

Bapu Ranba Navale and another	...	Petitioners
Vs.		
Shankar Ramchandra Navale and another	...	Respondents

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 24, 2016

Heard Mr. Bhargude, learned Counsel for petitioners in both the Petitions at length.

3. Writ Petition No.2376 of 2016 is directed against the order dated 18.02.2016 passed by the learned Civil Judge, Junior Division, Daund below exhibit-24 in Regular Darkhast No.4 of 2009. By that order, the learned trial Judge allowed the application exhibit-24 made by the decree-holder for obtaining possession of 75 Ares encroached area as per the map at exhibit-81 through police protection.

4. In support of this Petition, Mr. Bhargude strenuously contended that under Section 47 of C.P.C., executing Court can take note of the subsequent development. He relied upon the decision of the Apex Court in the case of ***Municipal Board, Kishangarh Vs. Chand Mal & Co., (1999) 9 SCC 198***, and in particular paragraph 6 thereof. He submitted that in the present case, Second Appeal was dismissed on 18.01.2014 and the subsequent development is the decision dated 11.12.2014 of the Deputy Superintendent of Land Records, Daund. He submitted that the Suit instituted by the respondents, hereinafter referred to as decree-holders, was decreed on the basis of the measurement map dated 10.10.2004 at exhibit-87 prepared by Taluka Inspector of Land Records. Decree-holders alleged that petitioners, hereinafter referred to as judgment-debtors, have encroached upon 75 Ares land towards the western side of Gat No.178/1 and 178/2 as shown in the red colour in measurement map dated 10.10.2004. He submitted that by order dated 11.12.2014, Deputy Superintendent of Land Records, Daund has cancelled that map. In view of this subsequent event, it is necessary to issue witness summons to the Deputy Superintendent of Land Records, Daund for producing documents and recording his evidence.

5. Mr. Bhargude submitted that the learned trial Judge rejected the application exhibit-87 on the ground that there is no provision under which application exhibit-87 for issuing witness summons is made and no provision was brought to his notice. He submitted that even in execution proceedings, witness summons can be issued. He relied upon Section 141 of C.P.C. as also decision of Lahore High Court in the case of ***Muhammad Hussain Vs. Radha Kishan, AIR 1925 Lahore 572***.

6. Mr. Bhargude further submitted that the jurisdiction of the Civil Court is barred in view of Section 36-A and Section 21(3) of the

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short 'Act'). He relied upon the decision of this Court in the case of *Ashok Yeshwant Dhumal Vs. Shankar Maruti Dhumal*, **2001 (3) Bom.C.R. 27**. Mr. Bhargude further submitted that no case is made out for allowing exhibit-74 for taking assistance of Deputy Superintendent of Land Records and police protection in obtaining possession of 75 Ares allegedly encroached by the judgment-debtors. He further submitted that order dated 18.02.2016 below exhibits 24 and 87 are liable to be set aside.

7. I have considered the submissions advanced by Mr. Bhargude. I have also perused the material on record. As noted earlier, Suit instituted by the decree-holders was decreed on 11.08.2008 by the trial Court and the judgment debtors were directed to handover the encroached portion of 75 Ares land to the decree-holders as shown in the measurement map at exhibit-81 and the said map was treated as part and parcel of the decree.

8. Aggrieved by that decision, the judgment-debtors preferred Regular Civil Appeal No.64 of 2008. By order dated 20.04.2013, the learned District Judge dismissed the Appeal. Aggrieved by these decisions, judgment-debtors preferred Second Appeal No.489 of 2013. By order dated 18.01.2014, this Court dismissed the Second Appeal. Mr. Bhargude submitted that Review Petition filed in this Court was also dismissed. In ground No.H of the Review Petition, judgment-debtors averred thus,

“H. It is submitted with respect that in view of subsequent developments, i.e. the proceedings before the Consolidation Authorities, by which the error in the map and record is sought to be corrected, the impugned judgment and decree is unsustainable in law and is required to be quashed and set aside.”

9. Mr. Bhargude submitted that in view of the decision dated 11.12.2014 of the Deputy Superintendent of Land Records, Daund, the learned trial Judge ought to have allowed the application exhibit-87 and issued witness summons to the Deputy Superintendent of Land Records, Daund for producing the record and for recording his evidence. Perusal of the order dated 11.12.2014 shows that the attention of the Deputy Superintendent of Land Records was not brought to the orders passed in civil proceedings. That apart, perusal of ground H in Review Petition also shows that the said ground was specifically agitated in Review Petition. Mr. Bhargude fairly stated that though the said contention was specifically raised, this Court did not review the order passed in Second Appeal. In my opinion, it is not open to the judgment-debtors to agitate this issue repeatedly in different proceedings.

10. Mr. Bhargude submitted that the learned trial Judge rejected application exhibit-87 on the ground that no provision is mentioned under which application for issuing witness summons is made and that no provision was brought to the notice of the Court. Section 141 of C.P.C. undoubtedly lays down that the provisions of C.P.C. in regard to Suits are applicable to all proceedings in any Court of civil jurisdiction. Explanation thereto lays down that the expression “proceedings” includes proceedings under Order IX but does not include any proceeding under Article 226 of the Constitution of India. In other words, the procedure provided under C.P.C. in regard to Suits are made applicable to the execution proceedings as well. He relied upon decision of Lahore High Court in the case of **Muhammad Hussain** (*supra*). There is no dispute with the proposition that the provisions of C.P.C. as regards Suits are applicable to execution proceedings as well. In the case of **Muhammad Hussain** (*supra*), judgment debtor pleaded in execution proceedings that he had made a certain payment out of Court

to the decree-holder. In the trial Court, summons was issued to 4 witnesses. However, none appeared and the trial Court dismissed the judgment-debtor's application. On appeal, the learned District Judge held that none of the 4 witnesses was served with the summonses and judgment-debtor was not to blame for their non-attendance. The learned District Judge then proceeded to hold that the four witnesses, since they did not appear to be men of any great status, would not have been able to convince the Court that the judgment debtor had made the payment and that it was useless to give any more time to the judgment debtor to prove his case. The learned District Judge dismissed the appeal. The High Court observed that the learned District Judge acted contrary to law. He could not have decided the appeal by the result of a surmise as to the probable effect on the Court of the statements of witnesses who had never appeared. The High Court, therefore, set aside the orders of the courts below and directed the trial Court to pass fresh order after giving appellant a fresh opportunity to produce 4 witnesses who failed to appear in the Court. The said decision is not applicable to the facts of the present case.

11. As noted earlier, the Civil Court had passed decree against the judgment-debtors holding that they have encroached to the extent of 75 Ares land in the decree-holders' property. The said decision is confirmed upto this Court. The request for issuing witness summons is made on the basis of decision dated 11.12.2014. I have already held that the said decision has no bearing in the sense that the decisions of the civil courts were not considered by the Deputy Superintendent of Land Records. That apart, though in ground 'H' of Review Petition, this contention was specifically raised, the Petition is dismissed. The said contention is deemed to be rejected.

12. Mr. Bhargude submitted that jurisdiction of Civil Court is barred in view of Section 36-A of the Act. I do not find any merit in this submission for more than one reason. In the first place, the said contention was available to the judgment-debtors in the earlier round of litigation. However, no such contention was advanced. Secondly, even in the application exhibit-87, no such contention was advanced. In view thereof, it is not open to the judgment debtors now to agitate the said contention.

13. In view thereof, no case is made out for interfering with the impugned order. Hence Writ Petition No.2370 of 2016 fails and the same is dismissed. As far as Writ Petition No.2376 of 2016 challenging the order below exhibit-24 is concerned, the judgment-debtors filed applications at exhibits-37 and 40 under Order XXI, Rule 97 and Order XXI, Rule 29 of C.P.C. respectively and application exhibit-74 raising self-same objections. All the applications were rejected. Though possession warrant at exhibit-22 was issued, the judgment-debtors are causing obstruction. The learned trial Judge, therefore, rightly allowed application exhibit-24 taken out by the decree-holders. Hence, no case is made out for interfering with the order passed below exhibit-24. Petition No.2376 of 2016 fails and the same is dismissed.

(R. G. KETKAR, J.)

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