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Workshop Paper

Sub : Decree for Specific Performance of Contract,
injunction and restitution of conjugal rights.

Introduction :

It is said that the justice is not only to be done but it must be seen to have been done. The real worth of a judgment and the decree that follows, can be ascertained from the fruits which actually fall into the hands of a Decree Holder as a result of the decree. Thus, the execution is the most important aspect of Civil Justice. Success or failure of system of Civil Justice depends on success in executing decrees of Civil Courts. The fact that the legislature has carved out a Code in the form of O.XXI inside the Code of Civil Procedure illustrates the importance of this topic. Hundred and six Rules of this Order, besides 34 Sections (i.e. Ss.36 to 74) and equally large, hundred and five paragraphs in the Civil Manual are devoted to this topic. My paper relates to the topic of mode of execution of decree of specific performance of contract, decree of injunction and decree for restitution of conjugal rights.

1) Decree for Specific performance of contract :

2- Many a times after the decree for specific performance of contract, the decree holder directly files an execution petition as if the decree is final. However, in many cases the decree for specific performance of contract impose certain obligation on one or both the parties. In that case decree can not be said to be final. Here reference to section 28 of the Specific Relief Act is necessary. It reads thus,

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed. –

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and

the purchaser or lease does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the Court---

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:-

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the Court.

3- Section 28 of the Specific Relief Act has been interpreted by the Hon'ble Supreme Court in various decisions. In the case of Bhupinder Kumar v. Angrej Singh, reported in (2009) 8 SCC 766, the Hon'ble Supreme Court in paras 19 to 21 held as under :-

“19. It is clear that the decree is in the nature of preliminary decree and the suit would continue and be under the control of the Court till either party moves for passing the final decree. It is also clear that though the Court has the power to extend time and it is the duty of the Court to apply the principle of equity to both the parties.

20. In Kumar Dharendra Mullick v. Tivoli Park “Apartments (P) Ltd. this Court after analysing earlier decisions, has concluded that : “When the Court passes the decree for specific performance, the contract between the parties is not extinguished. The Court does not lose its jurisdiction after the grant of the decree for specific performance nor does it become functus officio. The decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the grant of such decree. Hence, the Court retains control over the entire matter even after the decree. Section 28 gives power to grant order of rescission of the agreement which itself indicates that till the sale deed is executed, the trial Court retains its power and jurisdiction to deal with the decree of specific performance. Therefore, the Court has the power to enlarge the time in favour of the decree-holder to pay the amount or to perform the conditions mentioned in the decree for specific performance.

21. It is clear that S. 28 gives power to the Court either to extend the time for compliance with the decree or grant an order of rescission of the agreement. These powers are available to the trial Court which passes the decree of specific performance. In other words, when the Court passes the decree for specific performance, the contract between the parties is not extinguished. To put it clearly the decree for specific performance is in the nature of a preliminary decree and the suit is deemed to be pending even after the decree. (underlined is for emphasis)

4- In K. Kalpana Saraswathi v. P.S.S. Somasundaram Chettiar, reported in AIR 1980 SC 512 the Hon'ble Supreme Court in para 3 held as

under :-

“3. Read in the light of S. 28 of the Specific Relief Act and the rulings on the point which were cited before us the proper course in this situation was to pass a decree for specific performance, which would, for all practical purposes, be a preliminary decree. The suit would continue and be under the control of the Court until appropriate motion was made by either party for passing a final decree.” (underlined is for emphasis)

5- In the case of Ramankutty Guptan v. Avara, reported in AIR 1994 SC 1699 the question that emerged before the Apex Court was whether after the decree for specific performance the application should be on the original side or execution side. The Supreme Court in para 7 of the report held as under :-

“7. The question then emerges is whether it should be on the original side or execution side. Section indicates that it should be “in the same suit.” It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains control over the decree even after the decree has been passed. It was open to the Court to exercise the power under S.28(1) of the Act either for extension of time or for rescinding the control as claimed for. Since the execution application has been filed in the same Court in which the original suit was filed, namely the Court of first instance, instead of treating the application on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. In this view, we feel that the judgment of the Bombay High Court laid down the law correctly and that of the Andhra Pradesh High Court is not correct. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law.” (underlined is for emphasis)

6- Prior to 1963, it was clear that the scope of suit for specific performance would not admit of a claim for partition, delivery of

possession and delivery of separate possession to the purchaser. The provisions of the new Act make it clear that all ancillary reliefs may be obtained by a post decree application in the same suit for specific performance and that no separate suit for any of these ancillary reliefs will lie. In the light of the discussions made above it leaves to manner of doubt that a decree for specific performance is in the nature of a preliminary decree and the further remedy for ancillary or consequential reliefs lies in the same suit. The application made under S. 28 of the Specific Relief Act, 1963 either by the purchaser or seller should be numbered as interim application on original side in the same suit.

Mode to execute the decree :

7- O.XXI R.32 and 34 of CPC deals with the modes of execution of such decree. The Court can direct that the act required to be performed by J.D. may be performed as far as practicable by D.H. or any other person for and at the cost of J.D. This is an addition to the remedies of attachment of property and detention of the J.D. in Civil Prison¹. A decree for specific performance of agreement of sale is executed by obtaining from the decree holder a draft of the document prepared in terms of the decree. The draft is then served on the J.D. inviting his objection. After objection, if any, are dealt with and the draft is approved, the J.D. having failed to execute the same, the Court would execute the document on stamp paper provided by the D.H. If the document requires registration, the Court would cause it to be registered by sending it to the Sub-Registry either with an officer of the Court or a Commissioner appointed for this purpose².

II) Execution of decree for permanent injunction :

8- In case of willful breach of the decree for Permanent Injunction, the Court can enforce such a decree by detention of the J.D. in a civil prison or by the attachment of the property of J.D. or by both the modes. In Yashodabai Naik V/s. Gopi Naik 2002 (3) Mh.L.J. 801, in the execution proceeding the D.H. filed application for attachment and sale of the property of J.D. and ultimately, J.D. sentenced to suffer civil

imprisonment for fifteen days. After his release, he again committed breach of the decree. Hence, D.H. seek further action against J.D. but the execution court dismissed the execution petition holding that the J.D. cannot be detained in civil imprisonment on a second occasion as the relief is barred by constructive *res-judicata*. The issues before the Hon'ble High Court were (i) Whether the detention of the judgment-debtor in civil prison for having committed breach of the decree of permanent injunction tantamounts to satisfaction of the decree obtained by the decree holder? and (ii) Whether the Executing Court is helpless to implement decree even if judgment-debtor keeps on committing repeated and successive breaches thereof ?

The Hon'ble High Court held : A distinction has to be drawn between the mode of enforcing decree on one hand and actual satisfaction thereof, sentencing a person to jail as a "mode of enforcement". It is not a mode of satisfaction of the decree. The whole purpose of detaining a person in civil prison is to compel a person liable to obey the mandate of a decree who refused to comply with the terms of the decree without satisfactory cause. The purpose of sentencing him to jail is not to wipe out his liability to comply with the decree. A sentence of jail or detention of a person in civil prison, is no substitute for compliance of the decree. It is not a mode of discharging or satisfying a decree. The compliance of the decree can only be sought by resorting to these penal actions. The liability or obligation flowing from the decree cannot be taken to have been discharged by detaining a person liable to comply with the decree, to jail.It is not that once a person is made to suffer imprisonment or detention in civil jail, he cannot be proceeded with on second occasion for the fresh breach committed by him. Each breach is independent and is actionable in law. Merely, by putting a person in civil prison the decree does not get wiped out or satisfied. When despite the detention the J.D. did not amend his attitude and ventured to commit successive breaches of the decree, the effective order against him could be attachment of his property and in the event of persistent breach the sale thereof. If no property is available for attachment and if J.D. persists in committing deliberate and willful breach of the injunction he may again

be detained in the civil prison, depending upon the gravity of breach committed by him.

III) **Decree for restitution of conjugal rights** :

9- O.XXI rule 32 provides that before taking coercive measures to execute such decree, the court has to first satisfy that the judgment debtor has had an opportunity to obey the decree and has willfully failed to obey it. The decree for restitution of conjugal rights can be enforced by the attachment of the property of the judgment debtor. If such attachment remains in force for six months and the judgment debtor has not obeyed the decree, the court may on the application of the decree holder sold the attached property and out of sale proceeds pay such compensation as it thinks fit to the judgment debtor.

10- Order XXI rule 33 provides that at the time of passing such decree against the husband or at any time afterwards order that if the decree is not obeyed within stipulated period, the husband shall pay such periodical payment/maintenance as fixed by the court to the decree holder. The said amount can be recovered from the judgment debtor as if it is a money decree.

11- In Vijendra B. Singh Vs. Uma Vijendra Singh AIR 2010 Bombay 131, the Hon'ble High Court of Bombay extensively dealt with the provisions of order XXI Rule 33 of CPC and held thus,

Sub-rule (1) of Rule 33 Order XXI of the said Code starts with non obstante clause. Thus, Rule 33 will have overriding effect over the Rule 32. Under sub-rule (1) of Rule 32 it is provided that the decree for restitution of conjugal rights can be enforced by attachment of property of the party against whom the same is passed, provided, the party had an opportunity of obeying the decree and has willfully disobeyed it. Thus, what is contemplated by sub-rule (1) of Rule 32 is willful disobedience on the part of the party against whom such a decree has been passed. However, Rule 33 overrides Rule 32 because of non obstante clause and it confers power on the Court passing a decree either at the time of

passing a decree against the husband for restitution of conjugal rights or any time afterwards to direct that the decree for restitution of conjugal rights shall be executed in the manner provided in Rule 33. Thus, it is not necessary that at the time of passing a decree for restitution of conjugal rights, the Court has to pass an order that the decree shall be complied with in accordance with sub-rule (2) of Rule 33. Even after passing a decree, the Court can issue a direction that the decree shall be executed in the manner provided in Rule 33. In such event, under sub-rule (2) of Rule 33, the Court has power to direct that in the event the decree not being obeyed within such a period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just. In a given case the Court may require the judgment-debtor to secure to the decree-holder such periodical payments. As distinguished from sub-rule(1) of Rule 32, willful disobedience is not a condition precedent for passing an order under sub-rule (2) of Order 33 directing the judgment-debtor to make periodical payments to decree-holder. The Court gets power when it is found that the decree has not been complied with within such period as may be fixed in this behalf. The power can be exercised under sub-rule (2) of Rule 33 once the Executing Court finds that the decree is not obeyed within the period as may be fixed in that behalf. The provision of Sub-rule (1) of Rule 33 requires that the Court passing a decree should issue a direction at any time after passing a decree that the decree shall be executed in the manner provided in the Rule. Sub-rule (2) of Rule 33 provides that where the Court has made an order under sub-rule (1) that the decree shall be executed in the manner provided in Rule 33, it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make periodical payments as may be just. Thus, the power under sub-rule (1) of Rule 33 of Order XXI of the said Code directing that the decree shall be executed in the manner provided under Rule 33 is of the Court passing the decree. The power under Sub-rule (2) of Rule 33 is to be exercised by the Court in execution. Sub-rule (4) of Rule 33 provides that periodical payments ordered to be made under sub-rule (2) of Rule 33 may be recovered as if the same is payable under a decree for payment of

money. The effect of sub-rule (4) is that if the judgment-debtor fails to make periodical payments, as ordered under sub-rule 2) of Rule 33, the said direction can be executed as if it is a money decree.

5. As far as the date from which the periodical payment is payable, sub-rule (2) of Rule 33 confers discretion on the Court. It is not necessary that in every case periodical payment shall be ordered to be paid from the date of passing the decree of restitution of conjugal rights or from the date on which the period provided for compliance comes to an end. In a given case the direction under sub-rule (1) of Rule 33 may be issued by the Court after a lapse of considerable time from the date of decree as the rule provides that such a direction can be issued at time after passing a decree. In such a case, it may be unjust to direct that periodical payment shall be made from the date of passing the decree.

6. The Court gets power to pass a direction against judgment-debtor to make periodical payment in the event the decree is not obeyed within such time as may be fixed in this behalf. Therefore, while passing an order in terms of sub-rule (2) of Rule 33, of fixing the date from which the periodical payment is payable, the Court will have to consider all the facts and circumstances and conduct of the parties. At the same time, it must be noted that it is not necessary for the wife (decree-holder) to establish that there is willful disobedience of the decree on the part of husband-judgment-debtor. The Court gets jurisdiction to pass a direction for periodical payments when the judgment-debtor fails to obey the decree within time-limit provided. In a given case where time-limit is provided while passing a decree and if there is non-compliance, there may be some justification for passing a direction against the judgment-debtor to make periodical payments from the date of passing the decree. In a given case, a direction may be issued to make such periodical payments from the date on which period provided for compliance of the decree is over. No hard and fast rule can be laid down in that behalf.

Conclusion :

12- Procedure, when properly understood and used, furthers the cause of justice. If misused or abused a D.H. or a J.D. may stand

devastated or a Decree Holder or a judgment Debtor may dance in a sadistic ecstasy. Well, as the Executing Courts, we are to be conscious of these shades of life. Procedure is to be looked at, to make the process of the Court certain effective, satisfying and quick.

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