



WP No. 102158 of 2021

IN THE HIGH COURT OF KARNATAKA,
DHARWAD BENCH



DATED THIS THE 16TH DAY OF JUNE, 2022

BEFORE

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO. 102158 OF 2021 (GM-CPC)

BETWEEN:

1. DADA

2. SMT. VASUNDARA

...PETITIONERS

(BY MS. SURABHI RAVINDRA KULKARNI, ADVOCATE)

AND:

1. APPASAHEB

2. SURESH

...RESPONDENTS

(BY SRI. ARUN P. BOLAJ, ADVOCATE FOR R1 & R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227
OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE A WRIT OR

Digitally signed
by POORNIMA
SHIVANNA
Location: HIGH
COURT OF
KARNATAKA



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ORDER OR DIRECTION IN THE NATURE OF CERTIORARI QUASHING THE ORDER DATED 23.04.2021 IN ALLOWING IA NO.2 CONSEQUENTLY, QUASH THE DELIVERY WARRANT ISSUED IN EP NO.73/2014 ON THE FILE OF PRINCIPAL SENIOR CIVIL JUDGE, CHIKKODI, VIDE ANNEXURE-J.

THIS WRIT PETITION COMING ON FOR ORDERS AND HAVING BEEN RESERVED FOR ORDERS ON 20.4.2022, THIS DAY, THE COURT THROUGH VIDEO CONFERENCE PRONOUNCED THE FOLLOWING:

ORDER

1. The petitioner is before this Court seeking for the following reliefs:

- a. *Issue a writ or direction in the nature of Certiorari quashing the Order dated 23.04.2021 in allowing IA No.2. Consequently, quash the delivery warrant issued in EP No.73/2014 on the file of Principal Senior Civil Judge, Chikkodi, vide **Annexure-J**.*
- b. *Issue any other writ or direction which this Hon'ble deems fit to meet the ends of justice.*

2. Brief facts of the case are:

2.1. The petitioners are Judgment debtors and respondents are decree holders in Execution Petition No.73/2014 pending on the file of the Prl. Senior Civil Judge, Chikodi.

2.2. The respondents who are plaintiffs had filed a suit against the petitioners in O.S.No.65/2010 before the Senior Civil Judge, Chikodi seeking for a decree



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of specific performance and a direction to the petitioners herein to execute a sale deed in respect of the suit land as per the agreement of sale dated 29.03.2008.

2.3. Though the petitioners entered appearance through their counsel, the petitioners allege that due to the mistake on part of the counsel, written statement on behalf of petitioners was not filed, the suit proceeded to trial and the trial Court decreed the suit vide Judgment dated 26.06.2013 in pursuance of which a decree was drawn up.

2.4. The petitioners filed Mis. No.60/2014 under Order 9 Rule 13 of CPC seeking for setting aside the Judgment and decree dated 26.06.2013 which also came to be dismissed for non-prosecution on 9.08.2017. Prior to the dismissal of Mis. Petition No.60/2014, the respondents filed Execution proceedings in E.P.No.73/2014. The petitioners thereafter filed first appeal in RFA No.100033/2021



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on 12.01.2021 challenging the judgment and decree passed in O.S No. 65/2010. Though the said RFA is pending, there is no stay of the execution proceedings ordered in the said appeal.

2.5. The petitioners on being served in the execution proceedings, entered appearance through their counsel, petitioner No.1 filed statement of objections to the execution petition which came to be adopted by petitioner No.2 by filing a memo. Petitioner No.1 had also filed additional objections subsequently.

2.6. In the Statement of objections, petitioner No.1 has contended as under:

2.6.1. The advocate engaged by the petitioners earlier in O.S No.65/2010 had colluded with the respondents herein. The said advocate failed to file written statement and the suit came to be decreed ex-parte which came to the knowledge of the petitioners only on 05-09-2014, as they are illiterates and relied on the advocate.



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2.6.2. The respondents are in money lending business under the style and name M/s Dhanalaxmi Finance Corporation and M/s Laxmi Finance Corporation. The petitioners have borrowed money from these business and has no intention of selling the suit property.

2.6.3. The present valuation of the suit property is more than a crore rupees.

2.6.4. Since there is no specific prayer for relief of possession, the right to possession does not accrue to the respondents.

2.6.5. The suit land is in the name of one Marudevi who has not been impleaded in the suit as such she is not bound by the decree consequently the respondents are not entitled to the suit property.

3. Respondents filed IA-1 in the said execution proceedings seeking appointment of Court Commissioner to execute a registered sale deed in



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favour of respondents. The said application came to be allowed on 30.08.2018.

4. The Execution Court taking note of the fact that a draft sale deed has been furnished and no objections have been filed by the petitioners was of the opinion that in terms of the decree passed in O.S No.65/2010, the petitioners are liable to execute a sale deed in respect of the suit schedule property in favour of the decree holders as per the agreement dated 29.03.2008. The execution Court not being empowered to go beyond the decree was of the opinion that it was just and proper to appoint a Court Commissioner for the purpose of executing a registered sale deed and as such appointed First Division Assistant Sri.Yalagouda Sidagouda Patil as a Court Commissioner. While doing so, the Execution court was of the opinion that the contention of the petitioners that their advocate had cheated them and played fraud on them could not be gone into in the execution proceedings.



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5. In pursuance of the appointment of Court Commissioner, Commissioner warrant was issued. The said warrant was executed by the Commissioner by executing two sale deeds in favour of the respondents on 27.12.2018. Pursuant thereto, commissioner's report was filed placing on record the execution of the commissioner warrant and compliance of the direction given by the execution court.
6. It is thereafter that on 19.01.2019 the petitioners filed objections to the commissioner's report contending that sale deed was in contravention of Section 79-A and 79-B of the Karnataka Land Reforms Act. It is further contended that the said land was standing in the name of mother of Judgment debtor No.1 viz. Marudevi and there was no direction for execution of sale deed of the land of Marudevi in favour of the respondents. In the petition, though the decree holder had submitted one draft sale deed, the commissioner has prepared two sale deeds.



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7. Thereafter IA-2 was filed on 29.06.2019 seeking for issuance of delivery warrant as regards the possession of the property.
8. Objections to the said application was filed on 24.07.2019 by the petitioners stating that the sale deed was not approved by the execution court, objections to the main petition has not been considered, as also the objection to the commissioner's report was yet to be considered, therefore, IA-2 is required to be rejected.
9. Subsequently, on 30.08.2019, IA-3 was filed by the petitioners for summoning the Sub-registrar and production of certain documents which came to be dismissed on 30.01.2021. Thereafter IA-4 by the petitioners was filed on 08.02.2021 seeking for deferring the hearing on IA-2 until the objections on commissioner's report was considered. IA-5 by the petitioners was filed on 05.03.2021 for cross-examining the Court Commissioner. IA-6 was filed by the



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petitioners on 05.03.2021 for producing certain documents obtained from the Sub-registrar by the petitioners. Thereafter, additional objections to the main petition was filed stating that no relief of possession had been sought for in the suit; the suit land not standing in the name of the petitioners, but in the name of the mother of the first petitioner, who was not a party to the suit, neither a sale deed could be executed nor a delivery warrant could be issued as regards possession.

10. The execution court vide order dated 23.04.2021 rejected the application in IA No.5 seeking for cross examination of the commissioner, but allowed IA-2 by ordering issuance of delivery warrant by referring to the decision of the Hon'ble Apex Court in **P.C.Vergheese v. Devika Amma Balambika Devi & Ors** reported in **(2005) 8 SCC 486**, more particularly, paragraph 32 thereof. The execution Court was of the considered opinion that there was no legal impediment to entertain



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the prayer. The said paragraph 32 is reproduced hereunder for easy reference:

32. *The submission of Mr. Reddy to the effect that the learned Trial Judge committed a serious error in granting a decree for partition along with a decree for specific performance of contract need not detain us long as in view of Section 22(1)(a) of the Act a decree for partition and separate possession of the property can be granted in addition to a decree for specific performance of contract. As in this case, the Appellant herein in view of amended prayer 'C' relinquished his claim in respect of the property belonging to the minor - Respondent No. 4, he also prayed for a decree for partition and such a prayer having been allowed, no exception thereto can be taken. In any event, the said question has not been raised by the Respondents before the High Court at all. Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and/ or partition in a suit for specific performance. Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/ or partition is prayed for in anticipation of the grant of prayer for specific performance of contract. [See Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Others (1982) 1 SCC 525]*

11. It is aggrieved by the said order on IA-2 that the petitioners are before this Court seeking for the aforesaid reliefs.

12. It is also of relevance to note that an earlier Writ Petition No.10877/2018 filed by the petitioners challenging the orders passed on IA-1 was dismissed



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as infructuous and RFA No.100033/2021 is still pending consideration before this Court.

13. Smt. Surabhi Kulkarni, learned counsel appearing for the petitioner submitted as under:

13.1. The impugned order passed by the trial Court on IA-2 is contrary to law, illegal and violative of principles of natural justice;

13.2. A delivery warrant in respect of possession could not have been issued without a specific prayer having been sought for in the suit and a specific direction having been issued in the judgement passed in the suit directing handing over of possession by issuance of delivery warrant, the Executing Court has violated the mandatory requirement under Section 22(2) of the Specific Relief Act and as such, the impugned order is required to be set-aside;



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13.3. There being no decree directing handing over of possession, issuance of delivery warrant would amount to going beyond the decree which is impermissible;

13.4. Executing Court is restricted to the implementation and/or execution of a decree passed as per the decree and can not go beyond the decree;

13.5. There was no opportunity given to the petitioners to file their objections to the draft sale deed which is violative of the principles enshrined under Order 21 Rule 34 of CPC.

13.6. The Commissioner has also exceeded his power and it is for this reason that the petitioners had requested the executing Court to defer the hearing on IA-2 until the objections to the Court commissioner's report was considered which was also not acceded to by the executing Court



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resulting in gross injustice being caused to the petitioners.

13.7. Petitioners have filed detailed objections to the report of the Court Commissioner categorically stating that the said Court commissioner could not have applied for 11-E sketch, obtain the same, as also execute two separate sale deeds, one each in favour of respondents. The decree being a single decree, sale deed which had been produced before the executing Court being a composite sale deed, same could not have been split up by the commissioner without seeking permission to do as such.

13.8. Despite the above having been brought to the notice of the executing Court, the said Court without going into the objections to the commissioner's report filed on 19.01.2019, has issued delivery warrant on 23.04.2021, which



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ought not to have been done by the executing Court;

13.9. The Judgment debtor has a vested right in filing objections to any draft sale deed submitted by a decree holder.

13.10. In view of the above, learned counsel submits that the impugned order passed on IA-2 is required to be set-aside.

14. Sri.Arun P.Bolaji, learned counsel for the respondents submitted as under:

14.1. The impugned order passed by the trial Court is proper and correct and there is no requirement for this Court to intercede in the matter;

14.2. As regards the conduct of the petitioner, even though caveat petition had been filed by the respondents, the petitioner suppressing the caveat petition had obtained an order of stay and as such, the said stay order needs to be vacated;



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14.3. The petitioners having filed RFA No.100033/2021 and being unsuccessful in obtaining any interim order, the petitioners have delayed the matter. The respondents have been deprived of the just fruits of the decree dated 26.06.2013 for nearly 9 years;

14.4. The petitioners having challenged the orders passed on IA-1 in W.P.No.10877/2018 and the said writ petition having been dismissed, the question of petitioners challenging the consequential order in IA-2 is bereft of merits and as such, the present writ petition is required to be dismissed. There is no requirement as such for a plaintiff in a suit to seek for possession. The execution Court can always in furtherance of getting sale deed executed in favour of the decree holder direct handing over of possession. In this regard, learned counsel relied on a decision of the Hon'ble Apex Court in **P.C.Verghese case** supra,



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more particularly para 32, which has been reproduced hereinabove.

14.5. He therefore submits that there being no grounds made out the petition is liable to be dismissed.

15. Heard Smt. Surabhi Ravindra Kulkarni, learned counsel for the petitioners and Sri. Arun P. Bolaji, learned counsel for the respondents. Perused papers.

16. In view of the said submissions, the points that would arise for determination are as under:

- 1. Whether the provisions of Order 21 Rule 34 are mandatory inasmuch as whether there is a requirement for the execution Court to provide an opportunity to the Judgment debtors to file objections to the draft sale deed while executing the decree for specific performance and whether it is mandatory for the execution Court to approve the draft of the sale deed provided by the decree-holder by a reasoned order?**
- 2. What are the nature of objections that could be filed by a Judgment debtor requiring consideration under Order 21 Rule 34 of CPC?**



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3. *When the plaintiff had not sought relief of possession in a suit for specific performance but had only restricted the prayer for the execution of the sale deed, could the execution Court issue a delivery warrant directing handing over of possession to the decree-holder and/or would the issuance of the delivery warrant as above amount to going beyond the decree for specific performance?*
4. *Whether in the present facts and circumstances, there is a requirement for this Court to intercede in the matter?*
5. *What order?*

17. I answer the above points as under:

18. ANSWER TO POINT NO.1: *Whether the provisions of Order 21 Rule 34 are mandatory inasmuch as whether there is a requirement for the execution Court to provide an opportunity to the Judgment debtors to file objections to the draft sale deed while executing the decree for specific performance and whether it is mandatory for the execution Court to approve the draft of the sale deed provided by the decree-holder by a reasoned order?*

18.1. Order 21 Rule 34 reads as under:

Decree for execution of document, or endorsement of negotiable instrument.—



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(1) *Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.*

(2) *The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.*

(3) *Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.*

(4) *The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.*

(5) *The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—*

"C. D., Judge of the Court of,

(or as the case may be), for A. B., in a suit by E. F against A. B.",

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

[(6) (a) Where the registration of the document is required under any law for the time being in force,



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the Court, or such officer of the Court as may be authorised in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so, required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration.]

18.2. In terms of Sub-rule (1) of rule 34 of Order 21, it is for the Judgment debtor to execute the necessary document or endorsement. In the event of the Judgment debtor failing to do so, the Decree holder has been provided a right to prepare a draft of the endorsement or document and produce the same to the executing Court. Executing court thereafter is required to serve a copy thereof on the Judgment debtor together with a notice requiring his objections to be made within such time as the court fixes in that behalf. In the event of objections being filed, such



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objections would have to be considered by the Court and orders passed either approving the draft or refusing the draft on the basis of the objections.

18.3. If any alterations are to be made decree holder is required to provide the draft with alteration and the executing court may appoint any officer to execute the document. If the said document is required to be registered, the manner of registration also has to be provided in terms of Sub-section (2) the Hon'ble Apex Court in the case of **Rajbir v. Suraj Bhan** reported in **(2022) SCC Online SC 270** has considered the requirement of Order 21 Rule 34 of CPC. In paragraphs Nos. 11 and 12 it is observed thus:

11. *The present is indeed a case where the decree in question provides for the execution of the document. The document is the document of sale as contemplated under the decree. Therefore, Order XXI Rule 34 is clearly attracted. It contemplates that if the judgment debtor neglects or refuses to obey the decree, the decree-holder is to prepare a draft of the document. In this case, the draft of the document is the draft sale deed. The*



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draft of the sale deed must further be in accordance with the terms of the decree. It is to be delivered to the court. Thereupon, it is not required that the decree holder must directly deliver it to the judgment debtor. The procedure, therefore, is that the decree holder must make it available to the Court. Under Order XXI Rule 34, it becomes the duty of the court to thereupon cause the draft to be served upon the judgment debtor. There must be a notice inviting objections and the court may fix a time within which objections are to be filed. The judgment debtor may or may not object. Order XXI Rule 34 sub-rule (3) contemplates a situation where the judgment debtor objects. This is to be contained in writing within the time provided. The court is duty bound to make an order approving or altering the draft as it thinks fit. This is of considerable importance having regard to what may follow subsequently on the strength of the decree. It is also important from the point of view of the role of the executing court which is to act in conformity with the decree.

12. *It is well settled that the execution court cannot go beyond the decree. The decree must be executed as it is. Though, it is indeed open to the executing court to construe the decree; it cannot go beyond the decree. Therefore, when objections are filed pointing out in a given case that the proposed draft of the sale deed is not in conformity with the decree, it becomes the duty of the executing court to apply its mind and to make alterations in the draft, if needed, to make it in conformity with the decree. It will be thereafter that the decree holder is to deliver it to the court with the alterations if any made by the court, on proper stamp paper, if required and the execution of the document is effected by the court or the officer appointed. There are other formalities contemplated in regard to registration, all of which take place only after the procedure which is contemplated in Order XXI Rule 34 sub-rule (1) to (4) is followed.*



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18.4. A perusal of the above paragraphs would indicate that the Hon'ble Apex Court has categorically held that the procedure prescribed under Order 21 Rule 34 of CPC cannot be diluted as the same would have a deleterious consequence and as such has categorically held that it is for the execution Court to necessarily and mandatorily follow the principles of Rule 34 of Order 21 CPC.

18.5. This being so, for the reasons that the document without being executed on behalf of the Judgment debtor by the court has, in fact, executed in the name of the Judgment debtor and as such, the Judgment debtor is required to be given an opportunity to object to the contents of the document proposed to be executed in his name, more so when the document is being prepared by the decree holder who could include any particular covenant or recital in the document which may be to the detriment of the



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Judgment debtor or cause any inconvenience to the Judgment debtor. While decreeing the suit for specific performance, the Court only determines the eligibility of the plaintiff to receive a decree in his favour.

18.6. The contents of the sale deed or a document to be executed subsequent to an agreement which has been specifically enforced would normally be decided between the parties *inter se* after negotiation, but in a case where the parties are in dispute, the provision of Rule 34 of Order 21 of CPC envisages the manner in which a decree may be enforced in an execution court.

18.7. While doing so, there is a duty cast on the execution Court to see to it that the decree-holder does not provide a document which is contrary to or violative of the agreement between the parties, as also duty to see to it that the Judgment debtor does not unnecessarily



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object to the execution of the document furnished by Decree Holder and/or delay the proceedings.

18.8. It is for this reason that an opportunity is required to be given to the Judgment Debtor to execute the document upon mutual consent between the decree-holder and Judgment debtor. If the same is not possible, then the executing court shall direct the decree-holder to furnish a draft of the document which in turn has to be provided to the Judgment debtor to file objections in a time-bound manner and the said objections are required to be considered by the executing court and depending on the nature of objections and sustainability or otherwise of the objections either accept the same or reject the same.

18.9. In the event of any objection/s being accepted, suitable changes in the document submitted by



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the decree-holder is required to be carried out in a time-bound manner and the officer appointed by the Court or otherwise is required to execute the document and register the document, if under the law it is mandated that the such a document is required to be registered.

18.10. In view of the decision of the Hon'ble Apex Court and in view of the above discussion, it is clear that requirements of Rule 34 of Order 21 is mandatory and is required for the executing Court to follow and get followed the requirement of Order 34 of Rule 21 of CPC. Any violation of the said requirements would vitiate the execution proceedings giving rise to challenge to any order passed in violation of such requirement.

18.11. I answer Point No.1 by holding that the provisions of Order 21 Rule 34 are mandatory. The Execution Court is required



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to get served a copy of the property document to be executed xxx by the Judgment debtor, provide an opportunity to the Judgment debtor to file objections to the draft document, thereafter consider the objections, make such alterations as may be required in the document and then if the document is required to be registered, get the same registered.

19. ***ANSWER TO POINT NO.2: What are the nature of objections that could be filed by a Judgment debtor requiring consideration under Order 21 Rule 34 of CPC?***

19.1. There cannot be a straight jacket formula or straight jacket requirement of the nature of objections that could be filed. This Court cannot enumerate the same and or detail the same so as to pinpoint the contents of the said objections. Suffice it to however say that the Judgment debtor could raise objections as regards whether



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the recitals in the document to be executed are correct or not; whether any of the covenants has been agreed to between the parties or not; or whether any of the covenants which has been introduced in the document is contrary to the agreement; whether any of the recitals or covenants would cause any detriment to the Judgment debtor and if so, in what manner.

19.2. It is at that stage permissible for a decree-holder to justify the requirement of a particular recital or covenant and for the executing court to decide on the validity or otherwise of the objections. While doing so, the executing court is required to always keep in mind the purpose of execution being the implementation and/or execution of a Judgment and decree which has already been passed. The purpose and intent of the executing court should always be to execute the said Judgment and decree in a time-bound manner.



20. ANSWER TO POINT NO.3: When the plaintiff had not sought relief of possession in a suit for specific performance but had only restricted the prayer for the execution of the sale deed, could the execution Court issue a delivery warrant directing handing over of possession to the decree-holder and/or would the issuance of the delivery warrant as above amount to going beyond the decree for specific performance?

20.1. Section 22 of the Specific Relief Act, 1963 reads

as under:

22. Power to grant relief for possession, partition, refund of earnest money, etc.—

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or 1[made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of subsection (1) shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.



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(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

20.2. Sub-section (1) of Section 22 provides the manner and nature of relief that could be sought for by the plaintiff. Subsection (2) of Section 22 provides that the reliefs which have been sought for in sub-clause (a) and (c) of Sub-section (1) of Section 22 of the Act cannot be granted unless it has been specifically claimed. The proviso, however, provides an opportunity to the plaintiff to seek the said relief at any stage of the proceedings of the suit if not already sought by way of amendment to include such a claim or relief.

20.3. Thus, it is clear that unless the relief of possession or partition and separate possession of the property in addition to performance is sought for, no such relief can be granted.



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20.4. The Hon'ble Apex Court has considered the above issue in ***Babulal -vs- M/s Hazari Lal Kishori Lal and others [AIR 1982 SC 818]*** which also dealt with a suit for specific performance wherein the plaintiff had not sought for the relief of handover of possession.

20.5. The Hon'ble Apex Court by referring to Section 22 was of the opinion that it is only at first blush that it appears that the relief of possession cannot be granted without the same being specifically sought for in the plaint. The Hon'ble Apex Court went on to consider the wording of Section 22 of the Specific Relief Act by referring to the interpretation given to the same by various judgments of various High Courts including that in ***Mohammed Ali Abdul Chanimomin vs Bisahemi Kom Abdulla Saheb Momin reported in [AIR 1973 Mys. 131]*** wherein at paragraphs 13 to 15, it is held as under:



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13. *The observation contained in the extract from the order (Exbt. 63) given above to the effect that the agreement to sell a land operates only in personam and that therefore, there could be no lis pendens in regard thereto is either an unnecessary observation or a mere erroneous step in the reasoning leading to a decision to reject the plaintiff's application for impleading the second defendant in the execution proceedings. As the second defendant was not at all impleaded it is impossible to suggest that any question was decided between him and the plaintiff so as to attract the principles even remotely relating to res judicata. We are therefore, unable to find any legal complexion in the finding of fact against the appellant that the previous suit of the plaintiff for specific performance was collusive in nature and was therefore beyond the scope or operation of Section 52 of the Transfer of Property Act.*
14. *So far as the legal aspect is concerned, little argument is necessary to make out that the object of Section 52 is to subordinate all derivative interests or all interests derived from parties to a suit by way of transfer pendente lite to the rights declared by the decree in the suit and to declare that they shall not be capable of being enforced against the rights acquired by the decree-holder. A transferee in such circumstances therefore takes the consequences of the decree which the party who made the transfer to him would take as the party to the suit. The principle of lis pendens embodied in Section 52 being a principle of public policy, no question of good faith or bona fides arises. Such being the position, the transferee from one of the parties to the suit cannot assert or claim any title or interest adverse to any of the rights and interests acquired by another party under the decree in suit. The principle of lis pendens prevents anything done by the transferee from operating adversely to the interest declared by the decree.*



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15. *Another aspect of the matter is that whether or not a decree for specific performance expressly gives the relief of recovery of possession (we may state that in this case the decree expressly contains such a relief), the liability to deliver possession is necessarily implied in a decree for specific performance directing the defendant to execute a sale deed on the principle of Clause (f) of Sub-section (1) of Section 55 of the Transfer of Property Act, according to which the liability to deliver possession arises immediately upon execution of a sale deed unless by agreement, the date for delivery of possession is postponed. That was what was held by this Court in Venkatesh v. Parappa, (1966) 1 Mys LJ 799. The effect of that decision is that the plaintiff's right to ask for possession arose on the execution of the sale deed in her favour, i.e., 29th December, 1955 and the suit has been filed in less than six years from that date.*

20.6. The Hon'ble Apex Court in **Babulal's case** further deliberated on the word '*proceeding*' as contained in Section 22 in the phrase '*at any stage of the proceeding*' and came to a conclusion that the said word '*proceeding*' would also include "*execution proceedings*" and it was open for the executing court to grant the relief of possession even though the same had not been sought for in the plaint.



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20.7. The Hon'ble Apex Court was of the further opinion that Section 22 was only an enabling provision and as such was not mandatory and objection raised by the Judgment debtor that since the relief of possession was not sought for in the plaint but sought for in the execution proceedings no such relief can be granted to be hyper technical.

20.8. The Hon'ble Apex Court further went on to hold that the High Court or the execution Court could by way of an order permit amendment of the plaint and that the mere omission of the High Court in that case to allow the amendment to the plaint is not fatal so as to deprive the decree-holder the benefit of the decree under Section 55 of the Transfer of Property Act.

20.9. By referring to Section 28 of the Specific Relief Act, the Hon'ble Apex Court was of the opinion that further orders could be passed upon the decree holder making payment of the amounts



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directed to be paid under the decree, which would include the ordering of a delivery warrant.

20.10. Section 28 of the Specific Relief Act reads as under:

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 lessee 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*



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restoration of possession to the vendor or lessor, and 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.

20.11. A perusal of Sub-section (3) of Section 28 indicates that if the purchaser or lessee pays the purchase money as directed, then such a purchaser would be entitled to the execution of the proper conveyance or lease, delivery of



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possession or partition and separate possession and further that no separate suit in respect of any relief which could be claimed under the Section would lie at the instance of the vendor, purchaser, lessor or lessee.

20.12. The decision of the Hon'ble Apex Court and the provision under Section 28 of the Specific Relief Act is a complete answer to the objection raised by the petitioner.

20.13. Though an application in IA-2 has not been as such filed under Subsection (3) of Section 28 of the Specific Relief Act, the net effect and purport of the relief sought for in IA no.2 comes within the ambit and purview of sub-clause (b) of Subsection (3) of Section 28 of the Act, merely because the provision is not properly stated the decree-holder cannot be deprived of the benefits thereof.



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20.14. The decree-holder having paid the consideration amount and having complied with the directions issued in the decree, I am of the considered opinion cannot be deprived of possession of the property inasmuch as the mere execution of a sale deed would confer no right on the purchaser/decreed holder and the title of the purchaser would only remain on paper without the purchaser being entitled to make use of the property subject matter of the decree, despite having made payment of valuable consideration for the same.

20.15. The trial Court having held that the plaintiff was entitled for a decree of specific performance what was only required of a decree holder is to comply with the requirements of the agreement of sale and the directions contained in the decree. Once the same is done in terms of Subclause (b) of Subsection (3) of Section 28 of the Act, the decree



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holder would be entitled for delivery of possession or partition or separate possession of the property on execution of conveyance or lease.

20.16. Hence, I answer point No.3 by holding that even if the plaintiff has not sought a relief of possession in a suit for specific performance, but had only sought the prayer for execution of the sale deed, the Execution Court can issue a delivery warrant directing the Judgment debtor to handover possession of the property, subject matter of specific performance to the decree holder, upon the Decree-Holder performing all obligations as stated in the decree. Such an order would be within the purview of Subsection (3) of Section 28 of the Specific Relief Act, 1963 and would not amount to going beyond the decree for specific performance.



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21. ANSWER TO POINT NO.4: Whether in the present facts and circumstances, there is a requirement for this Court to intercede in the matter?

21.1. The contention of Smt. Surabhi Ravindra Kulkarni, learned counsel is that issuance of a delivery warrant by virtue of which possession is directed to be handed over to the decree-holder would amount to going beyond the decree inasmuch as the decree does not contemplate such delivery of possession is academic in view of my answer to point No.3 answered above.

21.2. The issuance of delivery warrant upon decree holder having complied with the directions of the decree would come within the purview of clause (3) of Subsection 3 of Section 28 of the Specific Relief Act and same being a statutory right which comes into force only after a decree is passed and the terms of the decree are complied, the issuance of delivery warrant in pursuance of decree of specific performance of sale of property



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cannot be said to be an order which goes beyond the decree.

21.3. The petitioner had earlier challenged the order passed on IA No.1 directing the Commissioner to execute a sale deed. The sale deed having been registered and executed in W.P.No.10877/2018 challenging the orders on IA-1 came to be dismissed as infructuous, the said order has attained finality. Since the writ petition has been withdrawn and attained finality, this Court cannot and would not be required to go into the validity or otherwise of the orders passed on IA-I.

21.4. Though much of the arguments were advanced in relation thereto and the same has been considered by this Court in point No.1 above, the same would not enure to the benefit of the petitioners now.

21.5. The only issue being as regards whether a delivery warrant could have been issued



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consequent to allowing of IA No.2 has been dealt with in point No.3 above, I have held that execution Court has necessary powers to issue a delivery warrant, there are no particular sustainable grounds which have been raised in the present petition. Hence, I pass the following order:

ORDER

The writ petition stands ***dismissed***.

**Sd/-
JUDGE**

In.