Appellant Vs. Avara Respondent reported in AIR 1994 SC 1699 the Hon'ble Apex Court with Page No.5 RSA 46 of 2017 respect to the control over the decree of the trial court within the ambit and scope of Section 28 of the Specific Relief Act, 1963 held as follows:-

7. The question then emerges is whether it should be on the original side or execution side. Section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The court retains control over the decree even after the decree has been passed. It was open to the court to exercise the power under [Section 28\(1\)](#) of the Act either for extension of time or for rescinding the contract as claimed for. Since the execution application has been filed in the same court in which the original suit was filed, namely, the court of first instance, instead of treating the application on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law.

In this view, we feel that the judgment of the Bombay High Court laid down the law correctly and that of the Andhra Pradesh High Court is not correct. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law.

10. Accordingly, keeping in view the ratio laid down by the apex court the submission of the learned counsel cannot be considered inasmuch as the direction for delivery of possession was passed by the Revisional Court which is a formal judicial order to that effect of delivery of possession by the appellant/judgment debtor to the respondent/decreed holder. Even if there is no such direction, under such circumstances also, if the condition stipulated under Section 28(1) so far deposit of the sale consideration is concerned and that too within the stipulated time framed by the trial court or any other court in appeal then a duty is cast upon the trial court to grant the necessary relief for successful end to the decree of specific performance of contract and to that extent the trial court has the authority to pass necessary reliefs accordingly.”

16. Again in the case of *Manickam @ Thandapani & Ors* (supra) Hon'ble Supreme Court has held that

“30. The defendant in terms of the agreement is bound to handover possession of the land agreed to be sold. The expression “at any stage of proceeding” is wide enough to allow the plaintiffs to seek relief of possession even at the appellate stage or in execution even if such prayer was required to be claimed. This Court in *Babu Lal* has explained the circumstances where relief of possession may be necessary such as in a suit for partition or in a case of separate possession where the property conveyed is a joint

property. In the suit for specific performance, the possession is inherent in such suit, therefore, we find that the decree-holders are in fact entitled to possession in pursuance of the sale deed executed in their favor.”

17. Thus, from the illuminating discourse it may be concluded that even though the relief for possession had not been granted in the Decree, but it is inherent in the Decree for Specific Performance of the Agreement to Sell. The decree holder is, therefore, entitled to the relief of possession, as the condition under Section 28(1) of the Specific Relief Act is satisfied here in this case.

18. Thus, having tested the impugned order, on the touchstone of the principles discussed herein above, this Court is of the considered view that the same failed to withstand the test of legal scrutiny, and therefore, this court is unable to agree with the finding, so recorded by the learned trial court.

19. In the result, this petition is allowed. The impugned order, dated 22.03.2023, stands set aside and quashed. The matter is remanded back to the learned executing court for passing necessary order, and thereafter, to hand over the possession of the land in question to the petitioner. The aforesaid exercise has to be carried out within a period of 4 (four) weeks, from the date of receipt of a certified copy of this order.

20. In terms of above this CRP stands disposed of. The parties have to bear their own cost.

JUDGE

Comparing Assistant