
of a receiver, or an order of attachment before judgment cannot be regarded as a matter affecting the trial of the suit and thus, cannot be stayed under Section 10, C.P.C. In the said authority, reliance had been placed on the law laid down by the Mysore High Court in *Baburao Vithalrao Sulunke's case* (supra). In the said authority it was held by the Mysore High Court that Section 10, C.P.C. seems to refer to the stay of trial of a suit and not other proceedings of an interlocutory character. In the said case the trial Court had declined to decide the application Under Order 38 Rule 5, CPC, for the grant of attachment before judgment on the ground that the suit had been stayed pursuant to the provisions of Section 10, CPC. The Mysore High Court allowed the revision petition, set aside the order of the trial court and directed the trial court to decide the matter in accordance with law. In *Senaji Kapurchand's case* (supra) it was held by a Division Bench of the Bombay High Court that an order staying the suit under Section 10, C.P.C, does not prevent the court from making interlocutory orders such as orders for a Receiver or an injunction or an order for attachment before judgment.

(8) In view of the law laid down by various High Courts in the above mentioned authorities, in my opinion, the learned District Judge was perfectly justified in holding that he was competent to deal with the application under Order 39 Rule 1 and 2, CPC, in spite of the fact that the trial of the suit had been stayed under Section 10, C.P.C. No authority to the contrary had been cited before me by the learned counsel for the petitioner.

(9) For the reasons recorded above, finding no merit in the present revision petition, the same is hereby dismissed with no order as to costs.

R.N.R

Before V.M. Jain, J

KASHMIR SINGH,—*Petitioner*

versus

TANA & OTHERS,—*Respondents*

C.R. No. 2002 of 1998

11th July, 2000

Code of Civil Procedure, 1908—0.21 Rls. 35(1) & (2)—Trial Court passing a decree for joint possession of immoveable property—Executing Court ordering issuance of warrants of actual possession on the basis of the list of khasra numbers supplied by the decree holder—Executing

Court dismissing the objection petition filed by the judgment debtors—Challenge thereto—In the absence of a decree for possession of a specific portion of the joint property, the Executing Court has no jurisdiction to issue warrants of actual possession—Actual physical possession could be delivered to the decree holder only after getting the joint property partitioned.

Held that the trial Court had passed a decree for joint possession of the land measuring 192 kanals 1 marla. That being so, there would be no question of taking actual physical possession in respect of any portion of the total land measuring 192 kanals 1 marla, without getting the suit land partitioned. In the absence of any specific decree for possession of any specific portion of the total land measuring 192 kanals 1 marla, the plaintiff-decree holder could not seek actual physical possession in respect of any portion of the suit land by supplying the list of various khasra nos. in the list of properties while seeking the issuance of warrants of possession.

(Para 15)

Further held, that the present decree being a decree for possession in respect of 1/2 share in the total land measuring 192 kanals 1 marla, only warrants for symbolic possession could be issued under Order 21 Rule 35(2) CPC and not warrants for actual possession as was done by the Executing Court in this case. The learned Executing Court committed an illegality and irregularity in the exercise of its jurisdiction, which requires interference by this Court, in the exercise of its revisional Jurisdiction. Thus, the order passed by the Executing Court is set aside and while allowing the objection petition of the objector-petitioners, it is held that warrants of actual possession could not be issued in execution of the decree passed by the Court.

(Paras 19 & 21)

Code of Civil Procedure, 1908—0.21 Rl. 35(2)—Co-sharers—Petitioner purchasing the share of one of co-sharers after passing of the decree for joint possession—Sale deed challenged by the L. Rs. of the seller—Whether petitioner being a co-sharer can file objections before the Executing Court against the issuance of warrants of actual possession—Held, yes.

Held that the plea of the petitioners that they had purchased the share of the other co-sharer namely Fatta after passing of the decree and as such they had become the co-sharers in the suit land was repelled by the Executing Court by observing that the sale deed in question dated 13th September, 1994 allegedly executed by Fatta in

favour of the objectors was already under challenge by the LR's of the said Fatta on the ground of fraud and misrepresentation and as such the objectors-petitioners could not take any benefit of the said sale deed. However, in my opinion, the learned Executing Court erred in law in this regard. The other co-sharer having sold a share in the suit property to the objector-petitioners even otherwise they had become co-sharers in the suit land and for that reason as well, physical possession could not be delivered to the decree holder without getting the suit land partitioned.

(Paras 16 & 18)

S.C. Kapoor, Sr. Advocate with Ashish Kapoor, Advocate *for the Petitioner.*

R.S. Mittal, Sr. Advocate with Sudhir Mittal, Advocate *for the Respondent*

JUDGMENT

V.M. Jain, J

(1) This is a revision petition against the order dated 2nd May, 1998 passed by the executing court dismissing the objection petition filed by the judgment debtors.

(2) The facts relevant for the decision of this revision petition are that Tana (plaintiff) had filed a suit for declaration and injunction against Hazara Singh, defendant. During the pendency of the suit, the plaintiff amended the plaint and converted the suit into a suit for declaration with possession as consequential relief, alleging therein that during the pendency of the suit, the defendant had taken forcible possession of the suit land. In the plaint, it was alleged by the plaintiff that he was the owner in possession of 1/2 share of the total land measuring 192 kanals 1 marla and that the defendant had obtained a civil court decree dated 4th January, 1984 with a view to defraud the plaintiff and that the said decree was passed on fraud and misrepresentation and was not binding on the plaintiff. It was further alleged that the plaintiff was in possession of the suit property before passing of the said decree and was still in possession thereof and the defendant was threatening to dispossess him and to alienate the same on the basis of the said decree. Subsequently, by way of amendment to the plaint, as referred to above, it was alleged by the plaintiff that during the pendency of the suit, the defendant took forcible possession of the suit land. The said suit was contested by the defendant. Finally the civil court decree dated 3rd April, 1991 was passed

by the trial court. The operative part of the said decree reads as under :—

“It is ordered that the suit of the plaintiff succeeds. A decree for declaration that the judgment and decree dated 4th January, 1984 passed in civil suit No. 13 of 1984 entitled *Hazara Singh v. Tana Singh* is null and void being based on fraud and for possession of the suit land is hereby passed in favour of the plaintiff and against the defendants with costs.”

(3) In the said decree, the details of the land measuring 192 kanals 1 marla had been given and it was no-where mentioned that the plaintiff had filed the suit for declaration and injunction and lateron for possession as consequential relief only in respect of 1/2 share in the suit land measuring 192 kanals 1 marla.

(4) During the execution proceedings, warrants of possession were issued in respect of land measuring 96 kanals 16 marlas (a part of the total land measuring 192 kanals 1 marla), on the basis of the list of property submitted by Tana, decree holder. At one stage, “Malkana” possession of the land measuring 96 kanals, being 1/2 of 192 kanals 1 marla, was given to the plaintiff, as per rapat roznamcha dated 31st October, 1994. Lateron, warrants of actual possession were issued in respect of the said land measuring 96 kanals 16 marlas. Thereupon, the present petitioners, who are the legal representatives of Hazara Singh, defendant, filed an objection petition against the issuance of warrants of actual possession, alleging therein that the decree under execution was for 1/2 share in the land measuring 192 kanals 1 marla and not of specific khasra Nos. and as such the warrants of actual possession could not be issued and only symbolic possession could be ordered to be delivered in execution of the decree, which had already been executed as per Daily Diary Report dated 31st October, 1994 and as such, the objection be allowed and the warrants of actual possession be recalled. These objections were contested by the plaintiff decree-holder. After hearing both the sides, the learned executing court dismissed the objection petition of the objectors vide order dated 2nd May, 1998. Aggrieved against this order of the trial Court, the objectors filed the present revision petition in this Court.

5) Notice of motion was issued. Counsel for the parties have been heard and record perused.

6) At the outset, learned counsel for the objector-petitioners submitted before me that even though the plaintiff had filed the suit for declaration and injunction and lateron for possession by way of consequential relief in respect of 1/2 share in the land measuring 192

kanals 1 marla and the said suit of the plaintiff was decreed by the trial Court, yet in the "decree" passed by the trial Court dated 3rd April, 1991, there was no mention that suit for declaration and possession had been decreed in respect of 1/2 share in the land measuring 192 kanals 1 marla. It was further submitted that this had resulted in the entire confusion and had further resulted in the miscarriage of justice. It was submitted that the objector-petitioners might be given time to move an appropriate application before the trial court for modification/clarification of the decree dated 3rd April, 1991 in this regard. On the other had, learned counsel for the plaintiff-respondent submitted before me that there was no necessity of getting the decree dated 3rd April, 1991 clarified/modified in order to show that the decree for declaration and injunction was in respect of 1/2 share in the land measuring 192 kanals 1 marla, as this was factually correct. In fact the learned counsel for the plaintiff-respondent submitted at the bar that the decree dated 3rd April, 1991 might be treated as a decree for declaration and possession in respect of 1/2 share in the land measuring 192 knals 1 marla and for this reason, it was not necessary to get the said decree clarified/modified in this regard.

(7) In view of the stand taken by learned counsel for the plaintiff-respondent before me, at the time of arguments, the learned counsel for the objector-petitioners proceeded to argue the case on merits. It was submitted that once it was found that the decree for possession was in respect of 1/2 share in the land measuring 192 kanals 1 marla, only symblic possession could be delivered to the plaintiff and not actual possession, without getting the land between the co-sharers partitioned, in view of the provisions of Order 21 Rule 35(2), CPC. It was further submitted that this being the position the learned executing court erred in law in dismissing the objections of the petitioner and issuing warrants of actual possession in respect of the land measuring 96 kanals 16 marlas, the details of which were given by the plaintiff decree holder in the list of properties while seeking issuance of warrants of possession. Reliance was placed on *Ram Kumar and anr v. Bhale Ram and ors* (1). It was further submitted that after the civil court decree, the petitioner had purchased the share of Fatta, the other co-sharer in the suit land and now the petitioner had become the co-sharer in the suit land and the plaintiff decree holder could not seek actual physical possession of any portion of the suit land in execution of the decree from the petitioner. Reliance was placed on *Ram Singh v. Gurnam Singh and ors* (2). On the other hand, the learned counsel for the plaintiff-respondent decree-holder submitted before me that the plaintiff

(1) 1990 P.L.J. 317

(2) 1989(2) P.L.R. 185

had given the list of those khasra Nos. in the execution proceedings, which were previously in possession of the plaintiff and the possession of which was taken away by the defendant during the pendency of the suit and the plaintiff wanted actual possession only of those khasra Nos. It was further submitted that the petitioner being not the co-sharer in the suit land, could not raise objection regarding issuance of warrants of actual possession instead of symbolic possession. Reliance was placed on *Ashok Kumar and ors v. Kamaljit Singh and ors* (3). It was further submitted that no case was made out for interference by this court with the order dated 2nd May, 1998 passed by the executing court in the exercise of its revisional jurisdiction. Reliance was placed on *M/s DLF Housing and Construction Company Pvt. Ltd. v. Sarup Singh and ors* (4).

(8) After hearing both the sides and perusing the record, in my opinion, the present revision petition must succeed and the order dated 2nd May, 1998 passed by the executing Court must be set aside.

(9) As referred to above, in view of the statement made by learned counsel for the plaintiff-respondent at the bar that the decree dated 3rd April, 1991 might be treated as a decree for declaration and possession in respect of 1/2 share in the land measuring 192 kanals 1 marla, the provisions of Order 21 Rule 35(2), CPC, would apply to the facts of the present case. This is especially so, when admittedly the plaintiff had filed the suit for declaration and injunction and later on for possession by way of consequential relief only in respect of 1/2 share in the land measuring 192 kanals 1 marla. Order 21 Rule 35(1) and (2), CPC, reads as under :—

- “1. Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.
2. Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.”

(10) From a perusal of the above, it would be clear that where a decree is for joint possession of immovable property, such possession

(3) 1995 P.L.J. 111

(4) A.I.R. 1971 S.C. 2324

shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclamation by the beat of drum or other customary mode at some convenient place, substance of the decree.

(11) In the present case, since the plaintiff was seeking declaration and possession in respect of 1/2 share in the land measuring 192 kanals 1 marla, it would be clear that the decree was for "joint possession of immovable property". That being so, the provisions of Order 21 Rule 35(2), CPC, would apply and not the provisions of Order 21 Rule 35(1), CPC, which pertain to the delivery of possession in respect of a decree for the delivery of immovable property.

(12) In 1990 PLJ, 317 (supra), the question before this court was as to whether in a decree for the joint possession, actual possession could be delivered. After considering various aspects, it was held by this court that where the decree was for joint possession, it could not be deemed to be a decree for actual possession. It was further held in the said authority that the distinction between the actual possession and joint possession was well recognised and was of vital significance. The execution of a decree for actual possession was dealt with under Order 21 Rule 35(1), CPC, while a decree for joint possession was dealt with under Order 21 Rule 35(2), CPC.

(13) In the present case, as referred to above, it shall be deemed that the decree passed in favour of the plaintiff was a decree for joint possession; inasmuch as the suit of the plaintiff for declaration and possession in respect of 1/2 share in the land measuring 192 kanals 1 marla had been decreed by the trial Court,—*vide* judgment and decree dated 3rd April, 1991. That being so, only the provisions of order 21 Rule 35(2), CPC, would apply and not the provisions of Order 21 Rule 35(1), CPC.

(14) So far as the authority 1995 PLJ, 111 (supra), relied upon by learned counsel for the plaintiff-respondents, is concerned, in my opinion, the same would have no application to the facts of the present case. In the reported case, the plaintiffs had filed a suit for declaration that they were owners of the property shown by letters ABCDEF in red and yellow colour in the site plan attached to the plaint and also for possession of the portion ABCG shown in yellow colour. The said suit was decreed by the trial court in favour of the plaintiffs. The first appeal was accepted by the Additional District Judge, but in the second appeal, the judgment and decree passed by the Additional District Judge in first appeal were set aside and the judgment and decree of the trial court were restored by this court. Thereafter, the plaintiffs took out execution and prayed for issuance of warrants of possession in respect

of the property qua which the suit had been decreed for possession. The objectors, who were the defendants and or their successors-in-interest filed objection petition, which was dismissed by the executing Court. The objectors filed a revision petition in this Court. It was contended that the decree-holders being the co-sharers were entitled to symbolic possession only in view of the provisions of Section 21 Rule 35(2), CPC, and the executing Court had erred in law in ordering delivery of physical possession. This contention raised on behalf of the objector-judgment debtors was repelled by this court and it was held that the provisions of Section 21 Rule 35(2), CPC, would not help the objectors inasmuch as sub rule (2) was applicable only where the decree was for joint possession of immovable property and in that situation, only symbolic possession was delivered leaving the parties to seek partition in an appropriate forum. It was further found that in the said suit, the plaintiffs had not only sought declaration that they were owners of the property, but had also prayed for the recovery of possession of the site ABCG. It was also found that the objectors or their predecessors were party to the suit and the Court had recorded a firm finding that the plaintiffs were owners of the property and had decreed the suit for possession of the suit property. It was further held that under those circumstances, it could not be said that the decree passed in the said case, the execution of which was in question, was a decree for joint possession. It was further observed in the said authority that "this apart, a decree for joint possession is passed in cases where defendants are also the owners of the property. In the present case, the private defendant-objectors are not the owners of the property. They claim their possession either through the Punjab Government or Municipal Committee. A co-owner is entitled to possession from a third party and such defendants cannot be permitted to raise an objection that a co-sharer is only entitled to joint possession and not actual physical possession."

(15) In my opinion, this observation made by this court in this authority, would be of no help to the plaintiff-decree holder in the present case. As referred to above, in the present case, admittedly, the trial court had passed a decree for joint possession of the land measuring 192 kanals 1 marla. That being so, there would be no question of taking actual physical possession in respect of any portion of the total land measuring 192 kanals 1 marla, without getting the suit land partitioned. In the absence of any specific decree for possession of any specific portion of the total land measuring 192 kanals 1 marla, the plaintiff-decree holder could not seek actual physical possession in respect of any portion of the land measuring 192 kanals 1 marla by supplying the list of various khasra Nos. in the list of properties while

seeking the issuance of warrants of possession.” In the reported case, the trial Court had decreed the suit for possession in respect of a specific portion i.e. ABCG shown in the site plan and under these circumstances, even if the plaintiffs were co-sharers in the total land, yet, they were entitled to seek actual physical possession in respect of the said portion ABCG, in execution of the decree in their favour. Thus, the authority 1995 PLJ 111(supra) relied upon by learned counsel for the plaintiff-respondent would be of no help to the decree holders in the present case.

(16) The case of the objector petitioners before the executing court also was that they had purchased the share of the other co-sharer namely Fatta after passing of the decree and as such they had become the co-sharers in the suit land and they could not be dispossessed therefrom in execution of the decree in question till the land had been partitioned in accordance with law. However, this plea of the objector-petitioners was repelled by the executing court by observing that the sale deed in question dated 13th September, 1994 allegedly executed by Fatta in favour of the objector-petitioners was already under challenge by the LRs of said Fatta on the ground of fraud and misrepresentation and as such the objector-petitioners could not take any benefit of the said sale deed dated 13th September, 1994 allegedly executed by the other co-sharer in their favour. However, in my opinion, the learned executing Court erred in law in this regard as well.

(17) In 1989(2) PLR, 185 (supra), it was held by this Court that where the decree was for joint possession of immovable property, the symbolic possession could be delivered to the decree-holder as contemplated under Order 21 Rule 35, CPC, and physical possession would be obtained by the decree holder after the property was partitioned. In the reported case, after the passing of the decree for possession on immovable property, the judgment-debtors had become co-sharer in the property along with the decree-holder and the executing court had dismissed the execution petition on the ground that the proper remedy for the decree-holder was to get the property partitioned.

(18) In the present case as well, the other co-sharer namely Fatta havnig sold a share in the suit property to the objector-petitioners vide sale deed dated 13th September, 1994, even otherwise, the objector-petitioners had become co-sharers in the suit land and for that reason as well, physical possession could not be delivered to the decree holder without getting the suit land partitioned.

(19) In the present case, as referred to above, at one stage, symbolic possession was delivered to the plaintiff decree holder on 31st October, 1994 as per the entry in the rapat roznamcha Vakyati of Village

Kharkara. Later on, the executing Court ordered the issuance of fresh warrants of actual possession in respect of land measuring 96 kanals 16 marlas, as per list of properties supplied by the decree holders. It appears that this confusion to the executing court arose because in the decree dated 3rd April, 1991, it was not specifically mentioned that it was for possession of 1/2 share in the land measuring 192 kanals 1 marla. However, in view of the stand taken by the learned counsel for the plaintiff-respondent decree holder before me, at the bar, as referred to above, this confusion no longer subsisted and the present decree being a decree for possession in respect of 1/2 share in the total land measuring 192 kanals 1 marla, only warrants for symbolic possession could be issued under Order 21 Rule 35 (2), CPC, and not warrants for actual possession as was done by the executing Court in this case. In my opinion, the learned Executing Court committed an illegality and irregularity in the exercise of its jurisdiction, which requires interference by this Court, in the exercise of its revisional jurisdiction.

(20) The authority AIR 1971 SC, 2324 (supra), relied upon by the learned counsel for the plaintiff-respondent decree holder, in my opinion, would be of no help to the decree holder-respondent. In fact, on the facts and circumstances of the present case, it would be clear that this Court has jurisdiction to interfere with the order dated 2nd May, 1998 passed by the executing Court, in the exercise of its revisional jurisdiction.

(21) For the reasons recorded above, the present revision petition is allowed, the order dated 2nd May, 1998 passed by the Executing Court is set aside and while allowing the objection, petition of the objector-petitioners, it is held that warrants of actual possession could not be issued in execution of the decree passed by the Court. There shall however, be no order as to costs.

S.C.K.

Before T.H.B. Chalapathi, J.

NIHAL SINGH,—*Petitioner*

versus

THE STATE OF PUNJAB & OTHERS,—*Respondents*

CRL. M. No. 11136-M of 1999

9th May, 2000

Constitution of India, 1950—Arts. 14 & 15(1)—Indian Penal Code, 1860—S. 302—Punjab Jail Manual—Paragraph 576(1)—