

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5433 OF 2016**

Rajendra Vasantao Buddhe and
Anr.

Petitioners

Vs

Amit Bhushan Shinde and Anr.

.. Respondents

Mr. Drupad S. Patil, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.

DATE : 05/05/2016

PC:

1. Heard Mr. Drupad Patil, learned counsel for the petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 27.4.2016 passed by the learned Jt. Civil Judge, Sr. Dn., Kolhapur, below Exh.45, in Regular Darkhast No. 155 of 2014. By that order, the learned trial Judge rejected the application made by the petitioners under section 151 of C.P.C. for staying the execution proceedings on the ground that the petitioners desire to challenge orders dated 27.4.2016 passed below Exhibits-36 and 37. The respondents-decree-holders filed application dated 4.4.2016 at Exhibit 36 for approving the revised/modified draft of the proposed sale deed. By order dated 27.4.2016, the learned trial Judge approved the draft sale deed and directed the judgment debtors to execute the sale deed in favour of the decree holders within two weeks, failing which

Assistant Superintendent Senior Division, Kolhapur is appointed as Court Commissioner for executing the sale deed.

3. Judgment debtors filed application dated 4.4.2016 at Exh.37 for directing the decree holders to remove the shortcomings in the draft sale deed. By order dated 27.4.2016, the learned trial Judge rejected that application. The petitioners, therefore, filed application dated 27.4.2016 at Exh.45 under section 151 of C.P.C for staying the execution proceedings on the ground that the judgment debtors desire to challenge orders dated 27.4.2016 passed below Exhibits 36 and 37.

4. Mr. Patil invited my attention to :-

- (i) Description of the suit property given in Agreement of sale dated 23.5.2006 as also clauses (7) and (15) thereof;
- (ii) Description of the suit property given in the suit;
- (iii) Order dated 15.3.2013 passed by the learned trial Judge decreeing the suit of the decree holders for specific performance of Agreement of sale;
- (iv) Order dated 19.3.2014 passed by the learned District Judge-2, Kolhapur, dismissing the Regular Civil Appeal preferred by the judgment debtors;
- (v) Order dated 23.3.2015 passed in Second Appeal No.594 of 2014. In that order, the submission made on behalf of the judgment debtors that there is variance between the description of property in the agreement of sale and paragraph 1 of the

plaint to the effect “other open space on the ground floor”, was recorded.

(vi) Order dated 9.12.2015 passed by this Court, whereby the Second Appeal was disposed of by consent of the parties by substituting the orders passed by the courts below. This Court directed the judgment debtors to execute the sale deed in respect of the suit property bearing City Survey no. 1463/B admeasuring 30.6 meters, situate at Kolhapur, more particularly described in paragraph 1 of the plaint in favour of decree holders within four weeks from the date of order, excluding the open space mentioned in paragraph 1 of the plaint upon the judgment debtors receiving sum of Rs.1,40,000/- within two weeks from the date of the order.

5. Mr. Patil submitted that clause 7 of the agreement of sale recorded that for approaching the first floor from the northern side, there is a staircase. While carrying out the new construction, the staircase has to be retained and the ownership of the staircase will continue to remain with the vendors. Similarly in case the basement is constructed, a way shall be maintained over which the vendors will have ownership. Clause 15 of the agreement of sale recorded that the vendors and their heirs will have right to carry on business of Pan-shop and for that, purchasers are not required to pay compensation or rent. However, without the written consent, vendors will not create

third party interest. In the event of vendors creating third party interest, the purchasers will have right to take possession of the Panshop. In the event of purchasers carrying out construction on the ground floor in future, it will be carried out at the expenses of purchasers and the vendors will have right over the F.S.I., terrace and staircase. He submitted that in the draft sale deed, clauses 7 and 15 are not incorporated. He, therefore, submitted that the learned trial Judge should have allowed the application Exh.45 as the judgment debtors intend to challenge the orders dated 27.4.2016 passed below Exhibits 36 and 37.

6. I have considered the submissions advanced by Mr. Patil. I have also perused the material on record. While rejecting the application, the learned trial Judge has observed that the judgment debtors had filed application under section 47 of C.P.C. After hearing both sides at considerable length, that application was rejected and the draft sale deed was approved. Draft of the sale deed at Exh.44 was approved with direction to execute the sale deed as per the decree passed in Regular Civil Suit No.803 of 2012 which was confirmed by the learned District Judge and further confirmed by this Court in Second Appeal No.594 of 2014 on 9.12.2015 with some modification with consent of both the parties. The learned trial Judge thereafter observed that the decree holders cannot be deprived of fruits of the execution and this is not a fit case for exercising discretion for ends of justice

as contemplated under section 151 of C.P.C.

7. As noted earlier, the learned trial Judge decreed the suit on 15.3.2013. Operative part of the order reads thus:

- 1) Suit is decreed with costs.
- 2) The defendants do execute the sale deed in respect of the suit property bearing C.S. No.1463/B more particularly described in para no.1 of the plaint, situated at Kolhapur, in favour of the plaintiffs within 3 months from today, failing which the plaintiffs make getit executed through the Court.
- 3) The plaintiffs do deposit Rs.1,53,900/- in the Court within 3 weeks.
- 4) Decree be drawn up accordingly. “

8. Aggrieved by this order, the judgment debtors preferred appeal. Appeal was dismissed on 19.3.2014. Clause (3) of the operative part of the order reads thus:

“(3) The appellants-defendants do execute sale deed in respect of the suit property bearing City Survey No.1463/B more particularly described in para 1 of the plaint, situated at Kolhapur in favour of the plaintiffs/respondents within three months from the date of this order, failing which the respondents/plaintiffs are entitled to get it executed through Court.”

Aggrieved by these decisions, the judgment debtors preferred Second Appeal No.594 of 2014. Second Appeal was disposed of by consent of the parties by substituting the orders passed by the Courts below. Clause (b) thereof reads thus:

(b) The defendants do execute the sale deed in respect of the suit property bearing City Survey No.1463/B more particularly described in paragrpah1 of the plaint situated at Kolhapur in favour of the plaintiffs within four weeks from today excluding the open space mentioned in paragraph 1

of the plaint upon the respondents paying a sum of Rs.1,40,000/- within two weeks from today to the appellants herein.”

9 Perusal of clause (b) thereof, extracted herein above, shows that the judgment debtors are directed to execute the sale deed in respect of the property bearing Survey No.1463/B more particularly described in paragraph 1 of the plaint, excluding the open space mentioned in paragraph 1 of the plaint. Grievance of the judgment debtors is that clauses 7 and 15 are not incorporated in the draft sale deed. In my opinion, the executing Court cannot go behind the decree. In view thereof, as also for the reasons recorded by the learned trial Judge in the impugned order, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India, reserving liberty to judgment debtors to consider filing of review application/application for modification of the order dated 9.12.2015 passed by this Court in Second Appeal No.594 of 2014. Subject to this, Petition fails and the same is dismissed.

(R.G.KETKAR, J.)