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IN THE HIGH COURT OF ORISSA AT CUTTACK

**W.P.(C) No. 10367 OF 2006**

(An application under Articles 226 & 227 of the  
Constitution of India)

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***Prasanna Kumar Mohapatra*** ..... ***Petitioner***

***-Versus-***

***Gokuli Bhoi and others*** ..... ***Opp. Parties***

*Advocates appeared:*

*For Petitioner* : Dwarika Prasad Mohanty, Advocate

*For Opp. Parties* : None

**CORAM :**

**MR. JUSTICE K.R. MOHAPATRA**

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**Heard and disposed of on 24.04.2024**  
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**JUDGMENT**

1. This matter is taken up through hybrid mode.
2. Order dated 10<sup>th</sup> July, 2006 (Annexure-1) passed by learned Civil Judge (Senior Division), 1<sup>st</sup> Court, Cuttack in T.S. No.382 of 1993 is under challenge in this writ petition, whereby an application filed by the Petitioner praying *inter alia* to direct the Defendants to effect delivery of possession of the suit property through process of Court, has been rejected.
3. Mr. Mohanty, learned counsel for the Petitioner submits that T.S. No.382 of 1993 was filed for declaration of title in respect of suit property and to direct the Defendants to transfer the ownership of the suit land in favour of the Plaintiff along



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with other consequential reliefs. Although the prayer was made for declaration of title in respect of the suit property, but the suit is in fact for specific performance of contract, which was also observed by learned trial Court in its order dated 1<sup>st</sup> March, 1995 by which the suit was disposed of *ex parte*. *Ex Parte* decree was drawn up on 10<sup>th</sup> March, 1995.

4. Mr. Mohanty, learned counsel for the Petitioner drew attention of this Court to the opening lines of the *ex parte* order, which reads as under:

*“Though the Plaintiff has filed the suit for declaration of his title in respect of the suit schedule land and for transfer of ownership by the defendants in favour of the plaintiff, it is a suit for specific performance of contract for execution of sale deed in favour of the Plaintiff by the defendants in respect of the suit schedule land.....”*

Thus, learned trial Court accepting the suit to be one for specific performance of contract, disposed of the same vide *ex parte* judgment dated 1<sup>st</sup> March, 1995 (Annexure-2) with the following order:

*“The suit is decreed ex parte against the defendants with costs. The defendants are directed....(torn) execute and register the sale deed in favour of the plaintiff on receipt of Rs.1,000/- from the plaintiff within two months hence, failing which the plaintiff may get the sale deed execute and register through the process of the court on depositing Rs.1,000/- on due notice to the defendants.”*

4.1. Since the Defendant did not come forward to execute the sale deed in terms of the decree passed in the suit, the Plaintiff-



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Petitioner presented the sale deed along with challan of Rs.1,000/- for its registration. Accordingly, the sale deed was registered on 11<sup>th</sup> September, 1998 under Annexure-4. But, delivery of possession was not given to the Plaintiff-Petitioner. Hence, he filed an application under Section 22(3) of the Specific Relief Act, 1963 (for brevity 'the Act') in the same suit for delivery of possession. Learned trial Court in the impugned order under Annexure-1, refused to entertain the application on the ground that the *ex parte* decree was not a preliminary decree. Thus, institution of a final decree proceeding did not arise. It further held that direction for delivery of possession through the process of Court would amount to travel beyond the decree and thus, an application to draw a final decree would not be maintainable. In order to execute the decree, the Plaintiff is required to file an execution case. The Petitioner being aggrieved by the said order, has filed this writ petition.

5. Mr. Mohanty, learned counsel for the Plaintiff-Petitioner further submits that although the application was made under Section 22(3) of the Act, but for all practical purposes, it should have been construed to be a petition under Section 28(3) of the Act. Drawing attention to the provision under Section 28(3) of the Act, it is submitted that the Court, which passed a decree for specific performance of contract, does not lose its jurisdiction to direct for delivery of possession in a suit for specific performance of contract, if an application is filed in that respect.



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In support of his submission, Mr. Mohanty, learned counsel for the Petitioner relied upon the case of **Joseph and another –v- Joseph**, reported in AIR 1997 KERALA 301, in which at Paragraphs-7, it is held as under:

*“7. The Supreme Court in Ramankutty Guptan v. Avara MANU/SC/1564/1994: (1994) 2 SCC 642 (AIR 1994 SC 1699), laid down that the Execution Court is not the "same Court" within the meaning of Section 28 of the Specific Relict' Act. The question that arose there was whether an application under Section 28 of the Specific Relief Act, 1963 should be filed on the original side or execution side. It was held that the 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. Earlier in the same case as reported in ILR (1993) Ker 197, this Court took the identical view while interpreting the expression "in the same suit" occurring in Sub-section (1) of Section 28 of the Specific Relief Act, 1963.”*

**5.1** In the case of **Ramankutty Guptan –v- Avara**, reported in AIR 1994 SC 1699, Hon’ble Supreme Court has laid down 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 contract 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*



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*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.”*

5.2 He, therefore, submits that a separate execution case is not required to be filed seeking for delivery of possession of the suit land. An application under Section 28(3) would be maintainable in the same suit for delivery of possession of the property in a suit for specific performance of contract. He, therefore, prays for setting aside the impugned order under Annexure-1 and to direct learned trial Court to take steps for delivery of possession of the suit property to the Plaintiff-Petitioner.

6. None appears for the Defendants-Opposite Parties although they are represented through learned counsel.

7. Considering the submission made by Mr. Mohanty, learned counsel for the Petitioner and on perusal of record, it appears that the suit was disposed of vide *ex parte* order dated 1<sup>st</sup> March, 1995 and the *ex parte* decree was drawn up on 10<sup>th</sup> March, 1995 by learned Civil Judge (Senior Division), 1<sup>st</sup> Court, Cuttack in T.S. No.382 of 1993 directing the Defendants to execute and register the sale deed in favour of the Plaintiff on receipt of Rs.1,000/- from the Plaintiff within a period of two



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months failing which the Plaintiff-Petitioner was at liberty to get the sale deed executed and registered through the process of Court on depositing Rs.1,000/- on due notice to the Defendants. Accordingly, the Plaintiff stated to have approached the Defendants for execution of the sale deed by accepting Rs.1,000/-. Having failed in his attempt to get the sale deed executed and registered, the Plaintiff got the sale deed executed and registered through Court on deposit of Rs.1,000/-.

**7.1.** As the Plaintiff was not delivered with the possession, he filed an application in the disposed of suit under Section 22(3) of the Act seeking for delivery of possession. Learned trial Court holding that the Court is not in seisin of a final decree proceeding, dismissed the application with an observation that the Plaintiff was required to institute separate execution case for delivery of possession.

**8.** Law is no more *res integra* in the cases of ***Joseph and another*** (supra) and ***Ramankutty Guptan*** (supra) that an application for delivery of possession under Section 28(3) (b) of the Act would necessarily be filed in the same suit. It would obviously mean in the suit itself and not in an execution proceeding. Law is also equally clear that after passing of the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains the control over the decree even after the decree has been passed. Thus, learned trial Court was competent to exercise the power under Section 28(1)



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of the Act either for extension of time or for rescinding the contract or in particular cases, for delivery of possession, partition and separate possession of the property, if deed of conveyance has already been executed.

**9.** In view of the above, the impugned order under Annexure-1 is not sustainable and is accordingly set aside. Learned trial Court is directed to take steps for delivery of possession to the Plaintiff-Petitioner following due procedure of law.

**10.** With the aforesaid observation and direction, the writ petition is disposed of..

Urgent certified copy of this judgment be granted on proper application.

***(K.R. Mohapatra)***  
***Judge***

*Orissa High Court, Cuttack,  
Dated 24<sup>th</sup> April, 2024/Madhusmita*