

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 59 OF 2016

Chetan s/o Devilal Bajaj

.... **APPELLANT**
[ORI. OBJ. PETITIONER]

V E R S U S

Shankar s/o Dattatraya Dagade
& Ors.

..... **RESPONDENTS**
**[R.Nos. 1 & 2 – ORI. D.H. &
R.NO. 3 – ORI. J.D.]**

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Mr. B.R.Warma, Advocate for Appellant.

Mr. B.R.Kedar, Advocate for R.Nos. 1 & 2.

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CORAM : T.V.NALAWADE, J.

DATE : 30th MARCH, 2016

ORAL ORDER :-

. The Appeal is filed against the Judgment and Order of R.C.A. No. 191/2012 which was pending in the Court of the District Judge -2, Jalna and also against the Order made on Exh. 25 in Spl. Darkhast No. 20/2004 by the Civil Judge [Sr. Division], Jalna. Both sides are heard.

2. Spl. Civil Suit No. 192/1998 was filed by Shankar and Jaishree against Devilal Bajaj for specific

performance of contract. There was agreement of sale of some portion [26' x 26'] of CTS No. 786 situated at village Tirthpuri, Tahsil Ghansavangi, district Jalna. The Suit came to be decreed and all the proceedings filed against the decree viz. Second Appeal and Special Leave Petition came to be dismissed. The decision as against Devilal has become final and present appellant Chetan is son of Devilal. Present Appellant was not party to the aforesaid Suit, but when the decision as against Devilal has become final, Chetan filed Spl. Civil Suit No. 589/2011 for relief of partition of the properties which are standing in the name of Devilal and those properties include CTS No. 786.

3. As per the record, the decree holders are in possession of the suit property and in the execution proceeding, there will be only question of execution of the sale deed by Devilal in favour of the decree holders.

4. In the application filed at Exh. 25, present Appellant contended that the property involved in the execution proceeding was owned by Chaturbhuj, father of Devilal and so Chetan has share in the suit property as he is a co-parcener. He contended that he has filed R.C.S. No. 58/2011 against Devilal and others for partition of the property and so the decree given in favour of present respondents Shankar and others can not be executed till the decision of R.C.S. No. 58/2011.

5. After hearing both sides, the executing Court held that whatever relief Chetan wants, he can get in the Suit

filed by him, but he can not create obstruction in the execution of the decree given in Spl. Civil Suit No. 192/1998. The first appellate Court has confirmed this finding.

6. Learned counsel for the appellant drew attention of this Court to the provisions of Section 47 and Order XXI Rule 97 of the Code of Civil Procedure. He placed reliance on 2 reported cases viz. AIR 1998 Supreme Court – 1827 (1) [Shreenath & Anr. Vs. Rajesh & Ors.] and 2008 (1) Mh.L.J. - 340 [Bombay High Court] [Sardar Hasanbhai Attar Vs. Usman Papamiya Attar Shaikh & Ors.]. Learned counsel submitted that the executing Court ought to have given opportunity to the present appellant to lead evidence as enquiry is expected when such objection is taken. It was submitted that as no such evidence was recorded, the order made by the executing Court can not sustain in law. He submitted that in view of the aforesaid provisions of the Code of Civil Procedure, whatever right the present appellant wants to claim, needs to be decided in the objection proceeding itself.

7. This Court has carefully gone through the aforesaid provisions of the Code of Civil Procedure. The provisions of Specific Relief Act are also relevant in the matter like present one. The provisions of Sections 15 and 19 of the Specific Relief Act, 1963 are relevant in the present matter and it can be said that for getting the decree in Spl. Civil Suit No. 192/1998, Chetan Bajaj was not necessary party. In view of the fact that present respondent Nos. 1 and

2 could get the possession of the suit property from Devilal, it can be said that Chetan Bajaj had knowledge about the proceedings and he came forward only when the decree became final.

8. The submissions made show that the sisters of Devilal had relinquished their rights in the suit property in favour of Devilal and the widow of father of Devilal had made gift in favour of Devilal in respect of her share. These circumstances need to be kept in mind while considering the case of Chetan that it was the ancestral property of Devilal. The portion which will be sold under sale deed is a very small portion of CTS No. 786. This circumstance also needs to be kept in mind while considering the objection of the present appellant.

9. In view of the provisions of Section 47 and Order XXI Rule 97 of the Code of Civil Procedure, this Court has no hesitation to observe that Chetan could not have obstructed the execution of the decree given in favour of respondent Nos. 1 and 2 of the present matter. The fact that they are in possession also needs to be kept in mind. The observations made by this Court with regard to the necessity of possession of objection petitioner in the case cited supra were in different context. Similarly, the observations of the Apex Court in the case cited supra were in favour of different party like tenant. In view of the facts and circumstances of the present case and further the circumstance that separate Suit is filed by Chetan to establish his rights against Devilal, this Court holds that both Courts have not committed error in

rejecting the objection petition filed by the present appellant. The law is settled on the points raised by the present appellant. His rights can be decided in the Suit filed by him viz. Spl. Civil Suit No. 57/2011.

10. In the result, Second Appeal stands dismissed. In view of the dismissal of the Appeal, C.A. No. 1012 of 2016 also stands disposed of.

[T.V.NALAWADE, J.]