

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11124 OF 2012**

1 Shri Dhondiram Bhimrao More	)	
Age 42, Occ-Business	)	
2 Shri Dipak Gopal Kshirsagar	)	
Age-47 years, Occ Business	)	
both having address at Vita,	)	
Tal Khanapur, Dist Sangli	)	..Petitioners

Vs.

1 Isak Mohan Khatik	)
Age-78 years, Occ-Business	)
At present Mayani, Waduj Road,	)
Near Mayani Chowk, Tal Khatav,	)
Dist Satara	)
2 Sahanavaz Isak Khatik	)
Age-55, Occ-Business	)
R/at Old Wasumbe Road,	)
Adarsh Nagar, Near Adarsh School,	)
Behind Revan-Siddhikrupa Building	)
Tal Khanapur, Dist Sangli	)
3 Salim Isak Khatik	)
Age-53 years, Occ-Business	)
R/At Mayani, Waduj Road,	)
Near Mayani Chowk, Tal Khatav,	)
Dist Satara	)
4 Sou Subhadra Anna Shinde	)
Since deceased, through heirs and	)
Legal representatives,	)
4a Mahadev Anna Shinde	)
Age-47, Occ-Agriculture	)
R/at Mangrul (Chinchni)	)
Tal Khanapur, Dist Sangli	)
5 Mahadev Anna Shinde	)

Age-47, occ-Agriculture)
R/at Karol Baug, Lane No.5, Jaimatadi)
Gold refinery, Tal Khanapur, Dist Sangli) ..Respondents

Mr. A. R. Gole for the Petitioners
Mr. Mahindra Deshmukh for the Respondent Nos.4a and 5

CORAM : R. M. SAVANT, J.
DATE : 8th DECEMBER, 2015

ORAL JUDGMENT

1 Rule. Considering the challenge raised in the above Petition, the same is made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order dated 31-8-2012 passed by the Learned 2nd Joint Civil Judge Junior Division, Vita, by which order, Regular Darkhast No.75 of 2007 filed by the Petitioners for execution of the consent decree dated 22-9-2005 in Regular Civil Suit No,195 of 2005, came to be dismissed on the ground that the said decree is unexecutable. In so far as the said Regular Civil Suit No.195 of 2005 is concerned, the same was filed for injunction by the Petitioners herein who are the tenants in respect of the shop premises wherein they were carrying out tailoring business. In the said Suit, the parties had arrived at a compromise pursuant to which a consent decree was passed in terms of the said compromise dated 18-8-2005. In terms of clause (3) of the compromise the

Respondent Nos.1 to 3 were to hand over possession of an equivalent area to the Plaintiffs on the new construction being completed on the site in question. It was also provided in clause (3) that in the event time for handing over possession is required to be extended, the same would be extended by the mutual convenience of the parties. In view of the fact that the Respondent Nos.1 to 3 did not abide by the said clause (3) though construction on the site in question was completed and did not hand over possession of the premises in question as contemplated by clause (3), the Petitioners filed Regular Darkhast No.75 of 2007 for execution of the said consent decree. It is in the said execution application that the 3 orders in question have been passed on the same date i.e. 31-8-2012.

3 In so far as the first order dated 31-8-2012 is concerned, the same has been passed on Exhibit 84 filed by the Petitioners/decreed holders by which they had sought the division of the shop so as to make the shop of the equivalent area as contemplated by clause (3) of the consent decree. The said application was rejected on the ground that the consent decree does not provide for if the judgment debtor fails to make such construction (of required area) the decree holder will be at liberty to make alteration and will be entitled for its possession. It was held by the Executing Court that allowing the application i.e. Exhibit 84 would amount to the Executing Court going behind the terms of the compromise decree.

Thereafter another order was passed on the same day by which order the application Exhibit 86 for sale of the immovables of the judgment debtor No.2 was rejected on the ground that the same would also amount to going behind the decree and by the last order of the same date, the Executing court has dismissed Regular Darkhast No.75 of 2007 on the ground that the same is unexecutable.

The last order has its origin in the first order passed on Exhibit 84 namely that since the premises of the size mentioned are not available on site, the decree holder cannot be granted possession by making alterations. It is on the said basis that the Execution Application has been dismissed by the Executing Court.

4 It is the submission of the Learned Counsel for the Petitioners that the Executing Court erred in dismissing the execution proceedings on the ground that the decree is unexecutable. It was the submission of the Learned Counsel that since the Respondent Nos.1 to 3 have chosen to make a construction which is not in consonance with the consent decree the Executing Court ought to have seen to it that the consent decree having been passed the same is executed and not frustrated as is sought to be done.

5 Per contra, it is the submission of the Learned Counsel appearing for the Respondent Nos.4a and 5 that the said Respondents had entered into an

agreement with the Respondent Nos.1 to 3 on 13-7-2005 i.e. a month prior to the filing of the Suit and therefore the said Respondents are not bound by the consent decree. It is the submission of the Learned Counsel that since the premises of the size contemplated by the consent decree are not available on site, the Trial Court was right in coming to the conclusion that the decree is unexecutable.

6 Having heard the Learned Counsel for the parties, I have considered the rival contentions. The question that is posed in the instant matter is whether the consent decree in question has become unexecutable. It is required to be noted that the predecessors of the Respondent Nos.4a and 5 with the Respondent Nos.1 to 3 have entered into the compromise on the basis of which the consent decree dated 22-9-2005 came to be passed in the Suit in question filed by the Petitioners. The Petitioners were undisputedly the tenants in premises wherein they were carrying on business of tailoring. Under the consent decree they are entitled to get an area equivalent to the area which was in their possession prior to the demolition of the structure in question and putting up of the new structure. The Petitioners as mentioned above are constrained to file the execution proceedings as the Respondent Nos.1 to 3 and even the Respondent Nos.4a and 5 are not complying with the consent decree. Since the Petitioners were the tenants of the premises in question in the old structure, they are obviously entitled to the allotment of an area equivalent to

the area which was in their occupation prior to the demolition of the old structure, their rights cannot be allowed to be defeated in the manner sought on account of the conduct of the Respondents herein. The decree of which the execution is sought has not been assailed on the ground that such a decree could not have been passed by the Executing Court. The Executing Court has rejected the execution on the ground that the decree has become unexecutable as the premises of the size contemplated by the consent decree are not available. As indicated above the decree cannot be allowed to be frustrated in the said manner.

7 In so far as the contention of the Learned Counsel for the Respondent Nos.4a and 5 is concerned, they have purchased the property by a registered document dated 13-7-2005. The said contention can very well be urged by the said Respondents before the Executing Court, however, that is not the ground on which the Executing Court has dismissed the execution proceedings. The dismissal of the execution proceedings is on the ground that the premises as contemplated by the consent decree is not available on site in question and that no alterations can be carried out. If the Executing Court is of the opinion that the Respondent Nos.4a and 5 in view of the facts that they have purchased the property prior to the consent decree being passed in the said Suit, it is free to record its finding accordingly. However, it would also have to bear in mind the fact that the decree has been passed by a Competent Court and under

which the Petitioners were to get the premises qua which they were to be the tenants.

8 In my view, the interest of justice would be served if all the impugned orders all dated 31-8-2012 are set aside and the matter is relegated back to the Executing Court for a denovo consideration of the Execution Application. Needless to state that on remand the execution proceedings would be heard on their own merits and in accordance with law subject to the observations made hereinabove. The contentions of the parties are kept open. The parties to appear before the Executing Court on 11-1-2016. the Executing Court thereafter to proceed with the execution proceedings expeditiously. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

9 The parties to act upon an ordinary copy of this order duly authenticated by the Court Shirestedar.

[R.M.SAVANT, J]