

Civil Revision

Present: **The Hon'ble Justice Jyotirmay Bhattacharya**

C.O. No.1693 of 2009

Judgment On: 16-04-2010.

M/s. S.S.B. Projects Ltd. & Ors

-Vs-

Chiradeep Bhattacharya & Ors

POINTS:

EXECUTION-Order granting permission to sell the vendor's interest - Implementation of such direction depends upon the wishes of the defendant no.1- Such direction whether can be construed as a mandatory direction, capable of execution-Code of Civil procedure, 1908 O 21 R 32- Constitution of India, Art.227

FACTS:

The plaintiff lent a sum to the defendant who accepted such loan by executing a promissory note in favour of the petitioners' and also by creating a charge in his interest in the suit property for repayment of the said loan. However the defendant failed to repay the said loan amount therefore the plaintiff filed a suit against the defendant as well as the petitioners praying for a decree for declaration of the charge on the suit property and for realization of the loan amount together with interest. The learned Trial Judge rejected the said application holding that such an order is not capable of execution and the relief claimed by the petitioner cannot be granted to him as per Order 21 Rule 32. The said order which was passed by the learned Trial Judge is under challenge under Article 227 of the Constitution of India before this Court

HELD:

The expression direction was loosely used in the order as all throughout the learned Trial Judge while considering the defendant no.1's proposal for sale very consciously observed that such liberty and/or permission cannot be granted to the defendant no.1., unless he secures the claim of the plaintiffs and since the claim of the plaintiffs was secured subsequently by the defendant no.1, such permission and/or liberty was granted to the defendant no.1 for completing the formalities of such sale. Thus, such direction should be construed as grant of permission by the learned Trial Judge authorizing the defendant no.1 to complete such transaction, if he so wishes and such order was passed by virtually modifying the interim order of injunction. Para-22

While passing the direction, the learned Trial Judge did not pass any direction to pay the balance consideration money before completion of sale. Such direction is optional in nature as the implementation of such decree depends upon the wishes of the defendant no.1. When implementation of such direction depends upon the wishes of the defendant no.1, such direction can not be construed as a mandatory direction, capable of execution. Para-23

An order which does not determine the rights of the parties conclusively is incapable of execution and as such, the learned Trial Judge did not commit any irregularity in rejecting the petitioners' said application under Order 21 Rule 32 of the Code of Civil Procedure. Para-24

For the Petitioners: Mr. S.P. Roy Chowdhury,
Mr. Asit Bhattacharya (II),
Ms. Sumana Sinha.

For the Opposite: Mr. Dipankar Ghosh.
Party No.1

For the Opposite: Mr. Aniruddha Chatterjee.
Party No.2

THE COURT:

- 1) A question has cropped up in this revisional application as to whether an order granting permission to sell the vendor's interest in the property to his purchaser, if the vendor so wishes, is capable of execution under order 21 Rule 32 of the Code of Civil procedure?
- 2) The proposed purchaser viz. the defendant no.4 filed an application under Order 21 Rule 32 of the Civil Procedure Code for execution of such an order against his vendor viz. the defendant no.1.
- 3) The learned Trial Judge rejected the said application under Order 21 Rule 32 of the Code of Civil procedure filed by the defendant no.4, by holding inter alia that such an order is not capable of execution. While rejecting the said application, the learned Trial Judge observed that if the defendant no.1 (vendor) violates the contract for sale, other remedy was open to the proposed purchaser for enforcement of the said contract. Thus, the learned Trial Judge was of the view that the relief which was claimed by the proposed purchaser (petitioner herein) cannot be granted to him as per Order 21 Rule 32.
- 4) The said order which was passed by the learned Trial Judge on 3rd April, 2009 in T.S. No.113 of 2006 is under challenge under Article 227 of the Constitution of India before this Court at the instance of the proposed purchaser namely the defendant nos.4 along with its constituted attorneys who were joined as defendant nos.5 and 6 in the said suit.

5) Heard Mr. Roy Chowdhury, learned Senior Counsel appearing for the petitioner (proposed purchaser), Mr. Aniruddha Chatterjee learned Advocate appearing for the opposite party no.2 (vendor) and Mr. Dipankar Ghosh, learned Advocate appearing for the opposite party no.1/plaintiff (vendor's creditor) herein.

6) Let me now give a very short background of this case which is necessary for the purpose of considering the present issue only:-

The plaintiff lent a sum of Rs.7,54,910/- to the defendant no.1 who accepted such loan not only by executing a promissory note in favour of the petitioners' herein but also by creating a charge on his interest in the suit property being premises no.39A Ekbalpore Road, Kolkata – 700023 for repayment of the said loan. Since the defendant no.1 failed to repay the said loan amount, the instant suit was filed by the plaintiff against the defendant nos.1,2 and 3 as well as the petitioners herein inter alia praying for a decree for declaration of the charge on the suit property and for realization of the loan amount together with interest. Though the said loan was taken by the defendant no.1 alone from the plaintiff by creating a charge on his share in the suit property for repayment of the said loan but, still then, the defendant nos.2 and 3 were impleaded therein as the suit property is a joint property belonging to the three brothers namely the defendant nos.1, 2 and 3. The defendant no.4 was joined as a party in the said suit as the said defendant allegedly entered into an agreement for development of the suit property with all the said three brothers for the consideration mentioned in the agreement entered between them on 16th May, 2006 and also because of the fact that the defendant no.1 also allegedly entered into another agreement with the defendant no.4 for transfer his allocation in the proposed multistoried building to be constructed by

the defendant no.4 on the suit property, in favour of the said defendant for the consideration mentioned in the said agreement. The defendant nos.5 and 6 who were the constituted attorneys of the said defendant no.4 were also joined as parties in the said suit.

7) In such a suit, an ad-interim order of injunction was passed by the learned Trial Judge on the plaintiff's application for injunction on 15th July, 2006 whereby the parties were directed to maintain status quo in respect of the suit property till 14th August, 2006.

8) Since the defendant nos.4, 5 and 6 were affected by the said interim order of status quo, they filed an application under Order 39 Rule 4 of the Code of Civil Procedure for modification and/or discharge of the said order of injunction by disclosing the aforesaid agreements executed between the defendant nos.1, 2 and 3 and the defendant no.4 as aforesaid. In course of hearing of the said application, the said defendant also expressed their willingness to give bank guarantee to secure the plaintiffs' claim in the said suit so that the interim order of injunction is discharged by securing the interest of the plaintiff in the suit and at the same time, the proposed developer/purchaser is not subjected to any further loss due to non-implementation and/or delayed implementation of the development agreement because of the injunction order.

9) After considering the balance of convenience and inconvenience of the respective parties and also after taking into consideration of the amount of the plaintiffs' claim in the said suit, the learned Trial Judge rejected the application under Order 39 Rule 4 of the Code of Civil Procedure filed by the defendant nos.4, 5 and 6 and made the ad-interim order of injunction absolute.

10) In this context, the defendant no.1 filed an application under Section 151 of the Code of Civil Procedure inter alia praying for permission of the Court for allowing him to publish a notice in the daily newspaper regarding his intention to execute a deed of conveyance in favour of the defendant no.4 and also for permitting him to execute a deed of conveyance in favour of the defendant no.4 on furnishing bank draft/pay order covering the entire claim amount of the above suit. He also made a prayer therein for keeping the said bank guarantee/pay order in the safe custody of the serestadar so that the plaintiffs may withdraw the said bank draft and/or pay order from the serestadar after execution of the sale deed by the defendant no.1 before the registering authority and on production of receipt of such registration of sale deed in respect of 1/3rd undivided share of the defendant no.1 in the suit property in favour of the defendant no.4.

11) The plaintiffs opposed the said prayer of the defendant no.1 by filing objection thereto. The learned Trial Judge refused to grant such permission to the defendant no.1 instantly as the learned Trial Judge was of the view that if such a permission is granted and the defendant no.1 is allowed to sell his share in the suit property, he may after such sale, refuse to secure the plaintiffs' claim in the suit and in that event not only the security for such payment of loan will be lost but also the defendant no.1 will be out of clutch of the Court of law. As such, the learned Trial Judge felt the necessity to direct the defendant no.1 to secure the plaintiffs' claim in the suit first by furnishing bank guarantee so that he may be allowed to sell his interest in the suit property thereafter. Accordingly, the defendant no.1 was directed to furnish the bank guarantee of Rs.7,54,910/- by 6th September, 2008. The said order was passed by the learned Trial Judge on 1st August, 2008 vide Order No.37.

12) The defendant no.1 complied with the said order of the learned Trial Judge. He submitted a pay order of Rs.7,54,910/- to the Court by procuring the said money from the defendant no.4. The said pay order was kept in the custody of a Senior Advocate practicing in Alipore Court as per the direction passed by the learned Trial Judge.

13) Thereafter the defendant no.1 was directed to complete all formalities of sale, if he so wishes within one month. The said order was passed on the defendant no.1's application wherein he prayed for permission to issue a publication in the newspaper regarding sale of his interest in the suit property with a further relief for allowing him to sell his interest in the suit property to the defendant no.4. The order which was passed by the learned Trial Judge on the said application of the defendant no.1 on 6th September, 2008 vide Order No.38 is as follows :-

“The defendant no.1 is directed to complete all formalities of sale, if the so wishes within one month.”

14) This order was sought to be enforced by way of execution under Order 21 Rule 32 of the Code of Civil Procedure by the defendant nos.4, 5 and 6 as the defendant no.1 failed to complete the sale in terms of the said direction.

15) A draft sale deed was submitted by the defendant no.4 in Court for completing the said transaction by executing a deed of conveyance in favour of the defendant no.4 as per the draft sale deed.

16) Mr. Roy Chowdhury, learned Senior Counsel, appearing for the petitioners pointed out from the said draft sale deed that after adjusting the payment of various amount on diverse date to the defendant no.1 towards the consideration price for sale of his undivided 1/3rd interest in the suit property, a sum of Rs.24,05,370/- still remains due and payable by the defendant no.4 to the defendant no.1 towards the balance consideration money in terms of the aforesaid agreement. Mr. Roy Chowdhury, thus, submitted that his clients want to complete the said transaction on payment of the said amount to the defendant no.1.

17) The learned Trial Judge, however, rejected the petitioners' said application under Order 21 Rule 32 by holding the same as not maintainable.

18) Mr. Roy Chowdhury, learned Senior Counsel, challenged the propriety of the said order by contending that in view of Section 36 of the Code of Civil Procedure, the direction passed by the learned Trial Judge upon the defendant no.1 for completing all formalities of sale in favour of the defendant no.4 is an executable order and as such, the learned Trial Judge committed an illegality by rejecting the petitioners' said application by holding the same as not maintainable though Order 21 Rule 32 of the Code of Civil Procedure prescribes a mode for execution of decree for specific performance of contract. According to Mr. Roy Chowdhury such direction of the learned Trial Judge should be regarded as a decree for specific performance of contract which is capable of execution as per Order 21 Rule 32 of the Code of Civil Procedure. Mr. Roy Chowdhury also contended that the provisions under the Code of Civil Procedure are wide enough to enable the parties to adjust their rights amongst themselves even though such adjusted rights are not related to the subject matter of dispute in the suit and a decree passed on the basis of such compromise is

valid enough as per the Code of Civil Procedure and as such, he submitted that the learned Trial Judge ought not to have rejected the petitioners' said application for execution. He, thus, invited this Court to interfere with the impugned order.

19) Mr. Chatterjee, learned Advocate, appearing for the defendant no.1/opposite party no.2 refuted such submission of Mr. Roy Chowdhury by submitting that the direction which was passed by the learned Trial Judge by Order No.38 dated 6th September, 2008 cannot be construed as a decree for specific performance of contract as the learned Trial Judge while passing the said direction, very consciously did not issue any mandate to the defendant no.1 to complete the said transaction; rather the learned Trial Judge by using the expression "if he so wishes" in the said order made the execution of such deed optional depending upon the wishes of the said defendant. Mr. Chatterjee further contended that even such direction was not passed in a suit for specific performance of contract. He further contended that while issuing such direction, the learned Trial Judge did not consider the validity and/or legality of the said agreement and/or the enforceability thereof and/or the readiness and willingness of the defendant no.4 for completing the said transaction as per the said agreement. He contended that no decree for specific performance can be passed by any Court without recording the Court's satisfaction with regard to the aforesaid conditions. He also pointed out that even no Court fees was paid by the defendant no.4 in respect of the said relief for specific performance of contract. As such, according to Mr. Chatterjee such direction, under no circumstances, can be regarded as a decree and/or order for specific performance of contract which is capable of execution as per order 21 Rule 32 of the Code of Civil Procedure. He, thus, supported the impugned order.

20) Mr. Ghosh, learned Advocate, appearing for the plaintiff/opposite party no.1 submitted that his client is only interested in realization of his monetary claim and if such money is paid, his client will be relieved. He, thus, neither supported the impugned order nor criticized the views of the learned Trial Judge expressed in the impugned order.

21) Having heard the learned Advocates of the parties and after taking into consideration the context in which the said interlocutory order was passed by the learned Trial Judge, this Court finds much substance in the submission of Mr. Chatterjee for the following reasons :-

Though it is true that the parties can adjust their rights by compromise in respect of any dispute beyond the subject matter of the suit, but this is not a case where, in fact, such direction was passed on the basis of any compromise between the parties. Direction for the completion of sale formalities was passed by the learned Trial Judge on the application of the defendant no.1 who on his own volition, sought for such permission for sell of his interest in the suit property to the defendant no.4 and such permission was sought for as the said defendant was unable to complete the said transaction even if he so wishes, because of the interim injunction passed in the said suit putting a restriction on his right to transfer his interest in the suit property during the pendency of the suit. While passing the said direction the learned trial Judge very consciously used the expression "if he so wishes" in the said order and thus, by using the said expression, the implementation of the said order was made optional, depending upon the wishes of the defendant no.1. The said order was passed on the application of the defendant no.1, without adjudicating the right of defendant no.1 vis-à-vis the right of defendant nos.4, 5 and 6 as per the aforesaid agreement for sale.

22) On reading the impugned order as a whole, this Court is of the view that the expression direction was loosely used in the said order as all throughout the learned Trial Judge while considering the defendant no.1's proposal for sell to the defendant no.4, very consciously observed that such liberty and/or permission cannot be granted to the defendant no.1., unless he secures the claim of the plaintiffs and since the claim of the plaintiffs was secured subsequently by the defendant no.1, such permission and/or liberty was granted to the defendant no.1 for completing the formalities of such sale. Thus, such direction should be construed as grant of permission by the learned Trial Judge authorizing the defendant no.1 to complete such transaction, if he so wishes, and such order was passed by virtually modifying the interim order of injunction. If in spite of obtaining such permission, the defendant no.1 refuses to complete the said sale by executing a deed of conveyance in favour of the opposite party no.4, the defendant no.1 cannot be compelled to execute the conveyance in favour of the defendant no.4 nor such execution of the conveyance can be made though Court as per Order 21 Rule 32 of the Code of Civil Procedure.

23) While passing the said direction, the learned Trial Judge did not even pass any direction upon the defendant no.4 to pay the balance consideration money to the defendant no.1 before completion of such sale. Such direction in my view is optional in nature as the implementation of such decree depends upon the wishes of the defendant no.1. When implementation of such direction depends upon the wishes of the defendant no.1, such direction can not be construed as a mandatory direction, capable of execution.

24) This Court, further, holds that such an order which does not determine the rights of the parties conclusively is incapable of execution and as such, the learned Trial Judge in my view did not commit any irregularity in rejecting the petitioners' said application under Order 21 Rule 32 of the Code of Civil Procedure.

25) In this peculiar set of facts, this Court permits the petitioners herein to take back the bank draft which was kept in deposit with Mr. Bagchi, Advocate and may also encash the same, if they so desire as admittedly the bank draft was procured by the defendant no.1 with the money given by the defendant no.4 with an understanding that the defendant no.1 will complete the sale formalities in favour of the defendant no.4 within a month.

26) The revisional application, thus, deserves no merit for consideration. The revisional application, thus, stands rejected.

27) Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.

**(Jyotirmay
Bhattacharya, J.)**