

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

**C.O. No. 1547 of 2022
Shri Satadal Ghosh
Vs.
Sri Sasanka Sekhar Dutta**

For the Petitioner : Mr. Saptangshu Basu,
Mr. Susondip Pathak,
Ms. Mrinalini Majumdar.

For the Opposite Party : Mr. Debjit Mukherjee,
Ms. Aditi Kumar,
Mr. Supratim Barik,
Mr. A. Mukhopadhyay.

Heard On : 29.08.2022, 29.07.2022.

Judgment : 30.09.2022.

Subhasis Dasgupta, J:-

The order impugned, dated 7th May, 2022, passed in Misc. Case No. 52 of 2022, arising out of Title Execution Case No. 1 of 2017 by learned Civil Judge (Senior Division), 10th Court at Alipore, declining to grant mandatory injunction at an interlocutory stage for the purpose of restoring back the possession of subject property, under reference, to petitioner, thereby simultaneously granting order, restraining alienation of the subject property and/or encumbering the said property (decretal

property) till the disposal of the Misc. Case, is under challenge in this case.

Adverting to order dated 04.04.2022, disclosed in the order impugned, Mr. Saptangshu Basu, learned senior advocate appearing for the petitioner submitted that when the court below itself was satisfied to observe that the Execution Case had been disposed of at the behest of opposite party/decreed holder, who suppressed material facts to persuade the court below to obtain possession of the suit property illegally, there left no impediment before the court below to order for restoration of possession to petitioner.

Mr. Basu further submitted that possession of the suit property should have been put back to the petitioner even in an interlocutory stage, because possession had been obtained practicing fraud upon the court below.

Reliance was placed by Mr. Basu on a decision reported in **(2003) 3 SCC 319**, delivered in the case of **Ram Chandra Singh Vs. Savitri Devi & Ors.** to contend that a fraud and collusion would vitiate, the entire proceeding relatable to the delivery of possession, upon executing an *ex parte* decree, obtained in connection with a suit for specific performance of contract.

Mr. Basu further contended that while executing decree for specific performance of a contract, all the steps/stages disclosed in Order 21 Rule 34 of Code of Civil Procedure, in particular Rule 1 to Rule 4 had to be necessarily complied with, and there could not be any departure allowed

to take place, while delivering possession of decretal property to decree holder.

Mr. Basu referring to the text of the *ex parte* decree submitted that there were two parts in the decree, which could be reproduced hereinbelow:

“The defendant is directed to execute the sale deed in favour of the plaintiff in respect of the suit flat within two months from the date of passing of this order and on depositing remaining consideration amount.

The defendant is further directed to deliver khas possession of the suit premises immediately after execution of sale deed in favour of the plaintiff, in default the plaintiff is at liberty to execute the decree in accordance with law.”

According to Mr. Basu failure to comply the first part of the decree being subject to the deposition of remaining consideration amount, in a suit for specific performance of contract, the second part of the decree, being a product of default clause, would not automatically come into operation, so as to execute the *ex parte* decree for giving delivery of possession of decretal property to the opposite party/decreed holder.

While making elaboration of such issue, Mr. Basu contended that there left nothing in the record that judgment debtor committed failure to ensure due compliance of first part of the decree so as to pave the way for the later part of the decree, being default clause, to execute the decree upon delivering the possession of the decretal property to the decreed holder, as the decree had been executed against a dead man, being

judgment debtor, without bringing on record, the legal representatives, assignees or anybody else having interest in the decretal property.

Reliance was placed on such issue by Mr. Basu on a decision, reported in **2022 SCC OnLine SC 270** delivered in the case of **Rajbir Vs. Suraj Bhan & Anr.** to contend that the executing court below would be diligent enough in the matter of execution of decree, that formalities contemplated in regard to registration of a deed had already been complied with, giving more and more emphasis to the sub-rule (1) to rule (4) of Order 21 Rule 34 C.P.C.

While elaborating such issue Mr. Basu submitted that the provision of Sub-Rule (1) to sub-rule (4), as envisaged under Order 21 Rule 34 C.P.C. could not be allowed to be diluted making any departure, because there would be deleterious consequences to follow, not merely *qua* the parties in question, but also persons, who come to deal with those parties in future.

It is thus submitted by Mr. Basu that provisions of sub-rule (1) to rule (4), while executing a decree for specific performance of contract have to be necessarily followed, otherwise parting with possession of decretal property to the decree holder would be against the sanction of law.

Mr. Basu also contended that when *ex parte* decree obtained in a suit for specific performance, had been executed upon delivering possession of decretal property to opposite party/decreed holder, making departure of the provisions available under Order 21 Rule 34 C.P.C., which the court itself was cognizant about the perpetration of fraud being

committed, while obtaining possession of decretal property, sufficiently got mentioned in the order impugned, the court below was under bounden duty to correct its own mistake, because no question of any acquiescence, waiver, estoppel against a party would arise, where error was committed by the court itself.

On this issue, reliance was placed by Mr. Basu, on a decision reported in **(1993) 2 SCC 470** delivered in the case of ***Devidayal Rolling Mills Vs. Prakash Chimanlal Parikh & Ors.*** to contend that the court below could have corrected its own mistake upon restoring the possession back to the petitioners without waiting for the decision to come in the Misc. Case.

Mr. Basu also submitted referring a decision reported in ***AIR 1985 Calcutta 248*** delivered in the case of ***Indian Cable Company Limited Vs. Smt. Sumitra Chakraborty*** that restoration of possession even in an interlocutory stage could be granted in aid of mandatory injunction in a case, when a person had been unlawfully dispossessed, and which the court below had already taken notice thereof.

Mr. Basu strenuously argued that when there had been nothing to reveal about deposition of balance consideration money in connection with an *ex parte* decree granted in a suit for specific performance of contract, in compliance of the first part of the decree, the right of the decree holder would only mature, when there had been valid deposition of balance amount, otherwise the *ex parte* decree could not have been executed. Thus

parting with possession of the decretal property to decree holder would be against the spirit of law.

Reliance was placed on such issue, by Mr. Basu, on a decision reported in **(2000) 10 SCC 636** delivered in the case of **A. Abdul Rashid Khan (dead) & Ors. Vs. P.A.K.A. Shahul Hamid & Ors.**

Incidental to addressing the core issues involved in this case, Mr. Basu, taking resort to a decision reported in **(2018) 18 SCC 165** delivered in the case of **Kohinoor Transporters Vs. State of Uttar Pradesh** submitted that the executing court below would have to execute the decree as it stands without adding anything to it.

While making elaboration of such issue, Mr. Basu submitted that when there had been nothing to disclose regarding compliance of the first part of the decree, as revealed in the *ex parte* decree granted in a suit for specific performance, straightway jumping to the second part of the decree to execute the decree for parting with the possession of decretal property would absolutely exceed the jurisdiction of the executing court below, for making contravention of Section 47 of C.P.C.

Upon advancing such submissions, Mr. Basu submitted that restoration of possession granting mandatory injunction could have been accorded by the court below even in an interlocutory stage, when there had been sufficient materials disclosing perpetration of fraud being committed so as to part with possession of subject property to opposite party/decreet holder, in violation of the conspicuous direction contained in the decree itself.

Mr. Debjit Mukherjee, learned advocate appearing for the opposite party, disputing with the submissions advanced by Mr. Basu, replied that the order impugned would not call for any interference in the instant case on the ground that the order granting *ex parte* decree in a suit for specific performance of contract, being Title Suit No. 16573 of 2012, had not been challenged. More so, the order granting delivery of possession in Execution Case No. 1 of 2017 also remained unchallenged before higher forum. The order dated 4th April, 2012, passed in Misc. Case No. 52 of 2022, however, could not be assailed in any higher forum.

Taking recourse to a decision reported in **(2016) 9 SCC 44** delivered in the case of **Anita International Vs. Tungabara Sugar Works Mazdoor Sangh & Ors.**, Mr. Mukherjee submitted that until an order passed by competent court was set aside, would be binding upon the parties, as the same would have the force of law.

The settled proposition of law, according to Mr. Mukherjee, would be that a party to the *lis* or a third party, who considers an order passed by court as void or *non est*, must approach a court of competent jurisdiction to have the said order set aside on such grounds, as available in law, and unless the said order is set aside, it would have the binding effect to the parties.

The instant Misc. Case No. 52 of 2022 being relatable to an application under Order 21 Rule 99 read with Sections 144 and 151 of C.P.C., and analogous provisions relating thereto, a mere claim of putting back in possession of subject property, under reference, on the strength of

a purchase, being a subsequent purchaser, in violation of the provision of Section 52 of Transfer of Property Act, would not automatically help the petitioner to enforce his claim of repossession, without making adjudication of his independent claim of right, title and interest in the subject property.

Reliance was placed by Mr. Mukherjee in this regard on a decision reported in **(2019) 17 SCC 279** delivered in the case of ***Shamsher Singh & Anr. Vs. Lieutenant Colonel Nahar Singh (dead) Through Legal Representatives & Ors.*** to contend that for putting back in the possession on an application under Rules 100 and 101 of Order 21 C.P.C., an applicant has not only to prove that he is in *bona fide* possession, rather he has to prove his right, title or interest in the property.

Therefore, according to Mr. Mukherjee, whether the decree had been executed against a dead person without making impleadment of the parties having interest to the decretal property, and that too upon practicing alleged fraud by not adhering to the sub-rule (1) to sub-rule (4) of Order 21 Rule 34 C.P.C., as emphasized by Mr. Basu, would not matter much in a claim for putting back in possession, which is always subject to the determination and/or adjudication of right, title and interest of the petitioner, even in a case based on claim for restoration of possession.

Adverting to observation of the court below, made in the order impugned, vide Para-8, Mr. Mukherjee submitted that the court below simply declined to put back in possession of the subject property to the petitioner in the concerned Misc. Case at an interlocutory stage, pending

determination of all questions relating to right, title and interest in the decretal property, which according to court below, in the event of mandatory injunction being granted, simply to restore the possession of the suit property to petitioner, would be to prejudice the pending Misc. Case, but granted, however, injunction restraining alienation of the subject property and/or encumbering the same in any manner whatsoever till the disposal of the Misc. Case.

Reliance was placed by Mr. Mukherjee on a decision reported in **(2004) SCC 478** delivered in the case of ***Metro Marins & Anr. Vs. Bonus Watch Co. (P) Ltd. & Ors.*** to contend that the case presented before the court below, being not alike to one of the exceptions carved out in the case of ***Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors.*** reported in **(1990) 2 SCC 117**, order granting mandatory injunction to put back in the possession of the decretal property to petitioner, what is presently in the possession of the opposite parties/decreed holders, had been rightly refused by the court below.

In context with the submissions advanced by the both the parties to this case, this Court is only to address the issue, whether mandatory injunction can be granted at an interlocutory stage to put back the petitioner in possession of subject property involved in Misc. Case No. 52 of 2022, under Order 21 Rule 99 read with Sections 144 and 151 of C.P.C. and analogous provisions connected thereto, containing a prayer for granting a decree for recovery of khas possession of the suit property, by evicting the opposite party from the subject property, under reference.

Admittedly, the opposite party got an *ex parte* decree in a suit for specific performance of a contract, vide T.S. No. 16573 of 2012, against one, Dr. Sanat Kumar Banerjee. That suit for specific performance of contract was instituted in the year 2012.

Ex parte decree in the suit for specific performance of contract was granted on 4th December, 2013. During the pendency of suit for specific performance of contract the defendant, Dr. Sanat Kumar Banerjee transferred the subject property in favour of his wife by registered deed of gift. In turn, after the *ex parte* was granted, the wife of defendant/Dr. Sanat Kumar Banerjee transferred the same suit property, vide registered deed of conveyance in favour of the petitioner, seeking restoration of possession of the subject property by way of granting mandatory injunction.

The main thrust of this revisional application is against non-adherence to the provisions available under Order 21 Rule 34 C.P.C. to execute the decree, while parting with possession of decretal property.

Failure of the first part, as contained in the decree itself *ex facie*, would pave the way to seek for execution of the decree subject to deposition of balance consideration amount, in a suit for specific performance of a contract.

The first and foremost contention of the petitioner is that the opposite party got the decree executed making suppression of facts against a dead man (Jdr.), without impleading the legal heirs of the Jdr. or assignee, or anybody else having interest in the subject property.

The court below by the order impugned observed that it was conscious about the alleged suppression of material facts to get the decree executed, but in spite of being consciously posted with such alleged perpetration of fraud practiced in the execution proceeding, declined to pass any mandatory injunction to put back in possession, without making effective adjudication of right, title and interest of petitioner, if there be any, in connection with the subject property; as the petitioner had purchased the property, consequent upon alienation of subject property during the pendency of suit for specific performance of contract, making violation of the provision available under Section 52 of Transfer of Property Act.

However, the court below protected the interest of petitioner, if there be any, with respect to the subject property, under reference, granting an order restraining alienation of the subject property and/or encumbering the same in any manner whatsoever, till the decision of the Misc. Case.

Therefore, this is not a simpliciter case of unlawful dispossession of a property by deceitful means, for which the petitioner has sought for restoration of possession. The claim of restoration of possession in the given facts and circumstances of this case is subject to the determination of independent right, title and interest of petitioner, if there be any, in the subject property, as per provisions mentioned in Order 21 Rules 100 and 101 C.P.C.

Thus by simply proving the fact that petitioner was in possession, prior to being unlawfully dispossessed by decree holder/opposite party,

petitioner may not to be allowed to be put back in possession of the subject property, pending adjudication of right, title and interest, to be reached in the concerned Misc. Case, as invited by the petitioner himself with a prayer for recovery of possession.

The allegation of alleged fraud, would not automatically entitle the petitioner to seek for restoration of possession, pending adjudication of his right, title and interest, if there be any, connecting the subject property under reference.

The settled proposition of law is that in an appropriate case being made out or established, there may be mandatory injunction granted to recover possession in a case of unlawful dispossession, but in the instant case, proof of possession alone, without adjudication of independent right, title, interest of the petitioner in context with Order 21 Rules 100 and 101 C.P.C., there may not be any mandatory injunction granted in aid of putting back in possession.

Since, granting of such injunction to a party is based on sound exercise of judicial discretion, in the order impugned there left nothing suggestive of erroneous exercise of judicial discretion, vested to the court below.

The case thus presented before the court below, while seeking mandatory injunction, was not sufficient enough to make out exceptional circumstances, needing immediate action, failure of which would cause great injustice or irreparable harm to petitioner.

When the court below upon due exercise of discretion declined to grant mandatory injunction to put back in possession of subject property, pending adjudication of independent right, title, interest of the petitioner, such discretion, in the given facts and circumstances of this case, being lawfully and reasonably exercised, would remain uninterfered with.

The findings thus reached, while making rejection of the prayer for mandatory injunction at an interlocutory stage, in any case may not be branded to be a perverse one.

The revisional application fails.

However, the pending Misc. Case be expedited, so that logical conclusion of Misc. Case may be reached at an early date.

With this observation/direction, the revisional application stands disposed of.

Parties are directed to make communication of this order to the learned court below.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis.

(Subhasis Dasgupta, J.)