

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST.) NO.1382 OF 2015

Surekha Rajendra Pawar through Power of Attorney
Holder Devidas Balasaheb Lonkar ... Petitioner
Vs.
Uday Jagannath Ghodke and others ... Respondents

WITH

WRIT PETITION (ST.) NO.1383 OF 2015

Kalidas Yashwantrao Lonkar ... Petitioner
Vs.
Uday Jagannath Ghodke and others ... Respondents

Mr. Devidas B. Lonkar, Petitioner in WP (St.) No.1382 of 2015 and
Mr. Kalidas Y. Lonkar, Petitioner in WP (St.) No.1383 of 2015.
Mr. A. V. Anturkar, Amicus Curiae.
Mr. P. J. Thorat for Respondent No.1..

CORAM : R. G. KETKAR, J.
Reserved on: 5TH AUGUST, 2015
Pronounced on: 11TH AUGUST, 2015

ORDER :

Heard Mr. Devidas B. Lonkar, petitioner in Writ Petition (St.) No.1382 of 2015, Mr. Kalidas Y. Lonkar, petitioner in Writ Petition (St.) No.1383 of 2015, Mr. Anturkar, learned Amicus Curiae and Mr. Thorat, learned Counsel for respondent No.1 at length.

2. Writ Petition (St.) No.1382 of 2015 is instituted by the judgment debtor No.1(g) challenging the judgment and order dated 09.12.2014 below exhibit-79 as also the judgment and order dated 09.12.2014 below exhibit-99 passed by the learned 2nd Joint Civil Judge, Junior Division, Pune in Regular Darkhast No.210 of 2013. Writ Petition (St.) No.1383 of 2015 is instituted by the judgment debtor No.1 also challenging the same judgments and orders. Since the common questions of law and fact arise in these Petitions, the same can conveniently be disposed of by this common order.

3. Regular Darkhast No.210 of 2013 is instituted by Shantabai Waman Sable through her PoA Holder Ananda Waman Sable for executing the decree passed in Regular Civil Suit No.1141 of 1987. The Suit was decreed on 31.07.1997. Aggrieved by that decision, Civil Appeal was preferred before the District Court, which was dismissed on 04.09.2001. By these orders, the Courts below decreed the Suits by holding that plaintiffs are entitled to possession of their 3/5th share in the suit lands. Aggrieved by that decision, Second Appeal No.62 of 2002 was preferred in this Court. That was dismissed on 10.06.2013. The S.L.O. was dismissed on 21.10.2013. Review Petition was dismissed by the Apex Court on 24.07.2014. The Curative Petition was also dismissed on 15.06.2015.

4. Judgment debtor No.4 - Surekha Rajendra Pawar filed application exhibit-79 dated 16.09.2014 under Section 47 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for staying the Darkhast till the objections raised by the judgment debtors are decided. By order dated 09.12.2014, the learned trial Judge rejected the application on the ground that the objections raised were also raised in the earlier litigation, and therefore, the principles of res judicata will be applicable. The learned trial Judge held that there is no substance in the objections raised by the judgment debtor No.4.

5. One Shri Uday Jagannath Ghodke filed application exhibit-48 on 12.06.2014 inter alia contending that the decree-holder Shantabai Sabale had executed registered sale deed in his favour on 18.01.2014, and therefore, the Darkhast may be amended by substituting him in the place of decree-holder Shantabai Wamanrao Sabale. By order dated 19.11.2014, the learned trial Judge allowed the application. Judgment debtor No.1 filed application exhibit-99 on 25.11.2014 seeking review

of order dated 19.11.2014 and for deleting the name of Mr. Ghodke from the Darkhast. By order dated 09.12.2014, the learned trial Judge rejected the Review Petition. It is against the orders dated 09.12.2014 passed below exhibits-79 and 99, the present Petitions are instituted.

6. Petitions were heard on 29.06.2015. Mr. Devidas B. Lonkar, Power of Attorney Holder of judgment debtor No.4 - Surekha R. Pawar [petitioner in W.P.(St.) No.1382 of 2015] and Kalidas Y. Lonkar, petitioner in Writ Petition (St.) No.1383 of 2015, who is also respondent No.2(a) in Writ Petition (St.) No.1382 of 2015 appeared in person. They submitted that this Court had decided Second Appeals No.61 and 62 of 2002. They submitted that the order passed by this Court was carried in the Supreme Court. The Supreme Court dismissed the S.L.P. Review Petition was also dismissed. It was further stated that Curative Petition is pending. It was submitted that they have apprehension that as this Court decided the earlier Appeals, they will not get justice. A request was, therefore, made to pass "Not Before Me" order. In the order dated 29.06.2015, it was made clear that it was not possible for the Court to pass such type of order and liberty was given to the petitioners to move the Hon'ble the Chief Justice for obtaining appropriate orders.

7. In pursuance thereof, the Registry put up submissions before the Hon'ble the Chief Justice on 08.07.2015. By administrative order dated 13.07.2015, the Hon'ble Chief Justice directed the Registry to place these Petitions before this Court as per the Roster. Accordingly, I have heard the parties. Petitioners have filed written submissions, which are taken on record and marked 'X' for identification. Their statement that they do not want to add anything further was recorded. In Writ Petition (St.) No.1382 of 2015, joint appearance of Mr. Sugandh B. Deshmukh and Mr. Prathamesh Bhargude was filed on behalf of the petitioner. Mr.

Anturkar had earlier appeared in both the Petitions. As the petitioners appeared in person, I requested Mr. Anturkar to assist the Court as Amicus Curiae. He readily acceded to my request and made submissions.

8. In the written submissions, petitioners contended that in the present case, there are two decree holders - Shantabai and Anjanabai. Decree-holder Shantabai has filed Darkhast. Shantabai alone could not have filed proceedings. In any case, Shantabai had sold her share on 18.01.2014 to Uday Jagannath Ghodke Ghodke. Mr. Ghodke is not a decree-holder and cannot continue the Darkhast proceedings. In support of this submission, petitioners relied upon Order XXI, Rule 10 of C.P.C.

9. Petitioners also relied upon Sections 49, 50 and Section 146 of C.P.C. Section 49 lays down that every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder. Section 50 lays down that where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased. Section 146 of C.P.C. lays down that save as otherwise provided by C.P.C. or by any law for the time being in force, where any proceeding taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. Petitioners submitted that Section 146 also does not apply because of the provisions of Order XXI, Rule 16 and Order XXII, Rule 10 of C.P.C. Order XXI, Rule 16 lays down that where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply

for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Order XXII, Rule 10 apply in cases of an assignment, creation or devolution of **any interest during the pendency of a suit** and with the leave of the Court, the Suit may be continued by or against the person to or upon whom such interest has come or devolved. It was submitted that Shri Ghodke is not a transferee of the decree. What is transferred under the sale deed is the property and not the decree. Mr. Ghodke cannot claim to be transferee of the decree as contemplated by Section 49 as also a legal representative of Shantabai during her life time, as contemplated by Section 50.

10. Petitioners further submitted that the Darkhast cannot continue unless the decree passed in R.C.S.No.92 of 1911 is executed. In that Suit, compromise decree was passed on 27.02.1935. Clause 3 of the compromise decree recorded that after demise of four daughters of Rama and defendant No.4 Radhabai and her daughter Sonubai, suit lands will revert to three co-sharers or their heirs in equal proportion. Shantabai is still alive and so long as she is alive, compromise decree dated 27.02.1935 passed in Regular Civil Suit No.92 of 1911 cannot be executed.

11. Mr. Anturkar submitted that after the S.L.Ps were dismissed on 21.10.2013, decree-holder Shantabai executed registered sale deed in favour of Mr. Ghodke on 18.01.2014. By that sale deed, Shantabai had sold her share in the suit lands. In other words, Shantabai did not assign or transfer decree in favour of Mr. Ghodke. Mr. Ghodke, therefore, cannot be substituted in place of Shantabai and consequently, cannot continue the Darkhast proceedings.

12. On the other hand, Mr. Thorat supported the impugned orders. He submitted that Mr. Ghodke filed application exhibit-48 for substituting him in the place of decree-holder Shantabai Wamanrao Sable. Say was filed on behalf of the judgment debtors, which reads as under:

“Say of J.D. Considering the Sale Deed on record, no objection to make party to the purchaser. Adv. for J.D.”

13. The learned trial Judge thereafter passed order on 19.11.2014, which reads as under:

“Perused application and say filed by J.D. Considering the no objection of J.D. and transfer of property in the name of Uday Jagannath Ghodke, he is now a necessary party to the darkhast have to be added and as prayed the name of Shantabai Wamanrao Sable be deleted.”

14. Mr. Thorat submitted that as the judgment debtors give no objection, it is not open to them to file review of order dated 19.11.2014. The learned trial Judge has rightly allowed application exhibit-48 on 19.11.2014. He submitted that judgment-debtor No.1 filed application for review, exhibit-99. The learned trial Judge rejected the application. As far as order below exhibit-79 is concerned, he submitted that objections raised on the ground that unless the consent decree dated 27.02.1935 passed in R.C.S.No.92 of 1911 is executed, decree-holder cannot file Darkhast for execution of decree passed in R.C.S.No.114 of 1987, were agitated in the earlier round of litigation. The learned trial Judge was, therefore, justified in rejecting the application.

15. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As far as challenge to the order dated 19.11.2014 below exhibit-48 and the order dated 09.12.2014 below exhibit-99 is concerned, I do not find any merit. As noted earlier, Mr. Ghodke filed application

exhibit-48 for substituting him as a decree-holder in the place of Shantabai Wamanrao Sable. Advocate on behalf of the judgment-debtors gave no objection. The learned trial Judge allowed the application after recording that judgment-debtors did not object to his application. It is, therefore, not open to the judgment-debtors to challenge the substitution of Mr. Ghodke in the place of Shantabai Wamanrao Sable.

16. Petitioners relied upon provisions of Sections 49, 50, 146, 150 as also Order XXI, Rules 10 and 16 and Order XXII, Rule 10 of C.P.C. Section 49 lays down that every transferee of a decree shall hold the same, subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder. Order XXI, Rule 16 lays down that where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

17. Explanation II of High Court Amendments (Bombay) to Order XXI, Rule 16 reads thus,

“Explanation II.- Nothing in this rule shall affect the provisions of Section 146, **and a transferee of rights in the property, which is the subject matter of the Suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule.**” (emphasis supplied)

18. Perusal of Explanation II extracted hereinabove shows that nothing in Rule 16 of Order XXI shall affect the provisions of Section 146 **and a transferee of rights in the property, which is the subject**

matter of the Suit, may apply for execution of the decree without a separate assignment of the decree as required by the rule. The reliance placed by the petitioners on the provisions of Sections 49, 50, 146, 150 as also Order XXI, Rules 10 and 16 and Order XXII, Rule 10 of C.P.C. is wholly misconceived for more than one reason. In the first place, judgment-debtor gave no objection for substituting Mr. Ghodke as a decree-holder. Secondly, in view of Explanation II to Order XXI, Rule 16 of the High Court Amendments (Bombay), a transferee of rights in the property, which is the subject matter of the Suit, can apply for execution of the decree without a separate assignment of the decree as required by Order XXI, Rule 16 of C.P.C.

19. As far as the other objection raised by the petitioners that unless the decree passed in R.C.S.No.92 of 2011 is executed, the present decree cannot be executed is concerned, in paragraph 3 of the impugned order, the learned trial Judge has recorded a categorical finding that the objections raised herein were raised earlier during the adjudication of the Suit by the parties. Thus, objections were already decided by the Courts and the same objections cannot be entertained as they are hit by the principles of *res judicata*. I have carefully perused the judgments in the earlier round of litigation. I do not find that the learned trial Judge has committed any error in overruling the objections for the reasons mentioned in paragraph 3 of the impugned order. Hence, Petitions fail and the same are dismissed. The Executing Court is requested to dispose of the Darkhast proceedings within 6 months from the production of the authenticated copy of this order.

(R. G. KETKAR, J.)