

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 604 OF 2014
WITH
CIVIL APPLICATION NO. 1317 OF 2014

Manohar Ganapati Jadhav & Ors. ... Appellants

Vs.

Chand @ Appalal Chimaji Pandat
(since deceased through legal heirs)

1-a. Smt. Khajabi Chand @

Appalal C. Pandat & Ors. ... Respondents

....

Mr. Amit Borkar for the appellants and applicants.

Mr. P.S. Dani, Sr. Advocate a/w. Ms. Jui Nerurkar for respondent
no. 1-B to 1-D.

Mr. V.B. Rajure for respondent no.1-e, 1-9(i), 1-9(2), 1-9(3),
1-9(4), 2.

....

CORAM : N.M. Jamdar, J.

DATE : 20.04.2016.

ORAL ORDER:

1. The appellants, obstructionists, challenge the judgement and order passed by the District Judge, Kolhapur in Civil Appeal No. 439 of 2004 dated 16/01/2012 allowing the appeals filed by the respondent and setting aside the judgement and order passed by the Joint Civil Judge Junior Division, Kolhapur in the applications filed by the appellants under Order 21 Rule 97 in Regular Darkhast No. 169 of 1997.

2. The predecessor-in-title of the respondent Mr. Chand executed a mortgage deed on 02/02/1931 in favour of one Mr.

Petkar. Disputes arose and a civil suit was filed by Mr. Petkar against Mr. Chand complaining of dispossession, which was allowed and the possession of the suit property was given to the mortgagee Mr. Petkar some time in the year 1941.

3. Therefore a Regular Civil Suit No. 28 of 1967 was filed by Mr. Chand for redemption of mortgage. The suit was dismissed on 03/09/1968. Mr. Chand filed an appeal, which was allowed on 25/12/1971. Thereafter, a Second Appeal was filed by Shri Petkar, which was dismissed in the year 1978. Mr. Chand, filed an application for preliminary decree which was granted on 30/03/1968. Thereafter, Mr. Petkar filed an Civil Appeal against the preliminary decree which was dismissed on 24/12/1977. The Second Appeal filed by him was rejected on 16/01/1978. After the dismissal of the Second Appeal, the respondents filed final decree application on 12/10/1979. The final decree passed on 11/10/1996. Thereafter Civil Appeal No. 97 of 1997 and 107 of 1997 were filed. The Civil Appeals were partly allowed. After the disposal of the Civil Appeals, the respondents filed Regular Darkhast No. 169 of 1997. In these darkhast proceedings the appellants filed their individual applications, taking an objection to the execution on the ground that the appellants are tenants in the suit property. The obstruction was allowed by the learned Civil Judge Junior Division by order dated 12/10/2004. Thereafter, the respondent filed Regular Civil Appeal No. 439 of 2004 which was allowed by the learned District Judge by the impugned order dated 16/01/2012, thereafter, the present Second Appeal is filed.

4. Heard. The learned counsel for the parties.

5. The first contention raised by Mr. Borkar, learned counsel for the appellant is that from the final decree an appeal was preferred and the appellate court while disposing of the appeal has categorically held that the decree as against the appellants directing them to hand over possession is set aside. He submitted that once decree directing the appellant to hand over the possession is set aside the same cannot be executed and such execution application is not maintainable. The submission so advanced cannot be accepted. When the final decree proceedings were instituted, a stand was taken by the appellants that they are needlessly to joined in the proceedings. While disposing of the appeal from the final decree, the learned District Judge held that the decree cannot be executed against the appellants, not on merits, but on the ground that appellants have been incorrectly joined to the proceedings. There is no finding that the decree cannot be executed against the appellants because of existence of any right in the property. While disposing of the appeal on 04/05/2001, the learned Judge has not allowed the appeal in *toto* but has modified the decree as against the legal heirs of defendant no.1 therein. Having once taken a contention that they have been needlessly to joined in the proceedings, at this stage the appellants can not then turn around and contest the dismissal of their Obstructionist Proceedings on the ground of *res judicata*. As far as their rights to the property is concerned they have been

given full opportunity to demonstrate the same.

6. Mr. Borkar, submitted that the appellants are tenants of the property and they have an independent right as a tenant in the property. However, if the application in the Obstructionist Proceedings is perused, except by stating that the appellants are tenants of the property, no particulars are given. It is not specified as to whose tenants the appellants are or from which date the tenancy is created and such other particulars which are required if the Obstructionist Proceedings are to be tried as a suit. The receipts which have been produced on record show that the rent has been collected by the mortgagee. The appellants, in the evidence, referred to a specific deed of tenancy but failed to produce the same and the learned Judge rightly drew adverse inference against them. In the year 1941 Mr. Petkar, the mortgagee had taken possession through execution and thereafter if any tenancy is created it can only be created by the mortgagee Mr. Petkar. Therefore, the appellate court has rightly recorded a finding of fact that the appellants failed to show that they are tenants of the mortgagor – Mr. Chand.

7. Mr. Borkar submitted that in the mortgage deed specific power was conferred upon the mortgagee to create tenancy and in the circumstances the appellants have become direct tenants of the mortgagor. He relied upon the decision of the Apex Court in the case of *Jadavji Purshottam V/s. Dhami N. Amaratlal & Ors. (1987) 4 SCC 223* more particularly

paragraph 11 thereof.

11. Leaving the facts aside for a moment we will turn our attention to the decisions of this Court upon which the appellant's counsel has placed considerable reliance. For the purpose of the present case the pronouncement of law in Mahabir Gope v. Harbans Narain, Asa Ram v. Ram Kali, Dahya Lal v. Rasul Mohammed Abdul Rahim and Prabhu v. Ramdev does not call for mention with reference to each decision. Suffice it to say that the general principle which has been recognised in all these cases has been aptly summarised in Mulla's Transfer of Property Act. Seventh Edition, page 514 in the following manner:

No question of imprudence can arise where, as in Prabhu v. Ramdev, the rights of the tenant were enlarged by tenancy legislation enacted after the tenant was put in possession by the mortgagee. It is submitted that this statement of the law is consistent with all the Supreme Court decisions quoted above.

The other preposition of law which has found acceptance with this Court is that a tenancy created by a mortgagee in possession may be binding even after the termination of the title of the mortgagee in possession if the mortgagors had concurred to the grant of the lease (vide Film Corporation case).

8. Relying upon above reproduced passage, Mr. Borkar contended that if the tenancy is created by mortgagee in possession is binding even after termination of the mortgage deed. He also contended that the mortgage deed grants specific right to the mortgagee to create tenancy. This submission cannot be accepted. In the very decision the Apex Court has laid down that the language of the mortgage deed and the circumstances when the mortgage was created will have to be looked into before

drawing the conclusion that express authorisation was given to the mortgagee. In the present case the mortgage deed is of the year 1931. The reference to creation of tenancy is of one year. There was no rent legislation in the year 1931. It was never in contemplation of the mortgagor to create a tenancy of such an nature which would have a statutory protection, which was brought in subsequently after the enactment of the rent legislations. The deed did not confer any un-restricted right upon the mortgagee to create tenancy. In the decision of ***Carona Shoe Co. Ltd. & Anr. reported in (1989) 2 SCC 395***, the Apex Court has laid down that the mortgage deed must specifically, categorically make exception in favour of tenants and must specifically state that they would continue in possession even after expiry of termination of mortgagee.

9. Therefore, the the appellants have failed to show that they were inducted by the mortgagor as a tenant, or that by virtue of the mortgage deed they had become tenants of the mortgagor, and that after termination of the mortgage they are entitled to protection.

10. As far as the right to be determined by due process is concerned, the appellants have filed Obstructionist Proceedings which are tried as a Civil Suit. Thereafter, appeal has been heard and full opportunity has been given to the appellant to put forth their case.

11. As regards the contention of Mr. Borkar that the common appeal is filed the same was raised before the Learned District Judge who has rightly observed that no prejudice was caused to the appellants by a common appeal filed by the respondents and all appeals the present appellants had an adequate opportunity.

12. It was then contended by Mr. Borkar that the appellant no.3 had expired during the proceedings in appeal and his heirs were not brought on record. Firstly, the title of the present Second Appeal refers to appellant no.3. Secondly, the appellants were represented through an advocate and if the appellant no.3 had expired it was their duty to point out the said fact to the respondent-appellants therein who would have taken necessary steps. The Code of Civil Procedure places responsibility on the party and their pleader to communicate the death of the party to the other side to enable them to take necessary steps. For the default of the appellant to give the communication and not pointing out these facts during the appeal proceedings, the order in favour of the respondents cannot be disturbed. Such arguments are nothing but attempts to create all possible hurdles to defeat the rights of the respondent to enjoy the fruits of the decree in a suit of the year 1967.

13. The proceedings are pending since the year 1967. Suit was decreed in the year 1971. Forty five years have gone by and the respondents decree holders are yet to get any benefit of the

decree. The Apex Court in the case of **Satyawati Vs. Rajinder Singh & Anr. 2014(1) MLJ** has deprecated such situation and has highlighted the agony of the decree holder under the present system. The learned Judges observed:

13. *It is really agonizing to learn that the appellant-decree holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant-plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of General Manager of the Raj Durbhnga under the Court of Wards vs. Maharajah Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in the case of Kuer Jang Bahadur vs. Bank of Upper India Ltd., Lucknow, AIR 1925 Oudh 448, the Court was constrained to observe that “Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.”*

14. *In spite of the aforestated observation made in 1925, this Court was again constrained to observe in Babu Lal vs. M/s. Hazari Lal Kishori Lal and ors, (1982)1 SCC 525 in para 29 that “Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections....”*

15. *This Court, again in the case of Marshall Sons and Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. And anr., (1999) 2 SCC 325 was constrained to observe in para 4 of the said judgment that “....it appears to us, prima facie, that a decree in favour of the appellant is not being executed*

for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes long time....”

16. Once again in the case of *Shub Karan Bubna alias Shub Karan Prasad Bubna vs. Sita Saran Bubna and ors.*, (2009) 9 SCC 689 at para 27 this Court observed as under:

“In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.”

17. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.

18. We are sure that the Executing Court will do the needful at an early date so as to see that the long drawn litigation which was decided in favour of the appellant is finally concluded and the appellant-plaintiff gets effective justice.

14. No question of law arises. The Appeal is dismissed. Civil Application stands disposed of.

15. Mr. Borkar seeks protection for some time. In view of the observations of the apex court reproduced above, I am not inclined. However, it is informed that the execution proceedings are now scheduled in June 2016, therefore in any case the appellants are protected till then.

(N.M. Jamdar, J.)