

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No.4602 of 2015

ORDER:

This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908, by the unsuccessful 2nd defendant/5th judgment debtor, is directed against the docket order, dated 15.10.2015, of the learned I Senior Civil Judge, City Civil Court, Hyderabad, passed in E.P.No.35 of 1999.

2. I have heard the submissions of Sri Krishna Devan, learned counsel for the petitioner/5th judgment debtor ('5th JDr', for brevity) and of Sri K.V.Subrahmanya Narusu, learned counsel for the respondent/decreed-holder ('DHR', for brevity). I have perused the material record.

3. The facts, which are necessary to be stated as a preface to this order, in brief, are as follows:

'The DHR/plaintiff brought the suit against the late first defendant and the 2nd defendant/petitioner herein (5th JDr) for specific performance and delivery of possession of the suit schedule property. The 2nd defendant (5th JDr) filed written statement resisting the suit. After full-fledged trial and on merits, the suit was decreed against the 1st defendant and was dismissed against the 2nd defendant/5th JDr, as no relief was claimed against her. The decree and judgment of the trial Court have become final. Therefore, the DHR filed the subject Execution Petition in E.P.No.35 of 1999 for execution of the sale deed by the legal representatives of the deceased 1st defendant. That Execution Petition

was resisted by the petitioner herein/5th JDr. The terms of the decree *inter alia* postulated that after the execution of the registered sale deed in favour of the plaintiff/DHr by the 1st defendant (since died), the plaintiff/DHr has to work out his remedies, if so advised and desires, for partition and separate possession of his share in the suit schedule property. Therefore, the contention of the 5th JDr is that after obtaining the sale deed, the DHr has to go for a suit for partition and cannot directly seek delivery of possession of the half share for which the suit is decreed. Therefore, in the counter-affidavit of the 5th JDr filed in the Execution Petition, the delivery of possession of the property to the DHr was objected to on the ground that the said relief is misconceived and unknown to law and that the DHr has to obtain delivery of possession of his undivided share only after obtaining a decree in a suit for partition that may be filed; but, the DHr cannot seek that relief of separate possession of his share in the Execution Petition in view of the terms of the decree. However, the Court of execution appointed an advocate commissioner for division of the property for separation of the undivided half share of the DHr from the entire property to facilitate delivery of the separated half share to the DHr in the Execution Proceedings. The commissioner so appointed by the Court of execution divided the property into two shares and filed his report with a sketch/plan. Thus, the commissioner's report and sketch/plan disclose division of the property into two parts encircled in red and green lines, described as 'A' and 'B' portions respectively. A review petition filed by the JDr in Execution Application No.328 of 2013 was dismissed by the Court of execution. After such division of property, the Court of execution

directed both the parties to appear before it for working out allotment of the divided halves of the property by means of picking of lots by the parties. On the date the matter is listed before the Court of execution for allotment of divided halves of the property by means of picking of lots, the petitioner herein/5th JDr was present at the time of call work, but, she did not later appear before the Court of execution on that day, though the matter is passed over for completing the exercise of allotment of shares basing on the commissioner's sketch/plan. Therefore, by the time the matter was called after lunch on that day by the Court of execution, the petitioner herein/5th JDr was absent before the Court of execution; and, therefore, the Court of execution proceeded with the matter and in the proceedings before the Court of execution on that day, when the lots were directed to be picked up, the DHr, who was present, picked up the slip containing share 'B' (plot 'B') (encircled in green colour in the commissioner's sketch/plan). Therefore, the said share 'B'/plot 'B' was allotted to the DHr and the remaining half share/plot 'A' (encircled in red colour in the commissioner's sketch/plan) was allotted to the petitioner herein/5th JDr and a direction was given to put the DHr in possession of plot 'B' (encircled in green colour in the commissioner's sketch/plan) by directing issuance of warrant to the Field Assistant of the Court for delivery of the said plot 'B' (encircled in green colour in the commissioner's sketch/plan) to the DHr and the Execution Petition was posted to 18.11.2015, obviously for recording delivery. At that stage, aggrieved of the docket order of the Court below, dated 15.10.2015, the present revision is filed by the 2nd defendant/5th JDr.

4. In this setting of facts, the case of the petitioner herein/5th JDr, in brief, is as follows:

'The DHr asked for execution of sale deed and delivery of possession as per the terms of the Decree, but did not specifically ask for division of property and allotment of separated half share as per the terms of the decree. E.A.No.167 of 2008 filed by the DHr seeking appointment of an advocate-commissioner to divide the property into two shares is not maintainable. Such application, under the said provision of law, is impermissible. Said permission goes contrary to the letter and spirit of the terms of the decree. The DHr cannot seek appointment of a commissioner for partition of his half share and delivery of possession, as the only remedy available to the DHr is to file a suit for partition in view of the terms of the decree. The report of the commissioner was accepted by the Court of execution ignoring the objections filed by the 5th JDr. The Court below failed to apply its mind to the facts of the case. The Court below grossly erred in resorting to allotment of separated share by means of picking of lots, i.e., lottery system, which is not provided in any law. When the case was called, on 15.10.2015, in the morning, during the call work, admittedly the 5th JDr and her counsel were present in the Court. The Court below erred in ordering *ex parte* allotment of shares. The 5th JDr remained in the Court premises upto 03:00 PM on that day; however, being an aged lady observing fast on that day in connection with the Navaratri festival, she left the Court for her home. Her advocate was engaged in some other court when the matter was called in the after lunch session. Therefore, her absence by the time the matter was called on the same day in the evening hours is

not wilful. The DHr expressed his willingness to take 'A' portion, which the Court ignored. The Court below ought to have seen that 'A' portion is an open land. The Court below erred in issuing the delivery warrant to the Field Assistant of the Court in a hasty manner. The delivery of possession of the separated 'B' portion/plot to the DHr is not permissible without demolition of the structure/rooms. Hence, the order of the Court below is unsustainable.'

5. *Per contra*, the learned counsel first respondent/DHr, while supporting the orders of the Court below, would contend as follows:

'The suit is filed not only for specific performance, but also for delivery of possession of the property. The Court below decreed the suit against the 1st defendant (since died) and directed execution of the sale deed for undivided half share and gave liberty to the decree holder to work out his remedies for partition and separate possession of the half share in the suit schedule property. In the Execution Petition, after execution of the sale deed for the undivided half share, the defendants filed E.A.No.167 of 2008 for appointment of a commissioner for division of the property into two equal shares for eventual allotment/delivery of possession of one such separated share to the decree-holder. The said application was allowed; commissioner was appointed; commissioner executed the warrant and filed a report along with a sketch/plan, after dividing the property into two halves. The review petition filed by the judgment debtors was dismissed. The said order has become final. The objections of the judgment debtors, if any, were overruled. The matter was posted for allotment of one of the two shares to the decree-holder and the other share to the petitioner herein/5th judgment debtor. On the

date fixed for such allotment of shares, the petitioner herein/5th judgment debtor was present in the Court at the time of call work and the matter was passed over for completing the exercise of allotment of shares. But after lunch when the matter was called, the judgment debtor failed to be present in the Court and her counsel was also absent. Therefore, the Court below completed the exercise of allotment of shares by means of picking of lots. The decree-holder picked up the slip containing 'B' portion and therefore, 'B' portion (encircled in green colour in the commissioner's sketch/plan) was allotted to the decree-holder. Since the allotment of shares was completed and as the possession is to be delivered as per the terms of the decree, the Court below rightly directed for delivery of property and issuance of delivery warrant to the Field Assistant of the Court for delivery of the allotted share to the decree-holder. At this stage, the petitioner herein/5th judgment debtor cannot challenge the order passed in the application for appointment of commissioner and the commissioner's report, as the review petition was dismissed and the order appointing the commissioner has become final and eventually the share of the property to which the decree-holder is entitled to is allotted to the decree-holder and the matter is now at the stage of delivery of the share of the decree-holder. The terms of the decree did not specifically direct the decree-holder to go for a suit for partition, but only direct to work out the remedies and the remedies were worked out in accordance with the procedure established by law. Therefore, there is no merit in the revision and it is too late in the day for the petitioner herein/5th judgment debtor to question the appointment of commissioner and the validity of the commissioner's report. The

Executing Court cannot, at the time of delivery of property, retrace its steps and review its earlier orders, which are unchallenged and which have become final. Hence, the revision may be dismissed.'

6. I have bestowed my attention to the facts and submissions.

7. The chronology of events is already stated supra. It is apposite to note that the plaintiff brought the suit against defendants 1 and 2 for specific performance in respect of the suit schedule property and delivery of possession. As no relief is claimed against the 2nd defendant/5th JDr, while dismissing the suit against the said 2nd defendant/5th JDr, the Court below decreed the suit against the 1st defendant (since died) and granted decree for half share in the suit schedule property in favour of the DHr.

The relevant terms of the decree read as under:-

1. That the defendants shall receive the balance of Rs.20,000/- from the plaintiff and execute the sale deed as regards the undivided interest in the suit schedule property, viz., half share in respect of house bearing No.15-9-294, 294/1, 294/2 situated at Gol Bungalow, Afzal Gunj, Hyderabad.
2. That the first defendant is granted one month's time to execute and register the sale deed in favour of the plaintiff on his failure to do so, the plaintiff shall get the sale deed executed by the Court on behalf of the first defendant.
3. That the plaintiff shall deposit the balance of sale consideration of Rs.20,000/- in to Court within 30 days from this day.
4. That the plaintiff shall bear the expenses of stamps and registration charges of the sale deed to be executed either by the first defendant directly or by the Court on behalf of the first defendant in favour of the plaintiff.
5. That after execution and registration of the sale deed in favour of the plaintiff by the first defendant, the plaintiff has to work out his remedies if so advised and desires for partition and separate possession of his share in the suit schedule properties.
6. that the suit as against the defendant No.2 be and the same is hereby dismissed but without costs.
7. That the plaintiff and the first defendant shall bear their respective costs of the suit.

8. Admittedly, the said decree has become final. The DHr filed the Execution Petition for execution of the sale deed in respect of his

undivided half share and delivery of possession of the same. The sale deed was duly executed for the said share. Since half share has to be separated and delivered, the decree-holder filed E.A.No.167 of 2008 for appointment of a Commissioner for division of the suit schedule properties into two halves. That petition was resisted by the 5th JDr. But over ruling the contentions of the 5th JDr that execution application was allowed. Accordingly, an advocate commissioner was appointed. He executed the warrant and divided the suit schedule properties and filed a sketch/plan showing the two halves or plots as portion 'A' and portion 'B', encircled in red and green colours respectively. An application in E.A. No.328 of 2013 filed by the 5th JDr seeking review of the said orders was dismissed by the Court below and the said order of the Court of Execution appointing an advocate commissioner has thus become final. After the Commissioner executed the Warrant and filed his report and after the objections of the 5th JDr are over ruled and when the Execution Petition is listed for allotment of shares, the petitioner herein/5th JDr, having initially appeared before the Court of Execution at the time of call work, failed to appear during after lunch session on that day; and, therefore, the Court below proceeded with the allotment of shares by means of casting and picking of lots. Since the DHr picked the slip containing 'B' share ('B' portion/plot) (encircled in green colour in the commissioner's sketch/plan) the said share was allotted to the DHr and the remaining 'A' share/'A' portion/plot (encircled in red colour in the commissioner's sketch/plan) was allotted to the petitioner herein/5th JDr.

9. The first grievance of the petitioner herein/5th JDr is that such allotment of shares to the parties to the execution proceedings by casting

of lots is unknown to law. It is not disputed before this Court that the Court of execution adjourned the matter to a fixed date for allotment of shares and on that the appearance of the parties with their advocates during the call work, the matter was passed over for completing the exercise of casting of lots and allotment of shares; further, the 5th JDr, who appeared before the executing Court during the call work, failed to appear at the time the matter was called after lunch and her counsel also failed to appear before the trial Court to facilitate completion of the exercise of the allotment of shares by casting of lots. In a case of this nature, if the parties do agree for allotment of shares without the necessity of casting of lots, the Court of execution would generally allot the shares as per the understanding or amicable settlement or agreement arrived at between the parties. However, though the 5th JDr contends that the plaintiff-DHr originally opted for 'A' part/plot, the 5th JDr did not agree for allotment of shares accordingly and preferred to contest the matter and later failed to appear before the Court on the day fixed for casting of lots and allotment of shares. In the circumstances, the court of execution was left with no option but to allot the shares by the method of casting of lots. The practice of allotment of shares to the parties during the execution proceedings is only by way of casting and picking of lots by the parties, if the parties fail to arrive at an amicable/cordial method for allotment and taking of shares. The said procedure, which is a recognised practice, was followed in the present case. If the petitioner/5th JDr has got any objection in regard to the said procedure, she ought to have been present before the Court below when the matter was taken up by the Court for completing the exercise of allotment of

shares by way of casting and picking of lots by the parties and ought to have suggested any better alternate method if any for allotment of shares. She failed to do so. Having deliberately absented herself, the petitioner herein/5th JDr cannot be permitted to find fault with the recognised practice and procedure viz., casting of lots adopted and followed by the Court below. In the considered view of this Court, casting of lots for purpose of allotment of shares is the most equitable way of allotment of shares to the sharers after dividing the property with reference to the entitlement of the sharers. That has been done in this case and this Court therefore does not find any justification for holding that the said procedure is unwarranted or illegal. Accordingly, the first contention that the allotment of shares by casting of lots is unknown to law and is unwarranted stands rejected accordingly.

10. The next contention is that the commissioner ought not to have been appointed in the execution proceedings and the executing Court ought to have directed the DHr to go for a suit for partition. It is also contended on behalf of the 5th JDr that only delivery of possession along with the relief of specific performance relief was sought in the suit and that relief of partition was not sought and that while granting a decree for specific performance for half share against the 1st defendant, the Court below directed the DHr by one of the terms of the decree to work out remedies for partition and separate possession of his share in the suit schedule property and that, therefore, after obtaining the sale deed for the undivided half share, the DHr cannot seek delivery of possession of his half undivided share without filing a suit for partition, as postulated in the terms of the decree. It is specifically and forcefully contended that in

the present suit, the relief of partition was not sought for and no such relief of partition was granted in the decree; and, therefore, the only remedy open to the DHr is to file a suit for partition, but, the DHr cannot seek appointment of commissioner in the Execution Petition for division of the property into two shares and allotment of one such separated share by circumventing the correct procedure, which required filing of a suit for partition by the DHr.

10.1 In support of the said contentions, the learned counsel for the 5th JDr placed reliance on the decision in P.C.Varghese Vs. Devaki Amma Balambika Devi and others¹. In the cited case, the facts disclose that a suit was brought for specific performance of an agreement of sale in respect of a total extent of Acs.0.19 cents. Alternatively, specific performance was sought in respect of shares of defendants 1 to 3 and recovery of possession of the said property from the said defendants. The trial Court granted a preliminary decree for partition with various permissions. The Supreme Court noted that the decree attained finality and that no decree for specific performance was passed against respondents 4 and 5, but they are otherwise bound by the decree passed by the learned Trial Judge and that therefore they are also proper and necessary parties and dismissed the appeal. The learned counsel for the 5th JDr, placing reliance on the above decision would further contend that ordinarily, after a sale deed is first obtained for an undivided share in terms of the decree for specific performance of contract, the proceedings for grant of preliminary and final decree for partition should be initiated and not vice-versa. In the case on hand, sale deed was executed and

¹ AIR 2006 Supreme Court 145

duly registered for the undivided half share, and thereafter, in the execution proceedings itself, the relief of division of properties into two shares and allotment of one such separated share was sought as per the registered sale deed that was executed as per the decree for specific performance. Therefore, the above cited decision is not helpful to 5th JDr. As rightly pointed out by the learned counsel for the DHr, in the suit itself, the relief of possession was already sought along with the relief of specific performance and the said relief was granted. The decision cited is more helpful to the DHr.

10.2 The learned counsel for the 5th JDr also placed reliance on the decision of the Supreme Court in Babu Lal Vs. M/ s.Hazari Lal Kishori Lal and others². The facts of the cited case are as under: A suit for specific performance was filed and resisted. The trial Court dismissed the suit. But the appeal was allowed by the Additional District Court. The High Court confirmed the judgment of the Additional District Court in the Second Appeal and directed the petitioner and respondents 6 to 9 to execute the sale deed in favour of the respondents 1 to 5 to bring it in line with the decision of the Supreme Court in LALA DURGA PRASAD VS. LALA DEEP CHAND { AIR 1954 SC 75), wherein, it was held as follows:

Since the petitioner, however, did not handover possession and remove construction raised by him despite his undertaking dated 25th of March, 1968, The decree holders, therefore, applied for execution of thee decree. The judgment-debtor-petitioner filed an objection under section 47 of the Code of Civil Procedure taking all possible pleas to defeat the execution. His objections were three-fold: (1) The decree was inexecutable as the decree-holders did not claim a relief for possession in the suit itself and consequently there was no decree for possession. The application for execution by delivery of possession was liable to be dismissed on this score alone in view of section 22(2) of the

² AIR 1982 Supreme Court 818

Specific Relief Act. (2) The Urban Land Ceiling Act having come into force it was incumbent on the decree-holders to obtain the permission as required under sections 26 and 27 of that Act and in the absence of any such permission the application for execution was not maintainable (3) The vendors were not impleaded as parties originally and they were impleaded as parties only after the court had directed the vendors to execute the sale deed in Second Appeal. As the vendors were not parties in the execution application it was not maintainable and it was not open to the execution court to implead a person who was not originally impleaded in the application. The execution court allowed the objection of the judgment-debtor in part inasmuch as it directed the execution of the sale deed in pursuance of the decree. It, however, refused to grant the relief of possession with the observation that the remedy of the decree-holders for possession was by means of a separate suit and not the execution proceedings. The other objections of the petitioners before the Supreme Court were overruled.”

In this cited case, the amendment of the plaint was sought and relief of possession, as enunciated in Section 22 of the Specific Relief Act, 1963, was also sought. The Supreme Court held that execution Court has every jurisdiction to allow the amendment and that mere omission of the High Court to allow an amendment in the plaint is not so fatal as to deprive the decree-holders of the benefits of the decree when section 55 of the Transfer of property Act authorises the transferee to get possession in pursuance of a sale deed. Finally, the Supreme Court held as follows:

“Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objections. In the circumstances narrated above, we do not find any fault with the order passed by the High Court.”

10.3 In A.Pramila and another Vs. G.V.Rathaiah³, the facts of the case are as under: ‘The respondent-decree-holder, though had claimed Specific performance of the agreement of sale coupled with the relief of possession, but curiously, the trial Court merely granted the relief for

³ 1998 (5) ALD 689

execution of the sale deed in favour of the respondent and the same was confirmed in appeal and L.P.A., in the High Court. The Special Leave Petition filed by the petitioners against the said judgment was dismissed. After the said dismissal of the Special Leave Petition, the respondents filed the execution petition; and on the petitioner refusing to execute the sale deed, the sale deed was executed by the Court. After the execution of the sale deed, the respondent filed an application for possession of the property and the same was ordered and the respondent was put in possession of the suit property on 17.19.1993. In this setting of facts, it was contended that the Court below acted illegally as the said decree has become final and as no amendment of the decree was sought and as such, possession could not have been delivered. Dealing with the said contention, this Court held as follows:-

Though at the first flush it appears that the above submission has substance, but on a close scrutiny it pales into insignificance, for the Apex Court in Babu Lal v. M/s Hazari Lal Kishori Lal (supra) in paragraph 27 has approved the judgment of the Apex Court in Hungerford Investment Trust Ltd. v. Haridas Mundhra, AIR 1972 SC 1826, dealing with Section 28(1) of the Specific Relief Act, 1963 where their Lordships have held as under:

"The Specific Relief Act, 1963, is not an exhaustive enactment and under the law relating to specific relief a Court which passes a decree for specific performance retains control over the decree even after the decree had been passed. Therefore the Court, in the present case, retained control over the matter despite the decree."

Following the law laid down by the Apex Court as above that the Specific Relief Act, 1963 is not an exhaustive enactment and under the law relates to the specific relief a Court which passes a decree for specific performance retains control over the decree even after the decree has been passed. Therefore, the Court, in the present case, retained control over the matter despite the decree and it was open to the Court to grant the relief of possession also to the petitioners and this view has been followed in Babu Lal v. M/s Hazari Lal Kishori Lal (supra) wherein it is also held in paragraph 29 that procedure is meant to advance the cause of justice and not to retard it.

11. The ratios laid down in the above cited decisions squarely apply to the facts of the instant case. In the case on hand, no amendment of the decree or the original proceedings is necessary as the relief of possession was already sought for and was granted by giving liberty to the DHr to work out the remedies for partition and separate possession of the DHr's share in the suit schedule property. It is not ordained in the decree that a suit for partition shall be filed by the DHr. It is only postulated that after execution and registration of the sale deed in favour of the plaintiff by the first defendant, the plaintiff has to work out his remedies, if so advised and desires, for partition and separate possession of his share in the suit schedule properties. The remedies were worked out in the execution proceedings itself that too by following the procedure established by law. At every stage of execution, the 5th JDr was provided with opportunities to contest the proceedings; and, orders were passed by the Court of Execution at every stage, on merits. Such orders passed by the Court of Execution from time to time and till the stage of fixing a day for casting and picking of lots before it for allotment of shares to the parties, have become final and binding on the parties. Therefore, the contentions of the 5th JDr are misconceived and devoid of merit, more particularly, in view of the terms of the decree, the orders passed by the executing Court from time to time and the legal position obtaining. The DHr is entitled to possession of the half share as per the terms of the Decree is admitted and is not in dispute. If that is so, what prejudice has been caused to the 5th JDr in the DHr obtaining possession of the half share in the execution proceedings could not be explained.

11.1 Before parting, it is to be noted that at the belated stage after the shares were allotted by means of lots, the petitioner herein/5th JDr is not entitled to question the order of appointment of commissioner and the commissioner's report, which was filed pursuant to the orders of Court of execution and which has become final on the dismissal of the application for review filed by the petitioner/5th JDr. It is too late in the day to contend that issuance of warrant for delivery of the allotted share to the DHr is not correct under facts and in law. Further, on examination of the merits of the matter and on over all consideration of the facts and the legal position obtaining, this Court finds that there is no illegality or impropriety or irregularity in the matter calling for interference with impugned orders of the Court of Execution. It is apt to emphasise and follow the precedential guidance wherein the Supreme Court succinctly stated that procedure is meant to advance the cause of justice and not to retard it and that the difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him and that the judgment-debtor tries to thwart the execution by all possible objections. In the circumstances of the case narrated above, I do not find any fault with the order passed by the Court of execution.

12. On the above analysis, this Court finds that none of the contentions raised by the petitioner herein/5th JDr need countenance and that the contentions of the petitioner herein/5th JDr are obviously intended to thwart the execution proceedings by making a desperate last-ditch attempt to ward off the delivery proceedings by some means or the other. Since the allotted share is not yet delivered, and as the lots were cast in the absence of the 5th JDr though on account of her fault, this

Court is of the considered view that having regard to the facts and circumstances the submissions made by the learned counsel for the DHr liberty may be given to the 5th JDr to approach the Court below and make a request for recasting of lots by filing an appropriate application within two (02) weeks from the date of receipt of a copy of this order.

13. Resultantly, the Civil Revision Petition is dismissed. However, liberty is reserved to the 5th JDr to make a request to the Court below for recasting of the lots by filing an appropriate application within two (02) weeks from the date of receipt of a copy of this order. It is made clear that any such application filed by the 5th JDr shall be considered and disposed of on its merit after giving an opportunity to the DHr. It is needless to state that on the failure of the 5th JDr to file any such application within the prescribed time, the Court below shall forthwith proceed with further proceedings in accordance with the procedure established by law for delivery of the already allotted share to the DHr.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this Civil Revision Petition, shall stand closed.

M. Seetharama Murti, J

20th March, 2017
Bvv