

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

SECOND APPEAL NO. 27 OF 2016
WITH
CIVIL APPLICATION NO.456 of 2016

Kachru s/o Mahadu Misal

Age 60 years, occup. Agril & business,

R/o Verul/Yellora, Tq. Khultabad,

District Aurangabada

.. Appellant / Orig.

objection petitioner

versus

Paraskumar S/o Balchand Thole,

Age 63 years, occup. Agril.,

R/o Kasabkheda, Tq. Khultabad,

Dist. Aurangabad

.. Respondent /Orig.

Plaintiff / D. H.

Mr. Milind K. Deshpande, Advocate for appellant

Mr. D.S. Bharuka, Advocate for respondent-caveator

CORAM : SUNIL P. DESHMUKH, J.
27TH JANUARY, 2016

ORAL JUDGMENT:

1. This is a second appeal by objection petitioner in regular darkhast bearing number 259 of 2005 pending on the file of executing court [4th Joint Civil Judge, Junior Division, Aurangabad], challenging judgment and order passed by Adhoc District Judge-3, Aurangabad on 06-01-2016 dismissing regular civil appeal no. 216 of 2009 filed by present appellant calling in

question rejection of his objection application (Exhibit-16) in said regular darkhast by executing court under judgment and order dated 14-08-2009.

2. Aforesaid darkhast is being prosecuted by plaintiff - decree holder for execution of judgment and decree dated 26-08-2005 in regular civil suit no. 1313 of 2000 seeking declaration of title and permanent injunction in respect of property bearing block no.699 situated at village Ellora, taluka Khultabad, district Aurangabad.

3. I have heard learned counsel for the parties at considerable length.

4. Mr. M. K. Deshpande, learned counsel appearing for the appellant-objection petitioner submits that the objection such as one taken by him in execution proceedings should be accorded treatment it deserves pursuant to Order XXI, rule 97 of the Code of Civil Procedure, 1908. He submits that the relevant rules and various decisions ordain that objection should receive a treatment as if it is suit proceeding. He refers to rules 100 and 101 of the Code of Civil Procedure which, according to him, envisage that questions about right, title, interest and possession shall be determined by the court in the same. Since no issues had been framed upon lodging of objection by present appellant, there is a gross failure on the part of the executing

court to follow proper procedure. He submits that executing court has overruled the objection and appeal therefrom has also failed as referred to hereinbefore whereas, in fact, purpose could have been served had the order of remand been passed by the appellate court.

5. Having regard to aforesaid, Mr. Deshpande submits that second appeal deserves to be allowed and matter requires to be sent back for proper adjudication to the executing court by framing proper and necessary issues.

6. Mr. Deshpande submits that appellant is in possession of 2 aar land from block no.699. Block no.699 had been owned by his father Mahadu. Out of said block no.699, Mahadu had sold in 1969 an area of 3 acre 24 guntha, i.e. 1 hectare, 44 aar to one Omprakash Hansraj Sethi. In view of area sold to Mr. Omprakash Sethi, learned counsel submits that subsequently, said Omprakash Sethi could not have sold to Mr. Bhaskar Joshi and Panalal Gangwal more area than 3 acre, 24 guntha i.e. 1 hectare, 44 aar and transaction with said persons show that Omprakash Hansraj Sethi dealt with more than 1 hectare 44 aar. He submits that had proper issues been raised, appellant could have been able to establish his case.

7. Mr. Deshpande refers to and relies on quite a few decisions, particularly decisions of the supreme court in the

cases of *Brahmdeo Chaudhary v Rishikesh Prasad*, reported in AIR 1997 SC 856, *Nooruddin vs Dr. K.L. Anand*, reported in (1995) 1 SCC 242 and *Raj Babulal vs Raj Kumar*, reported in (1996) 3 SCC 154, in support of his submission that order XXI, rule 97 and subsequent rules of Code of Civil Procedure are complete code in themselves and that the objections by appellant are required to be adjudicated upon even prior to losing possession to the decree holder.

8. On the other hand, Mr. Bharuka learned counsel appearing on behalf of respondent-decree holder submits that arguments on merits as have been canvassed by appellant have been aptly considered by executing court as well as appellate court. It is submitted that the appellant is indisputably a member of joint family and that the suit had been instituted against the members of joint family, including mother of the appellant and his elder brother. He submits that similar sort of contention had been taken up in defence by said defendants and upon adjudication, the trial as well as appellate courts have found that the defendants had encroached over 6 aar land and as such had passed the decree. It is submitted that in earlier round, regular civil appeal before the district court and second appeal in the high court at the instance of mother of the present appellant had been dismissed. Objection petition thereafter by present appellant is an attempt to procrastinate execution of the decree

and keep the decree holder away from the fruits of the same. He submits that argument of other side that the proceedings initiated by appellant raising objection to execution of the decree should receive proper treatment as envisaged under the concerned rules would weigh with the court only when the claim made under objection petition is supported by some material. According to learned counsel for respondent save and except objection petition, there is no material placed on record by present appellant to show that he is in possession of 2 aar portion as is sought to be claimed. He submits that, in fact, 6 aar land comprising suit property also comprises 2 aar land contained and stated in the objection petition filed by the appellant. He submits that in face of decision in suit being against all members of joint family, appellant cannot claim independent right to the suit property. In the absence of title or authority of the appellant, objection should fail.

9. Mr. Bharuka in support of his contention, refers to and relies on case of *Jagdish vs Chandrapal*, reported in 2007 (1) *Mh.L.J.* 402.

10. The appellate court has taken stock of the situation and has quite elaborately discussed the matter in issue and has further considered the very same contentions as are being advanced on behalf of the appellate before this court.

Considering the reasons as are appearing in paragraphs no. 10 to 13 of the appellate court's judgment dismissing the appeal particularly that the claim of the objection petitioner being not supported by any material and further that the appellant being a member of the joint family, independent objection by him would not have any force and substance.

11. Authorities relied on by appellant are in respect of absolute stranger to the property. Here in present matter, it may not be such a case, for, the objection petitioner-appellant appears to be a member of the joint family consisting of his elder brother defendant no. 12 and mother-defendant no. 1 in the suit. In such circumstances, the cases relied on by appellant may not assist him save and except that an adjudication of objection in the case is required. Said decisions are rendered in different set of facts and as such may not carry the case for appellant forward having regard to the reasons given by appellate court in its judgment.

12. Observations of the decision of three judge bench of the supreme court in the case of "*Silverline Forum Pvt. Ltd., V. Rajiv Trust and Another*" reported in (1998) 3 SCC 723 in paragraphs no. 12 and 14 respectively, to a large extent, would hold the situation in the present matter. Paragraphs No. 12 and 14 read thus:-

“12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. similarly, a third party, who questions the validity of a transfer made by a decree- holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in order 21 Rule 97(2) of the Code, the execution court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

14. It is clear that executing court can decide whether the resistor or obstructor is a person bound by the decree and he refused to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on

*admitted facts or even on the averments made by the resistor:
Of course the Court can direct the parties to adduce evidence
for such determination. If the Court deems it necessary.”*

13. The position after hearing emerges that it is not disputed that the appellant is a member of joint family comprising his brother- defendant no. 12 and mother-defendant no.1 in the suit. Suit was defended on the very same ground that deceased Mahadu had not sold suit property to Omprakash Hansraj Sethi. Such a contention had been raised, evidence in respect of the same had been given in the suit, adjudication suffered at the trial court's level had been taken up to the high court level and challenge at the instance of appellant-defendant to the decree in the suit comprising the area claimed by the appellant had failed. In such circumstances, judgment cited by the respondent-decree holder would come quite close to the present facts and the principles and observations therein would hold the field in the present matter as well.

14. Having regard to reasons given by appellate court referred to above, present second appeal does not raise any substantial question of law.

15. Second appeal, as such, stands dismissed. Civil application does not survive and stands disposed of.

16. At this stage, Mr. Deshpande, learned counsel appearing on behalf of appellant seeks extension of interim relief for a period of six weeks as granted by this court. As such, interim order to continue to operate for a period of six weeks and no further.

SUNIL P. DESHMUKH, J.

pnd