

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

SECOND APPEAL NO.705 OF 2014

Shri. Sharad Baburao Latkar
Age-52 years. Occ. Business,
R/o. 261, Yadogopal Peth, Satara,
Tal. & Dist. Satara .. Appellant.
(Org.Judgment Debtor)

V/s

1. Shri. Sharad Vasudeo Gujar
Age. 60 years. Occ. Business
R/o. 349, Yadogopal Peth,
Satara.
2. Prashant Ganesh Kulkarni
Age. 50 years. Occ. Classes
R/o. 259, Yadogopal Peth,
Satara .. Respondents.
(Org. Decree Holder)

Mr. V.S. Talkute, for Appellant.
Mr. R.A. Thorat, Senior Counsel i/b Mr. P.B. Gujar, for
Respondents No.1 & 2.

Coram : Smt. R.P. SondurBaldota, J.
Date : 27th February, 2015

P.C.

1) This Second Appeal is directed against the judgment and order dated 19th November, 2014 passed by the District Court, Satara in Regular Civil Appeal No.116 of 2014 upholding the preliminary objection raised by the respondents regarding maintainability of the appeal. The District Court held that the appeal preferred by the appellants herein was not maintainable and dismissed the same. The appellant also challenges the order dated 03rd May, 2014 on Exh.40 & Exh.57 passed by the Executing Court dismissing the applications.

2) The appeal has a chequered history, the brief statement of which, needs to be mentioned here, so as to appreciate the merits of the appeal and the objection to its maintainability. On 02th July, 1991, the respondents filed the Regular Civil Suit No.365 of 1991 against the appellant for declaration of their share to the extent of 10 Ana and 8 Paisa in the suit property and for injunction. During pendency of the suit, the appellant carried out construction of a shed admeasuring 70 ft south-north and 11 ft x 18 ft east-west, on the property in question. Therefore, the plaint was amended to seek the mandatory order for removal of the construction. The appellant also,

on 01st October 1991, filed Regular Civil Suit No.526 of 1991 for injunction and protection of his possession of the suit property and in the alternative for partition. The Trial Court by its judgment and order dated 07th June, 2003 partly decreed the suit of the respondents, declaring their share in the suit property to the extent of 8 Ana and dismissed the suit of the appellant. Both the sides carried the order in appeal to the District Court. Respondents herein, described hereinafter as decree holders, preferred Regular Civil Appeal No.256 of 2003 and the appellant herein, described hereinafter as the judgment-debtor, preferred Regular Civil Appeal No.281 of 2003 and Regular Civil Appeal No.282 of 2003. The District Court by its judgment and order dated 31st October, 2011 allowed the appeal of the decree-holders increasing their share in the suit property to the extent of 10 Ana 8 Paisa and dismissed the appeals preferred by the judgment-debtor. The District Court while allowing Regular Civil Appeal No.256 of 2013, passed the following order :-

- a) The R.C.S. No.365 of 1991 is decreed with costs. It is declared that, Shri Prashant Ganesh Kulkarni-the plaintiff is the owner of C.T.S.No.260 to the extent of 10 and 8 pai share.

b) Sharad Baburao Latkar-the defendant is directed to remove the south-north 70 ft and east-west 11 ft. x 18 ft. construction at his own costs.

c) If, Shri Sharad Baburao Latkar-the defendant fails to remove the said construction, then the plaintiff should get it removed through appointment of Court Commissioner.

3) Being dissatisfied with the order of the District Court, the judgment-debtor filed three Second Appeals, being S.A. No.363/2012, S.A. No.364/2012 and S.A.No.365/2012 in this Court. All the three second appeals were dismissed by the judgment and order dated 28th September, 2012. The judgment-debtor then approached the Apex Court with Special Leave Petitions, which were also dismissed on 22th July, 2013. Still unsatisfied, the Judgment-debtor sought review of order passed by this Court on the Second Appeals by filing Review Petitions No.11 of 2014, No.12 of 2004 and St. No.22748 of 2013. The Review petitions came to be dismissed on 03rd April, 2014.

4) Despite losing in every challenge to the decree, the judgment-debtor failed to comply with the same compelling the decree-holders to put the decree to execution, vide Execution

Application No.48 of 2012. After necessary notice to the judgment-debtor and after hearing him, the Executing Court passed the following order on 24th January 2013.

Order passed below Exh.1, 30, 33, 34 & 35 in R.A.D.No.48 of 2012 :

Heard Advocate for the DH. JD has filed today an application that execution petition be adjourned for one month. It is submitted that, special leave petition is pending in the Hon'ble Apex Court and hence it is just and necessary to adjourn the execution proceedings. It is important to note here that, second appeal filed in the Hon'ble High Court was dismissed on merit and while dismissing that appeal sufficient opportunity was granted to JD to knock the doors of the Hon'ble Supreme Court. Time of 10 weeks was granted to file the SLP. However, record shows that during that period JD has done nothing and immediately after expiry of that period, he filed SLP and started submitting before this executing court that further time need to be granted as the matter is subjudice before the Hon'ble Apex Court. This very approach in my opinion is wrong. The JD would have prefer the necessary SLP within given time. During that period he did nothing and therefore seeking further time on the sayd that matter is subjudice is wrong.

Moreover, despite expiry of 10 weeks ample opportunity was granted to JD. Time of 10 weeks was expired on 07/12/2012. Thereafter the execution petition was adjourned on 13/12/2012 and 04.01/2013. Thus, about a month was given to the JD for getting necessary stay or status-quo. In that period also nothing was done.

Today, even counsel for JD Shri. V.H. Karande Advocate is absent. Adv. Shri S.R. Pawar is present before

me. He submitted that, in the interest of justice it is necessary to grant short time. I am not at all convince with this submissions. More than enough opportunity is granted. Merely because matter is subjudice before any High Court, the executing court must execute the decree within reasonable period and it is infact the duty of the Court. The litigation between the parties is pending since 1991 and decree is confirmed upto the Hon'ble High Court therefore there is no reason to keep adjourning the decree when more than enough time is granted.

The decree is modified in R.C.A. No.281/03, 282/03 and 256/03. In both these appeals JD Sharad Latkar was ordered to remove his construction done in encroached portion. Court Commission was done to measure encroachment made by the JD. It is mentioned in the map filed on 13/06/2012, Exh.23 that A-B is the demarcating boundary line between the properties of DH and JD. Therefore no construction caused by the JD towards east of that line is to be removed. Hence, it is necessary to appoint T.I.L.R. (Asst. Superintendent, land record, Satara) and Jr. Engineer, P.W.D. For demolition of the construction and for delivery of vacant possession to the DH.

As mentioned above sufficient opportunity is granted to the JD. At present there is no stay by any Court to the execution. Hence, I pass the following order.

ORDER

1) TILR (Asstt. Superintendent, land record) Satara and Jr. Engineer of PWD Satara both are hereby appointed as Joint Court Commissioner. They shall fix the demarcated boundary line A-B between the properties of DH and JD and by fixing that boundary they shall remove the unauthorised construction done by the JD in the property of DH and thus demolition that construction handover vacant peaceful possession to the DH.

- 2) The Court Commissioner shall prepare the detail panchnama of handing over the possession to the DH and file the report accordingly to this Court.
- 3) The expenses of Commission work and process fee shall borne by the DH.

5) Immediately, thereafter, i.e. on 28th January, 2013, the judgment debtor preferred the application at Exhibit 40 before Executing Court for setting aside the order contending that order was inexecutable and also sought stay of the order. This application was styled as the application under Section 47 and 74 of Civil Procedure Code. While this application was pending, the judgment debtor on 19th April, 2013 filed another application vide Exhibit 57 for the identical relief. The second application, however, did not specify the provision under which the same was filed. According to Mr. Talkute, appearing for the appellant, it was filed under Order 21 Rule 97 Civil Procedure Code.

6) The decree-holder contested the applications stating that same were not maintainable because applicant could not have approached the Executing Court for setting aside its own order. If the judgment debtor was aggrieved by the order of the Executing Court it was necessary for him to challenge it appropriately before the higher forum. The Executing Court by its order dated 03rd May,

2014 dismissed the applications at Exhibits 40 and 57.

7) The judgment-debtor treated the order of dismissal of the applications as decree and preferred appeal to the District Court vide Regular Civil Appeal No.116 of 2014. Decree holders contested the appeal contending that the order impugned in appeal was not decree within the definition under Section 2 Civil Procedure Code and hence, the appeal filed under Order 41 of Civil Procedure Code was not maintainable. The District Court by its order dated 19th November, 2014 upheld the objection and dismissed the appeal, holding that same is not maintainable. Being aggrieved by that order, the judgment-debtor has approached this court by way of Second Appeal.

8) The relevant observations of the District Court in the order impugned in the present appeal at it's para 22 read as follows :-

If above legal aspects is considered in the lights of facts and circumstances of this case, it seems that objections raised in Exh.40 as well as in Exh.57 by the J.D. is relating to the execution and satisfaction of the decree. Further, the learned Counsel for the J.D. raised objection namely issuing of possession warrant in case of decree of mandatory injunction and when C.T.S. No.260 is joint property. All these questions appears to be

questions between the J.D. and D.H. Who are parties to the suit bearing Regular Civil Suit No.365 of 1991 in which decree has been passed and said judgments are relating to the execution discharge and satisfaction of the decree which clearly comes within the purview of Section 47 of the Code of Civil Procedure. There is no question about right, title and interest of any of the parties or of the D.H. or J.D. On the contrary, the D.H. is declared to be the owner of 10 Ana 8 Pai share in C.T.S. No.260. The objections raised by the District Court how it is to be executed ? Whether the executing court can issue possession warrant when there is decree of mandatory injunction. Therefore, in my view, I do not find any substance that application below Exhibit 57 comes within the purview of Order 21 Rule 97 of the Code of Civil Procedure. Therefore, said order cannot be treated as decree under Order 21 Rule 103 of Civil Procedure Code.

9) As already noted above, the first application filed by the appellant at Exhibit 40 specifically mentions that it was under Section 47 and 74 Civil Procedure Code. The second application at Exhibit 57 filed during pendency of the first application was without specifying the provision of law under which the same was filed. The argument of the appellant is that the second application was under Order 21 Rule 97 of Civil Procedure Code.

10) The provisions of Section 47, 74 and Order 21 Rule 97 relied upon by the appellant are reproduced below for the sake of convenience.

Sec. 47. Questions to be determined by the Court executing decree.-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) omitted by Act 104 of 1976. effective from 1-2-1977

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court

Explanation I: For the purposes of this section, a plaintiff whose Suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the degree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

Sec. 74. Resistance to execution - Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

Order 21, Rule 97 – Resistance or obstruction to possession of immovable property – (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such

property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

[(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]

11) Mr. Talkute, the learned advocate for the appellant submitted that the applications filed at Exhibits 40 and 57 by the appellant were in fact to challenge only that part of the order dated 24h January, 2013 by which the appellant was directed to hand over possession of the property after demolition of the structure mentioned in the decree. He argued that since the appellant is the co-owner of the suit property alongwith the respondents, there could not have been an order for handing over of possession of the suit property. He further submits that the direction of appointment of Court Commissioner can also not be maintained as the decree does not specify location of the shed in question.

12) The Executing Court while dismissing the application of the applicant at Exhibits 40 and 57, observed that for removal of the construction in compliance with the decree, it was necessary to appoint commissioner who would demarcate the property to be

demolished and for that purpose take the measurements. The Executing Court also held that there was no error in granting the order of handing over the possession. In its opinion if the suit property is to be restored to its original position, the direction for handing over of the possession of the land under the shed to the respondents has to be given, otherwise the decree in favour of the respondents would be rendered meaningless.

13) In the opinion of this Court there is no infirmity either in the order of Executing Court or the Appellate Court. The Courts have held that the applications filed by the appellant at Exhibit 40 and Exhibit 57 for recall of the order of the Executing Court were not maintainable. The appeal preferred against the order on the two applications was also not maintainable. If appellant felt aggrieved by order of handing over possession of property to the respondents the only remedy available to him was to challenge the order in the appropriate higher forum. He could not have approached the same court for setting aside the order. It is obvious that the appellant had engineered the applications at Exhibits 40 and 57 with sole intention of avoiding to remove the shed. The appellant not only filed untenable applications but also pursued the same relentlessly.

This conduct of the appellant needs to be deprecated. It is patent abuse of process of law by the appellant which has put the respondents to unnecessary expenses.

14) As regards maintainability of the two applications under Order 21 Rule 97 Civil Procedure Code, apparently no objection was raised before the Executing Court, because its order impugned herein does not refer to it. The order rejects the applications on merits. Mr. Thorat, the learned Senior Counsel submits that the appellant being the judgment-debtor could not have filled application under Order 21 Rule 97 Civil Procedure Code because his claim of title to the suit property has already been adjudicated upon and there is no question of the second round of litigation between the parties.

15) Mr. Talkute, replies relying upon the decision of the Apex Court in *Bhanwar Lal V/s Satyanarain and anr, reported in (1995) 1 SCC page 6*, submits that an application u/o 21 Rule 97 Civil Procedure Code can be made by 'any person' including the judgment debtor. The observations specifically relied upon are “ A reading of Order 21, Rule 97 CPC clearly envisages that “any person” even including the judgment-debtor irrespective whether he claims

derivative title from the judgment-debtor or set up his own right, title or interest dehors the judgment-debtor and he resists execution of a decree, then the court in addition to the power under Rule 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not.” Therefore, the application was maintainable.

16) Careful reading of the decision cited by Mr. Talkute, shows that the same is not an authority on the question that the judgment debtor against whom the decree has attained finality can maintain an application under O.21 Rule 97 to resist execution of the decree. In the facts before the Apex Court the appellant had obtained decree of ejectment, execution of which was obstructed by a third person. The appellant had made an application under O.21 Rule 35(3) Civil Procedure code for police assistance in removal of the obstruction. The court directed him to make an application under O.21 Rule 97 Civil Procedure Code. When the appellant complied with the direction his application was dismissed as being barred by limitation. When he filed yet another application the same was dismissed as being barred by res-judicata. In these facts the Apex court found that “The crux of the question is whether the application

filed on 25-5-1979 by the appellant, though purported to be under Order 21, Rule 35(3) against Satyanarain, is convertible to one under Order 21, Rule 97.” While deciding this question the above observation was made after which the Apex Court further held that The decree-holder gets a right under Rule 97 to make an application against third parties to have his obstruction removed and an enquiry thereon could be done. Each occasion of obstruction or resistance furnishes a cause of action to the decree-holder to make an application for removal of the obstruction or resistance by such person. It is thus clear that the observation relied upon by Mr. Talkute is a passing reference and the same cannot be picked up out of context to say that it is the authoritative pronouncement of law.

17) Reverting to the facts of the present case, the application by the appellant to resist the decree was not maintainable for the simple reason that his every conceivable challenge thereto in every forum was rejected and the decree against him has attained finality. All the issues between him and the respondents have already been adjudicated upon.

18) Mr. Talkute submits that in any case the direction of the Executing Court to hand over possession after removal of the shed

was clearly without jurisdiction, it being beyond the decree. I find no merit in the argument. Because, when the appellant carried out the construction of shed during pendency of the suit, he had deprived the respondents of joint possession of the land under the shed. Direction for restoration of that possession cannot be said to be a direction beyond the decree.

19) The last submission is on the maintainability of the appeal before the District Court. It has been rightly held by the District Court that the order passed on Exh.40 and Exh.57 cannot be called a decree within the meaning of the word u/s 2 Civil Procedure Code and hence, the appeal filed under Order 41 Civil Procedure Code was not maintainable.

20) In the circumstances neither the applications at Exhibits 40 and 57 nor the appeal preferred to the District Court, nor the present Second Appeal is maintainable. The Second Appeal is therefore, liable to be and is dismissed.

21) Mr. Thorat, submits that this is a fit case for award of exemplary costs against the appellant. The respondents have been put to unnecessary expenses by the appellant by abusing the process of law and by filing appeals which were clearly not maintainable.

There is substance in the argument of Mr. Thorat. The appellant is therefore, directed to pay the costs quantified at Rs.50,000/- (Rs. Fifty Thousand Only) to the respondents.

(Smt. R.P. SondurBaldota, J.)