

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1013 OF 2016

Mohammed Sameem Mohammed Yusuf ... Petitioner

Vs.

Mukhtar Ahmed Sajjad (Decsd.)

through LRS.

1A Shaikh Mohammed Rafique & Ors. ... Respondents

.....

Mr. Toor a/w. Farhan Khan i/b. Kalpesh Nanse for the petitioner.

Mr. Yousuf Khan for the respondents.

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CORAM : M.S. SONAK, J.

DATE : 02.02.2016.

P.C.:

1. Rule. Rule is made returnable forthwith with the consent of the learned counsel appearing for the parties.

2. The challenge in this petition is to the order dated 23/12/2015, by which, the Small Causes Court, has dismissed petitioners application seeking leave to lead oral evidence in the Execution Application No. 487 of 2015 instituted by the respondents.

3. Mr. Toor, learned counsel for the petitioner has submitted that after the decree of eviction was made and during the period appeal against the same was pending before the appeal court, the parties arrived at a settlement. In terms of the settlement, the petitioner agreed not to pursue the appeals instituted by him and the respondents agreed to withdraw the application filed by them for execution of the eviction decree. This was on the basis that the petitioner would pay enhanced rents in respect of the suit premises. Mr. Toor points out that the

enhancement was double the existing rates. Mr. Toor submitted that the petitioner, consistent with his part of the settlement, did not pursue the appeals before the appeal court. Similarly, the respondents, not only accepted and continued to accept the enhanced rents but also, unconditionally withdrew the execution application. Mr. Toor submits that the respondents, after lapse of considerable time have applied for execution of the eviction decree, which according to him, already stands satisfied by way of settlement arrived at between the parties as aforesaid. He submits that in these circumstances, considering the provision of Section 47 of the Civil Procedure Code (CPC), the petitioner should have been granted leave to lead oral evidence in the matter so that, the petitioner is in a position to satisfy the executing court that the decree of which the execution is applied for has already been satisfied.

4. Mr. Yusuf Khan learned counsel for the respondents joined issue with the contentions raised by the Mr. Toor. He submitted that the petitioner in the present case had instituted two appeals. The first, challenging the eviction decree and the second challenging the order by which the application for setting aside the decree came to be rejected. He submits that two appeals were not at all maintainable. In any case he submits that the two appeals were dismissed, as there was no merit in either of them. The execution application was withdrawn not because there was any settlement between the parties, but because at the relevant time there was a stay of the execution of decree by the

appeal court. Mr. Yousuf Khan tendered compilation of documents, which includes inter alia the application by which the execution application was withdrawn and order thereon. With reference to such documents, Mr. Yousuf Khan submitted that there was nothing unconditional about the withdrawal as projected by the petitioner. Finally, Mr. Yousuf Khan pointed out that the execution proceedings are being delayed by the petitioner and if leave is granted to lead oral evidence, the execution proceedings will be further delayed. For all these reasons, he submitted that this petition is liable to be dismissed.

5. The rival contentions now fall for determination.

6. Section 47 of the Code of Civil Procedure (CPC) provides that 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 executing court and not by a separate suit. Explanation ii(b) to Section 47 of Civil Procedure Code (CPC) inter alia provides that all questions relating to the delivery of possession of property to the purchaser or his representatives shall be deemed to be questions relating to the execution, discharge or execution of the decree within the meaning of the section.

7. Considering the scope and import of the provisions contained in Section 47 of the Civil Procedure Code (CPC), the petitioner in this case, is certainly entitled to raise all issues with regard

to alleged satisfaction of the decree of which execution has been applied for. However, the question is whether for such purpose, in the facts and circumstances of the present case, leave is required to be granted to the petitioner to lead oral evidence in the matter. In my judgement, the Small Causes Court has rightly declined leave to lead oral evidence in the matter.

8. The contention with regard to withdrawal of appeal or the earlier application for execution is really a contention which is based upon the court records. These are all matters of court records and therefore, the same can be easily verified from the court records. There is no necessity for leading any oral evidence for such purpose. Mr. Yousuf Khan learned counsel for the respondents in the present case has tendered a compilation of documents, which include, inter alia copies of appeal dismissal orders or orders of application and orders by which the earlier execution proceedings were withdrawn. These are again all matters of records and without doubt the executing court can look into the same, even though, the parties are declined leave to lead oral evidence in this matter.

9. On the aspect of payment of rents, again as pointed out by Mr. Yousuf Khan there is no real dispute. The rents have been paid by the petitioners and same have been accepted by the respondent. Therefore, there is no reason to lead any oral evidence on this aspect. The question at the highest, is to the effect of such payment and

acceptance. That is again a matter which, the parties shall be entitled to argue upon at the stage of disposal of the objection under Section 47 of the Civil Procedure Code (CPC). For this purpose there is no necessity to lead any oral evidence in this matter.

10. It is however, clarified that the parties shall be entitled to place on record documentary evidence, which will mostly be in the form of rent receipts, court records and all such documentary evidence shall be considered by the executing court whilst disposing of the petitioners objections under Section 47 of the Civil Procedure Code (CPC). The opinions that may have been expressed by the executing court in the impugned order shall be regarded as only tentative and the executing court shall decide the execution application as well as the objections thereof on its own merits and in accordance with law after taking into consideration the documentary evidence tendered by both the parties. However, in the facts and circumstances of the case there is no case made out to interfere with the impugned order to the extent it declines leave to the petitioner to lead oral evidence in this matter.

11. In the facts and circumstances of the present case, the imposition of cost by the impugned order is set aside. Mr. Toor learned counsel for the petitioner, on the basis of instruction from the petitioner very graciously agrees to pay an amount of Rs. 5,000/- by way of donation to Kirtikar Library within a period of two weeks from today. Statement of the petitioner is accepted such amount may be paid to the

Kirtikar Library and necessary receipt be placed on record before the executing court.

12. It is made clear that this court has not adverted to the merits of the matter and therefore all contentions of all the parties are left open to be decided by the executing court.

13. Rule is disposed of in the aforesaid terms. There shall be no order as to costs.

14. Since the execution proceedings are pending since September 2015. The executing court is directed to dispose of the same as expeditiously as possible.

15. All concerned to act on the authenticated copy of this order.

(M.S. SONAK, J.)