

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.47 OF 2016

DAMODHAR MALHARRAO SAPKAL,
DIED THROUGH LR'S

1. Smt.Narmadabai W/o Damodhar Sapkal,
Age-72 years, Occu-Household,
2. Nanda w/o Ajay Talekar,
Age-47 years, Occu-Household,
3. Sangita D/o Damodhar Sapkal,
Age-46 years, Occu-Household,
4. Shivaji S/o Damodhar Sapkal,
Age-44 years, Occu-Advocate,
5. Parmeshwar S/o Damodhar Sapkal,
Age-40 years, Occu-Agriculture,
6. Maya D/o Damodhar Sapkal,
Age-39 years, Occu-Household,
7. Chaya D/o Damodhar Sapkal,
Age-38 years, Occu-Household,

All R/o Karanja Road,
Beed, Tq. Dist. Beed

PETITIONERS

VERSUS

PANCH COMMITTEE,
Line Galli Beed,
Tq. and Dist. Beed

RESPONDENT

Mr.G.K.Naik Thigle, Advocate for the petitioners.
Mr.P.P.Dawalkar, Advocate for the respondent.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 31/03/2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard by the consent of the parties.

2. The petitioners are aggrieved by the order dated 07/11/2015 passed by the learned District Judge-2, Beed, by which application Exh.22 in Misc.Civil Application No.326/2008 has been rejected.

3. The petitioners submit that they are the original defendants in RCS No.8/1992. Same was decreed by judgment dated 02/09/1993. The petitioners preferred Reg.Civil Appeal No.48/1994 before the Appeal Court. By an order dated 10/06/2008, the appeal was dismissed for want of prosecution. An application for condonation of delay alongwith an application for restoration of the appeal was filed before the Appeal Court. By order dated 24/02/2010, the application for condonation of delay was rejected.

4. It is further submitted that the petitioners, therefore, preferred WP No.3468/2012 before this Court and by judgment dated

07/10/2015, the application for condonation of delay was allowed and the delay was condoned. The Misc.Civil Application No.326/2008 seeking restoration of RCA No.48/1994, is still pending.

5. The petitioners in the meanwhile were facing the execution proceedings in Execution Petition No.11/2009. The Executing Court by order dated 14/07/2010 issued a warrant of possession which was challenged before this Court in WP No.10413/2010. By judgment and order dated 20/04/2015, this Court dismissed the petition and directed the Executing Court to initiate steps for executing the warrant of possession forthwith.

6. The petitioners submit that by the impugned order dated 07.11.2015 below Exhibit 22, the Appeal Court declined to stay the decree. This petition has been moved urgently by the petitioners considering the public notice dated 22/03/2016 by which the decree holder intends to create third party interest in the suit property and is likely to alienate the suit property.

7. Learned Advocate for the petitioners strenuously submits that eventually if the petitioners succeed in getting the appeal restored

and further succeed in the appeal itself, there is every likelihood that the decree would be quashed and set aside. As such, if third party interest is created or if there is any alienation of the suit property, an irreparable harm would be caused to the petitioners.

8. It is further submitted that the Appeal Court should have stayed the decree and should have granted interim protection to the petitioners so as to ensure that the property is neither alienated nor damaged. Reliance is placed upon the judgment of the Hon'ble Supreme Court in the matter of Maharwal Khewaji Trust (Regd.) Faridkot Vs. Baldev Dass (2004) 8 SCC 488. It is contended that the Apex Court has laid down the law that alienation or transfer of the property which is likely to lead to a loss or damage, should be prevented if a party may ultimately succeed in a matter. Multiplicity of proceedings should be avoided. It is, therefore, prayed that the respondent be prevented from alienating the property and executing the decree dated 02/03/1993 delivered in RCS No.8/1992.

9. Mr.Dawalkar, learned Advocate appearing on behalf of the respondent opposes the petition. Contention is that after the decree was passed, the petitioners filed their Regular Civil Appeal No.48/1994. No orders under Order 39 Rule 1 were sought. The

appeal was kept in a dormant state. Eventually, the appeal got dismissed in default on 10/06/2008, which is after 14 years of the institution of the appeal. It is further submitted that as on date the appeal has not been restored. Delay that was caused in filing the Misc. Application for restoration was condoned by this Court. The application for restoration is yet to be decided.

10. It is further stated that this Court by its judgment dated 20/04/2015 has directed the Executing Court to initiate appropriate steps to execute the warrant of possession forthwith. In this backdrop, the learned Advocate submits that no injunctory orders could be passed against the decree holders when the petitioners have failed to acquire any such order from the Appeal Court in the last two decades. He, therefore, prays for the dismissal of this petition with costs.

11. I have considered the submissions of the learned Advocates as have been recorded hereinabove.

12. There is no dispute that the decree dated 02/09/1993 has been challenged by the petitioner in RCA No.48/1994 which has been dismissed in default. There is no dispute that the petitioners have not

pressed any application under Order 39 Rule 1 of the CPC seeking a stay to the decree pending the appeal. From 1994 till 10/06/2008, in a period of 14 years, the petitioners did not seek injunctory orders from the Appeal Court. The fact that the petitioners did not diligently pursue the appeal proceedings, led the appeal Court to dismiss the appeal in default.

13. The decree passed by the Trial Court reads as under :-

- “1. The suit of the plaintiff is decreed with costs.*
- 2. The defendant is hereby directed to remove construction of three shop premises in suit portion A, as shown in the map annexed with plaint and that he is also directed to give vacant possession of suit portion A to the plaintiffs within three months from the date of this order.*
- 3. The defendant is also hereby directed to remove pillars erected by him in suit portion B as shown in the map annexed with plaint within three months from the date of this order.*
- 4. An enquiry be held under Order 20 Rule 12 of CPC in respect of future mesne profits.*
- 5. Decree be drawn accordingly.”*

14. The warrant of attachment of the property was assailed before this Court in WP No.3460/2012. This Court considered the above facts and concluded that the appeal has been dismissed in default

and the same is yet to be restored. Considering the law applicable, this Court dismissed the petition filed by the petitioners by observing in paragraph Nos. 11, 12 and 13 as follows :-

“11 If we go through the observations made by the executing Court, particularly while dealing with application Exh.19, the executing Court was alive to the fact that the appeal of the judgment debtors was twice dismissed in default. This shows the negligent/delaying attitude on the part of petitioners and the petitioners wanted to take benefit of their own wrong by citing cause of pendency of their proceedings in relation to appeal to appeal against the decree under execution. The executing Court has taken into account all facets of the objections raised by the judgment debtors and noticed that the objections are not bona fide. It is required to be noted that the executing Court cannot travel beyond the decree in question and the perusal of the issues, the observations and the verdict of the trial Court reflects great clarity in identifying the suit property in the background of (specifications) in the suit claim. Once the encroachment was specifically established in the suit, raising objection again and again and grant of such objection at the behest of judgment debtors amounts to opening the ponder box. The executing Court, while deciding the Exh.19 and Exh.34 has considered the claim for appointing of Court Commissioner under Order XXVI, Rule 9 of the code of Civil Procedure and for appropriate reasons rejected the same. In my opinion, the reasons recorded by the learned executing Court while rejecting the objections Exh.19 and Exh.34 preferred by the present

petitioners has taken into account the very decree i.e. under execution and specifications of the suit property mentioned therein. The approach of the petitioners, particularly in the background of twice dismissal of their appeal in default, then taking those proceedings before this Court, is nothing but an abuse of process of law. I have perused the judgment delivered by the learned trial Court on 2nd September 1993 in Regular Civil Suit No.8 of 1992 and noticed that the same contains utmost clear specifications about the suit property.

12 In view of above, the writ petition preferred by the present petitioners is hereby dismissed with costs.

13 The executing Court is directed to take appropriate steps to execute the warrant of possession forthwith.”

15. The respondent has filed an affidavit in reply on 27/01/2016 in this petition. It is specifically stated on oath that pursuant to the orders of this court dated 20/04/2015, the decree dated 02/09/1993 has been executed and the possession of the suit property has been handed over to the respondent. It is, therefore, submitted that the public notice has been published since the execution of the decree has already taken place and the property is now in the possession of the respondent.

16. It is further contended that any embargo being created on the respondent would amount to taking away a legal right of the decree holder.

17. It is evident that the warrant of possession has been executed in the light of the orders of this Court and after considering the fact that there was no stay on the decree. The petitioners have allowed their appeal to be dormant for 14 years. The contention by the petitioners that it did not have any apprehension about alienation of the property, is fallacious. Once the decree was awarded in favour of the original plaintiffs, the threat of alienation of the property always loomed over the petitioners/defendants. It is beyond comprehension that the petitioners had no apprehension of alienation of the property for 14 years.

18. Notwithstanding the above, after the dismissal of the appeal in default, the petitioners were in slumber. They have filed the application for restoration beyond limitation and the delay was finally condoned by this Court. The appeal is yet to be restored. It would therefore be a matter of speculation as to whether the restoration application would be allowed and if so, whether the appeal would be allowed.

19. The reliance placed upon the judgment of the Hon'ble Supreme Court in the case of Maharwal Khewaji Trust (Supra) is misplaced. In the said matter, the application for injunction under Order 39 Rule 1 and 2 of the CPC was refused by the Civil Court as well as by the Appeal Court. The civil suit was pending. The High Court did not grant injunction to the said appellant. The Hon'ble Supreme Court considered the grievance of the plaintiff and prevented the change in the nature of the property which was put up for construction. In the instant case, the suit has already been decreed and this Court has directed the Executing Court to execute the warrant of attachment forthwith. The said order of this Court was assailed before the Apex Court and the Special Leave to Appeal was dismissed after condoning the delay on 26/10/2015.

20. Considering the effect of the fact situation as above, I do not find that the respondent deserves to be restrained from dealing with the property in the manner as desired. However, since the proceedings in relation to the restoration of the appeal is pending, the respondent, if proceeds pursuant to the public notice dated 22/03/2016, shall ensure that the prospective purchaser on any third party which may have rights created in the suit property, would

be made fully aware of the pending proceedings and the pendency of the said proceedings shall find place in any sale deed if it is sought to be registered or executed.

21. Needless to state, the Misc.Civil Application No.326/2008 shall be decided by the learned Appeal Court on its own merits considering the grounds set out for seeking restoration.

22. With the above observations, this petition is disposed of. Rule is discharged.

(RAVINDRA V. GHUGE, J.)