

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1518 OF 2015

Jayant Dharshi Shah : Petitioner.
Versus
Sushilaben Zaverchand Shah : Respondent

**Mr. Rajesh Shah with Mr. Chetan Yadav i/by M/s. R V & Co. for the
Petitioner.**
Mr. Sham V Walve for the Respondent.

CORAM : R. M. SAVANT, J.
DATE : 03rd March 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 17/12/2014 passed by the learned Judge of the City Civil Court, Greater Mumbai by which order the Application being Chamber Summons No.1464 of 2010 came to be allowed and the directions as contained in the operative part of the impugned order came to be issued.

2 The Petitioner herein is the original Defendant to the suit in question which was originally filed in this Court and bore High Court Suit No.1828 of 2006. The Respondent herein is the original Plaintiff and is the sister-in-law of the Petitioner herein i.e. the original Defendant. The suit in question was filed for partition of the suit property in which the Plaintiff claimed 50% of the share. The said suit came to be decreed by a learned Judge of this Court on account of the acceptance of the fact that the parties admitted

that they have 50% share each in the suit property. The suit property is a land and the structure standing thereon including tenanted building as described in the plaint. The said decree in its entirety is reproduced herein under for the sake of ready reference :-

“1. This is a partition suit between the sister-in-law and the brother-in-law. The parties admit that they have a 50% share in the suit property. The suit property is land and the structure standing thereon including the tenanted building as described in plaint.

2. The parties would be entitled to $\frac{1}{2}$ share each in the immovable property itself as well as the rents, income and profits of the said property. Since the relationship between the parties, share of the parties as well as the suit property itself is admitted a preliminary decree for partition is required to be at once passed. Both Counsel agree that the decree be passed.

3. The Plaintiff and the Defendant shall be entitled to a $\frac{1}{2}$ share in the rents, income and profits of the suit property.

4. The Plaintiff and the Defendant shall also be entitled to $\frac{1}{2}$ share each in the proceeds of the suit property.

5. Both Counsel state that they shall negotiate to sell the suit property. The suit property shall be sold to the purchaser obtained by either party. The higher offer obtained by either party shall be accepted. Until the sale is effectuated, the Defendant agrees to give the Plaintiff her admitted $\frac{1}{2}$ share in the rents, income and profits of the suit property after deducting the taxes and expenses therefrom. Such rents, income and profits shall be given on 30th June and 31st December of each year until the property is sold. The first of such installment shall be given on 31st July, 2009.

6. The Defendant shall not transfer any tenancy or

create any 3rd party rights except with the consent of the Plaintiff.

7. The Defendant agrees that the Defendant shall give credit to the Plaintiff at the time of distribution of the parties $\frac{1}{2}$ share to the extent of the amounts received upon the tenancies already transferred by the Defendant without the consent of the Plaintiff.

8. Suit as well as Notice of Motion are disposed of accordingly.”

3 A reading of the said decree therefore ex-facie discloses that the parties admitted that they have 50% share in the suit property. It is on the said basis that the parties were held entitled to $\frac{1}{2}$ share each in the suit property as well as the rents, income and profits of the said property. In view of the admitted position, the learned Single Judge of this Court deemed it appropriate to pass a preliminary decree in terms thereof. By virtue of clause (5) the parties had agreed that they would negotiate to sell the suit property to the higher offerer. It was further agreed that until the sale is effectuated, the Defendant agrees to give the Plaintiff her admitted $\frac{1}{2}$ share in the rents, income and profits of the suit property after deducting the taxes and expenses therefrom. It was further agreed that such rents, income and profits shall be given on 30th June and 31st December of each year until the property is sold. By virtue of clause (7), it was agreed that the Defendant shall give credit to the Plaintiff at the time of distribution of the parties $\frac{1}{2}$ share to the extent of the amounts received upon the tenancies already transferred by the Defendant

without the consent of the Plaintiff. It seems that the Plaintiff called upon the Defendant to comply with the decree in question to which it seems that there was no favourable response from the Defendant. This resulted in the Plaintiff filing Execution Application in the year 2010 which was initially filed in this Court and thereafter transferred to the City Civil Court, Greater Mumbai on the pecuniary jurisdiction of the City Civil Court, Greater Mumbai being enhanced, and now bears the number Execution Application No.178 of 2013. The said Execution Application contains various Heads from (A) to (J). The objection of the Petitioner is to the Head bearing alphabets (G) and (J). It is the case of the Defendant i.e. the Petitioner herein that the same goes beyond the decree.

4 The Plaintiff filed the instant Chamber Summons Nos. 1464 of 2010 and the reliefs sought by way of the said Chamber Summons were by way of prayer clauses (a) and (b) which read thus :-

“(a) that the matter be referred to the Commissioner for taking Accounts High Court to sell the suit property by Public Auction and after deducting costs, charges and expenses divide the sale proceeds equally between the parties and pay to the Plaintiff her one-half share and pay to the Defendant his one-half share after deducting the amount payable by the Defendant to the Plaintiff for her share in rents, profits and income and the amount received by the Defendant for transfer of tenancies effected by him without the consent of the Plaintiff.

(b) that matter be referred to the Commissioner for taking Accounts, High Court to ascertain the exact

amount payable to the Plaintiff for her share in rents, profits and income and the amount received by the Defendant for transfer of tenancies effected by him without the consent of the Plaintiff and after giving credit for the amount if any, received by the Plaintiff to pay to the Plaintiff the balance amount due and payable by the Defendant to the Plaintiff from the amount of one-half share of the Defendant coming to his share from the sale proceeds of the suit property.”

The said prayer clauses (a) and (b) are referable to to the decree dated 12/6/2009 which has been passed by a learned Single Judge of this Court.

5 The said Chamber Summons and in fact the Execution Application was opposed to on behalf of the Defendant inter-alia on the grounds which are found in the Affidavit in Reply. A reading of the Affidavit in Reply discloses that in raising the said grounds more so in the teeth of the decree that has been passed the intention of the Defendant is very clear viz that he is not willing to abide by the said decree. The grounds set out in the said Affidavit in Reply are such that the said facts were very much in existence when the decree was passed, and therefore, raising of the said grounds post passing of the decree and after the application for execution has been filed can only be attributed to the fact that the Defendant wants to stall the execution of the decree on one ground or the other.

6 The Trial Court i.e. the learned Judge of the City Civil Court, Greater Mumbai considered the said Chamber Summons No.1464 of 2010 and

has by the impugned order dated 17/12/2014 has allowed the said Chamber Summons and granted the reliefs which were sought vide prayer clauses (a) and (b) thereof. The contention raised on behalf of the Defendant that since the decree is a preliminary decree, it is unexecutable has been rejected by the Trial Court by observing that the decree itself spells out that both the Plaintiff and the Defendant would be entitled to $\frac{1}{2}$ share each in the immovable property as well as in the rents, income and profits of the said property. The learned Judge of the City Civil Court, as the impugned order discloses, adverted to the correspondence, letters, notices issued by the Plaintiff to the Defendant to show that the Defendant is not ready to abide by the decree passed in the said Notice of Motion No.2069 of 2006. The objection as regards the decree being a preliminary decree has also been answered by the Trial Court against the Defendant by holding that in the present case the question of determining rights of the parties by metes and bounds does not arise, as in the decree passed in Notice of Motion it was directed to sell the suit property to the higher bidder. The Trial Court has distinguished the case laws cited before it wherein it was laid down by the Apex Court that unless a final decree is passed and it is engrossed on a stamp paper, the decree is not executable by holding that looking to the nature of the decree passed it could not be said that it is a preliminary decree. The Trial Court observed that the decree was executable right from the day when it was passed, and that the said decree is not necessary to be engrossed on the stamp paper as nothing is to be transferred in

favour of either Plaintiff or Defendant under the present decree.

7 The learned counsel appearing on behalf of the Petitioner herein i.e. the original Defendant Shri Rajesh Shah would reiterate the case of the Defendant before the Trial Court as regards unexecutable of the decree being preliminary decree as also on the ground that the occasion to put the decree into execution has not arisen.

8 In my view, it is not possible to accept the contentions urged on behalf of the Petitioner/Defendant. As indicated above the decree itself specifies the share of the Plaintiff and the Defendant which share both the parties admittedly agreed. The decree also specifies the share of the parties in the rents, income and profits of the suit property as also how the adjustment is to be made in respect of the amount which has been received by Defendant upon the tenancies already transferred by the Defendant without the consent of the Plaintiff prior to passing of the decree. Hence looking to the nature of the decree that was passed as long as back in the year 2009, in my view, the finding of the Trial Court that the procedure of final decree being passed and the same being engrossed on a stamp paper need not be followed cannot be taken exception to. Similarly the objection to clauses (G) and (J) in the Execution Application is without substance having regard to the nature of the decree passed.

9 The facts of the present case disclose the intention of the Petitioner/Defendant. The intention can be said to be writ at large in so far as the reluctance of the Defendant to abide by the decree in question. This is one more instance where a Defendant who is in possession of the property and has to comply with the decree is obstructing the decree being executed on one ground or the other. The Writ Court obviously cannot entertain such pleas on behalf of such a party. In that view of the matter, no case for interdiction in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]