IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9193 OF 2015

WITH

WRIT PETITION NO.9952 OF 2015

M/s. Om Shanti Commercial Premises Co-Operative Society Ltd.	]]	… Petitioner
Versus		
M/s. Arcade (India) Pvt. Ltd.	]	… Respondent

Mr. S. S. Kulkarni i/b Mr. R. M. Pethe for Petitioner in both Writ Petitions.
Mr. P. O. Verghese for Respondent in both Writ Petitions.

CORAM :- M. S. SONAK, J.
DATE :- OCTOBER 13, 2015

P. C. :-

1. These two petitions can be disposed of by a common order, since they relate to the very same execution proceeding i.e. Special Darkhast No.104 of 2010. The challenge in these two petitions is to the orders dated 28/08/2015 and 15/09/2015 made below Exh.133 and Exh.144 respectively. By order dated 28/08/2015, the Executing Court has dismissed petitioner's application seeking report from some other Architect or seeking direction to the Architect (Court Commissioner) earlier appointed to furnish a fresh report with specific direction to report as to whether the existing building at the suit site is in accordance with the plan at Exh.250 and till then stay the further

execution of the decree for specific performance. By order dated 15/09/2015, the Executing Court has dismissed he petitioner's application at Exh.144 seeking enquiry upon application under Section 47 of CPC by framing of issues and leave to lead oral and/or documentary evidence to substantiate the contentions raised by him vide the say application under Section 47 of the CPC at Exh.136. Further, leave was applied to cross-examine M/s. Deole and Brothers (Court Commissioner) in respect of their report dated 20/06/2015 in the execution proceedings.

2. Mr. Kulkarni, learned Counsel for petitioner, submitted that 27 shops to which reference is made in the agreement (booking memo dated 11/05/1987) do not really exist at the suit site. This is because the plans for the project were revised and in pursuance of such revision, it is not possible to identify the 27 shops, in respect of which decree of specific performance was granted by the Trial Court on 17/07/2010. The Court Commissioner has submitted a report which travels far beyond the commission assigned to him and therefore the report ought not to have been accepted. In these circumstances, Mr. Kulkarni submitted that the application at Exh.133 was required to be allowed. Mr. Kulkarni further submitted that the application under Section 47 of the CPC is still pending consideration. In terms of Section 47 of the CPC, all questions which arise in the course of execution are required to be determined by the Executing Court. The issue of identification of the property will be an issue that is required to be determined under Section 47 of the CPC and for that

purpose, it is necessary that proper issues are framed and opportunity of leading evidence is granted to the petitioner. Inasmuch as the impugned order dated 15/09/2015 has denied the reliefs in application at Exh.144, there is failure to exercise jurisdiction. For all these reasons, Mr. Kulkarni submitted that the impugned order be set aside.

3. Mr. Verghese, learned Counsel for decree holder, submitted that since the making of the decree of which execution is applied for, several proceedings have been instituted by the petitioner in order to obstruct the execution of the decree. After the substantive appeal challenging the decree failed, the petitioner claimed that it has an independent right and on the said ground, sought to obstruct the execution of the decree. The obstructionist proceedings were dismissed not just by the Executing Court but also by this Court and the Hon'ble Apex Court. By way of a third round of litigation, applications of the nature which have been dismissed by the impugned order, have been filed by the petitioner with the sole objective of depriving the decree-holder the fruits of the decree obtained by them. Mr. Verghese submitted that the equitable jurisdiction under Article 227 of the Constitution of India may not be exercised to assist such judgment-debtor to frustrate the executing proceedings. Mr. Verghese placed reliance upon the decision of this Court in the case of ***Warna Valley Sahkari Kharedi Vikri Society Limited Versus Ashok J. Gaikwad & Ors.***[1]

1 2015 (5) Bom.C.R. 338

4. Rival contentions now fall for my determination.

5. In this case, the decree of which execution has been applied for was made by the Trial Court on 17/07/2010. The decree was made against the original defendants and it is now settled that the petitioner is the successor in interest qua the defendant/judgment-debtor and therefore, has stepped into the shoes of the original defendant/judgment-debtor. The substantive appeal against the decree dated 17/07/2010 dismissed by this Court on 19/07/2012. In execution proceedings which ensued, the petitioner, who is held to be transferee *pendente lite* filed obstructionist proceedings claiming an independent right and that it is not bound by the specific performance decree dated 17/07/2010. Whilst the obstructionist proceedings were pending, the petitioner instituted Writ Petition Nos.8141 of 2013 and 8142 of 2013, seeking certain reliefs in the context of their claim.

6. By Judgment and Order dated 05/02/2013, the aforesaid two writ petitions were disposed of. Full opportunity was directed to be afforded to the petitioner to make good their claim. Liberty was granted to the parties to lead evidence and directions were issued to the Executing Court to decide the petitioner's obstructionist proceedings in accordance with law. The Executing Court, by order dated 21/03/2014, dismissed the obstructionist proceedings, *inter alia*, by holding that the petitioner can claim no independent right but was bound by the specific performance decree dated 17/07/2010.

7. The petitioner thereupon instituted First Appeal No.468 of 2014 before this Court which was dismissed on 16/01/2015. The Division Bench of this Court reiterated that the petitioners are transferee *pendente lite* and therefore cannot claim any independent right but rather, were bound by the decree dated 17/07/2010. Thus, in effect, the validity of decree dated 17/07/2010 and its executability qua the petitioner has virtually been examined in two rounds of litigations. The first round concerned the substantive challenge to the decree dated 17/07/2010 and the second round concerned the executability of the decree in the context of claims raised by the petitioner. After the decks were cleared, the execution proceedings were recommenced.

8. Undeterred, the petitioners have taken out an application under Section 47 of the CPC objecting to the execution of the decree on the spacious plea that the property, in respect of which specific performance has been directed, does not even exist at the site, on account of revision of plans. Mr. Kulkarni pointed out that even before the suit was instituted, the plans had been revised and this revision was to the knowledge of the decree holder. If the decree-holders have not chosen to seek the appropriate relief, they cannot be permitted to execute the decree dated 17/07/2010, particularly as the 27 shops referred in the decree are not available at the site or in existence at the site.

9. The Executing Court, appointed the Court Commissioner and the Court Commissioner has submitted a report. It is pertinent to note that the decree made reference to 27 shops in the context of agreement dated 11/05/1997 (booking-memo). The booking memo very clearly made reference the total carpet area of the booked shops as 13170 sq.ft. Therefore, there was no serious ambiguity as such in either the decree made or on the question of identification. The Court Commissioner, particularly in the context of the area booked, has submitted a report that the same is, on account of the revised plans, now spread over about 45 shops having area of 13252.31 sq.ft. and if one of the shops is excluded, the carpet area of the remaining 44 shops would come to approximately 13019.92 sq.ft. corresponding to the property referred to in the decree. The Court Commissioner has therefore identified the property in respect of which decree of specific performance was made. The circumstance that suit property is now sub-divided into larger number of shops, though having lesser individual area, is really not a circumstance which would entitle the petitioner to urge that the suit property does not even exist at the site. Such a plea is obviously an unreasonable one and aimed at protracting the executing proceedings or if possible frustrating the very decree obtained. As noted earlier, the decree made by the Trial Court has been upheld by this Court. The petitioner, a *pendente lite* transferee, claimed that the decree did not bind it. Such claim was rejected by the Trial Court, this Court as also the Hon'ble Apex Court. In the third round i.e. in execution proceeding, the petitioner, taking advantage of the self serving circumstance of revision of plan, has now put forth the

spacious plea that the suit property does not even exist at the site. This obviously cannot be countenanced.

10. Although, the plea was *ex facie* frivolous, the Executing Court appointed a Court Commissioner to visit the site and submit the report. The Court Commissioner has submitted report as aforesaid. The petitioner, thereupon, filed application at Exh.133 seeking appointment of yet another Commissioner or re-directing the Commissioner to submit yet another report. The application was entirely misconceived and has been rightly dismissed by the Executing Court. It is apparent that the suit property which was particularly described in the booking memo dated 11/05/1987 and the document accompanying the same, very much exists at the site. On basis of revision of plan, however, the property which was to comprise 27 shops having particular dimension, is now comprising about 44 shops having lesser dimension. The revision of plan was effected by the judgment-debtor obviously after the execution of agreement/booking memo dated 11/05/1987. On the basis of such self serving circumstance, neither the original judgment-debtor nor the petitioner, who has now stepped into the shoes of the original judgment-debtor, can be permitted to frustrate the execution of the decree of specific performance. The Executing Court has rightly observed that entertaining of objections of such nature would virtually amount to conferring upon the petitioner, a premium for having changed plan after committing the sale of 27 shops in terms of the agreement/ booking memo dated 11/05/1987. The Executing Court is right in

noting that the applications made by the petitioner constituted abuse of the process of the Court. The Executing Court was right in dismissing the application at Exh.133, though, costs imposed by it were too meagre.

11. There is really no qualitative difference between the applications at Exh.133 and Exh.144 made by the petitioner. Accordingly, order dated 15/09/2015, which dismisses the application at Exh.144, warrants no interference, based upon similar reasoning applicable in the context of application at Exh.133. The foundation for the application at Exh.144 is the same i.e. the purported non-existence of the suit property at the site and the consequent inexecutability of the decree of specific performance. It is clear that the entire objective behind the filing of such application is to inordinately protract the execution proceedings. The Executing Court has considered the factual and legal position in great details and rightly dismissed the application at Exh.144. Record bears out that petitioner has been offered ample opportunity in the matter of its defence. The petitioner however cannot claim a vested right in making applications after applications for the sole purpose of obstructing the execution proceedings and denying the decree-holder the fruits of their decree. At least this Court, in exercise of its extraordinary and equitable jurisdiction under Article 227 of Constitution of India, cannot lend any support to such petitioner in its inequitable misadventure.

12. In the case of ***Satyawati Vs. Rajinder Singh and Another***[2], the Honble Apex Court has made reference to the observations made by the Privy Council in the year 1872 that the difficulties of a litigant in India begin, once he has obtained a decree and has observed that the position has not improved till date. The Hon'ble Apex Court, in strong terms, has deprecated the unreasonable delay in execution of the decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain. The Hon'ble Apex Court approved the decision of the Privy Council in the case of ***Kuer Jang Bahadur v. Bank of Upper India Ltd.***[3] that the Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

13. The Hon'ble Apex Court, in the case of ***Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Others***[4], has observed that procedure is meant to advance the cause of justice and not to retard it. The difficulties of a decree-holder start no sooner he obtains decree for possession. The judgment-debtor then tries to thwart the execution by raising all possible objections. The present case is a clear illustration of the malaise referred to by the Hon'ble Apex Court.

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2 (2013) 9 Supreme Court Cases 491
3 AIR 1925 Oudh 448 (PC)
4 (1982) 1 Supreme Court Cases 525

14. The Hon'ble Apex Court, in the case of ***Marshall Sons & Co. (I). Ltd. Vs. Sahi Oretrans (P) Ltd. and Another***[5], has held that proceedings in execution are dragged on for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time.

15. In the case of ***Shub Karan Bubna alias Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Others***[6], the Hon'ble Apex Court has held that in the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that that difficulties of a litigant begin when he obtains a decree. It is, therefore, necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.

5 (1999) 2 Supreme Court Cases 325
6 (2009) 9 Supreme Court Cases 689

16. The impugned orders in the present petitions are consistent with the law laid down by the Hon'ble Apex Court, which has recommended a conceptual change regarding civil litigation so that emphasis is not only on disposal of suits, but also on securing relief to the litigant. In this case, the petitioner has exhausted every possible avenue to obstruct the execution of the decree. The petitioner seeks to take undue advantage by raising procedural complications which have rightly been thwarted by the Executing Court. The petitioner seeks to obtain undue advantage arising out of its own or out of self serving act of the judgment-debtor in whose shoes the petitioner has stepped. This cannot be permitted. There is really no reason to interfere with the impugned order, except the observation that amount of costs awarded to the decree holder is too meagre.

17. Therefore, both these petitions are dismissed with consolidated costs of Rs.50,000/- (Rupees Fifty Thousand Only). Such costs to be paid by the petitioner to the decree-holder within a period of two weeks from today. The Executing Court to ensure that such costs are paid by the petitioner. Further, the Executing Court is directed to dispose of the execution proceeding as expeditiously as possible and in any case, within a period of three months from today.

(M. S. SONAK, J.)