

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE NO.1030 OF 2015
IN
EXECUTION APPLICATION NO.577 OF 2013
IN
SUIT NO.3896 OF 1990**

Ashford Developers Pvt. Ltd.

...Plaintiff/Judgment
Creditor

V/s.

Mrs. Saroj Pravin Desai & Ors.

...Defendants/Judgment
Debtors

.....

Mr. S.U.Kamdar, Senior Advocate with Mr. Parimal K. Shroff, Mr. D.V.Deokar and Ms. Jaylaxmi Gaud i/by M/s. Parimal K. Shroff and Company, Advocates for the Plaintiff.

Mr. Vibhav Krishna i/by Juris Consillis, Advocate for the Defendants.

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CORAM : A. K. MENON, J.

DATE : 21ST MARCH, 2016.

P.C.:

1. This is an application by which the Plaintiff is seeking a direction in a Notice taken out under Order XXI Rule 34 of the Code of Civil Procedure, 1908. The Plaintiff seeks assistance of the Court in execution of a Conveyance deed under the provisions of Rule 34 of Order XXI of the Code of Civil Procedure, 1908. Under Rule 34 Sub-clause (1), where a decree requires

execution of a document, the Decree Holder may prepare a draft of document and deliver the same to the Court. The Court will thereafter cause the draft to be served on the Judgment Debtor together with a notice requiring his objections if any. If the Judgment Debtor objects to the draft, his objections shall be stated in writing and the Court shall make such order either approving or altering the draft. Thereafter, the Decree Holder is required to tender to the Court a copy of the draft with such alterations as the Court may have directed and then an officer may be appointed to execute such document. In cases, where registration of the document is required, the Court may authorize an officer to register such document. It is in this background that the present application has been moved.

2. It will be useful to set out the relevant rule:

"34. Decree for execution of document, or endorsement of negotiable instrument-(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his

objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

“C.D. Judge of the Court of

(or as the case may be), for A.B., in a suit by E.F. against A.B.”, and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

[6(a) Where the registration of the document is required under any law for the time being in force, the Court, or such

officer of the Court as may be authorised in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration.]

3. It will be necessary to briefly narrate the facts leading to the present application. The above Suit came to be filed against the Judgment Debtors and one Pravin Desai seeking specific performance of the agreement for sale dated 27.10.1988 between the Judgment Creditor and the Judgment Debtor Nos. 2 to 4 and consequential reliefs of the execution of the conveyance in respect of the suit lands. Consent Terms came to be filed by the parties on 8.6.1998 These Consent Terms came to be challenged by the Original Defendant Nos.1, 2 and 4 by filing Notices of Motion bearing Nos.2399 of 2007, 3507 of 2007 and 552 of 2008 by which the Defendants sought to set aside the Consent Terms. The Motions taken out by the said Defendants were dismissed by judgment and order dated 29.8.2008. The Original Defendant No.1 and others filed Appeals bearing numbers 58 of 2009, 140 of 2010 and 141 of 2010. On 6.7.2010. the Appeals filed by the said Defendants were

dismissed. Aggrieved Defendants filed Special Leave Petition to Appeal No.22615 of 2010. On 25.8.2010, the Special Leave Petition to Appeal came to be dismissed. Thus, on or about 29.8.2010, the Consent Decree became executable.

4. The Judgment Creditor/Plaintiff took out Chamber Summons No.572 of 2007 inter alia seeking reliefs under Order XXI Rule 22 of the Code of Civil Procedure, 1908. By an order dated 12.4.2013, while disposing of the Chamber Summons, the reliefs in terms of prayer clauses (a) and (b) were granted but the Plaintiffs did not press for prayer clauses (c) to (i) and (k) & (l) but all issues concerning these prayers were kept open. It is pursuant to the aforesaid order that this present Notice is taken out. The Notice is opposed by the Judgment Debtor/Defendant No.2 by filing an affidavit. None of the other Defendants have filed any affidavit. However, the affidavit of the Defendant No.2 sets out that it has been made on behalf of the Deponent herself, Defendant No.1(b) and on behalf of the Defendant Nos.2 and 3 in her capacity as director of the said Defendants. A Rejoinder dated 26.10.2015 has been filed on behalf of the Plaintiff in which the Plaintiff has refuted the Defendants' contention.

5. Mr. Kamdar, the learned Senior Counsel appearing on behalf of the Plaintiff, points out that upon the decree becoming executable, the Plaintiff is

following due process of taking out the Notice under Order XXI Rule 22 of the Code of Civil Procedure, 1908 and sought usual reliefs for renewal of the judgment and several ancillary reliefs which were not pressed at the relevant time. One of those reliefs included directions under Rule 34 which are now being sought in this Notice. Mr. Kamdar pointed out that although the Consent Terms and the decree in terms of the Consent Terms contemplated execution of conveyance in respect of 1148 acres of land forming the suit property, the present Notice seeks to obtain conveyance only in respect of 881 acres. According to Mr. Kamdar, presently the Defendant No.1 is only capable of conveying 881 acres since they have not yet become owners of the remaining portion of the land. As far as 881 acres is concerned, the Defendants are owners of the property and are well and sufficiently entitled to execute a conveyance in favour of the Plaintiff as required by the Consent Terms. This fact is admitted by Mr. Krishna the learned counsel for the Defendants. Mr. Kamdar submitted that the Plaintiff has called upon the Defendants to execute the conveyance as per the draft forwarded to them but the Defendants have declined to do so giving frivolous reasons. He, therefore, submitted that the Notice is liable to be made absolute and the draft of the conveyance is liable to be approved.

6. Mr. Krishna the learned counsel appearing for the Defendants submitted that the decree is not enforceable. He submitted that by its very

nature, the reliefs sought for in the present Notice require the decree to be executable. According to him, the decree is of a declaratory nature and is not capable of execution. He points out while making reference to the plaint and the Consent Terms that the Consent Terms merely resulted in a declaration that the Plaintiff is entitled to conveyance but does not operate as conveyance and as such, reliefs prayed for cannot be granted. He submitted that the present Notice is not maintainable in view of the fact that firstly, it is not supported by Affidavit. Secondly, the Plaintiff had earlier taken out Chamber Summons No.572 of 2007 and prayed for several reliefs, however they pressed for reliefs only in terms of prayer clause (a), (b) and (j) and since the other reliefs including reliefs sought in this notice were not pressed, the same are deemed to have abandoned and, therefore, the present notice is not maintainable. Mr. Krishna referred to the order dated 12.4.2013 passed in the Chamber Summons No.572 of 2007 copy of which appears at Exhibit A to the affidavit-in-reply to the Notice in this behalf.

7. Mr. Krishna further submitted that the notice is also not maintainable since the property contemplated under the Consent Terms was 1148 acres and that the present relief is sought only in respect of 881 acres. Mr. Krishna further submitted that such piecemeal relief could not be given in the facts and circumstances of the case. He submitted that even otherwise, the equivalent of 881 acres expressed in 34,65,280 square meters is incorrect.

Furthermore, he submitted that the land is not demarcated and, therefore, it is not identifiable. Mr. Krishna then submitted that area of 1148 acres was valued at the material time at Rs.6.88 Crores but it is far more valuable today and for this reason also the conveyance cannot be granted. Furthermore, it is not possible to apportion part of the consideration for 881 acres on a pro-rata basis.

8. It is Mr. Krishna's case that the Defendant and her daughter were wrongly joined in this present Notice. He further submitted that recitals indicate that part of the land is described as pot kharaba and this is not the correct description of the land. Mr. Krishna also opposed the application on the basis that were dated 8.6.1998 and though the draft decree was filed far back in June, 2012, the present Notice has been taken belatedly and is not maintainable. Therefore, no relief can be granted in the present notice.

9. Having considered the rival contentions, I am of the view that objections raised to the effect that the decree merely declaratory is lacking in merits. The Notice in the present case was caused to be issued only as a result of failure of the Defendants to comply with the consent decree. The attempt of the Defendants appears to be to frustrate the execution of the consent decree. In my view, the Court is required to interpret the Consent Terms in manner so as to enforce the decree and give effect to the parties bargain rather than bogged

down by the hyper-technical defences. Mr. Krishna's contention that the decree is merely declaratory and, therefore, not executable, in my view, has no substance.

10. Mr. Krishna relied upon a judgment of the Calcutta High Court in the case of **Syama Charan Das v. Satya Prasad Chaudhari**¹ to contend that the decree was in essence declaratory in character, and the Plaintiff could not have recovered possession and execution thereof. In my view, the facts of the said case are completely different. The Suit itself was filed for declaration and, therefore, being a declaratory suit, there was no question of possession being recovered thereunder. In yet another judgment cited by Mr. Krishna viz **State of Madhya Pradesh v. Mangilal Sharma**², he relied upon the observations in paragraph 8 in support of his contention that a declaratory decree cannot be executed since it only declares the rights of the parties. The judgment of the (Full Bench) of the Punjab & Haryana High Court in **Prakash Chand v. S.S.Grewal**³ was cited with approval in the said decision.

11. Mr. Krishna relied upon yet another judgment of the Punjab & Haryana Court in the case of **S.J.Ebenezer v. Velayudhan and Others**⁴ and submitted that where the parties had merely agreed to a declaration as to the

1 AIR 1923 Calcutta 252

2 AIR 1998 SC 743

3 1975 Cri LJ 679

4 AIR 1998 SC 746

Plaintiff's right, title and interest in the disputed land, they did not say that the Defendants would deliver possession of the land or that failing delivery of the possession by the Defendants out of the Court, the Plaintiff would be entitled to take delivery of the possession through the Court. Mr. Krishna, therefore, submitted that in the present case, the Plaintiff cannot seek possession with the assistance of the Court.

12. I do not see how these judgments come to the assistance of the Defendants since they are only restricted to the cases where the Suit resulted in a declaratory decree. There can be no doubt that in a decree which is purely declaratory, question of execution cannot arise. However, in the present case, consequential reliefs flow out of the declarations. Perusal of the Consent Terms will dispel all doubts that the Defendants carry as to its enforceability. With specific reference to the clauses of the Consent Terms namely, clauses 16, 17, 20, 21 and 22, Mr. Krishna had submitted that as far as the Defendant Nos.1 to 4 are concerned, these clauses merely result in declarations. Even Clause 27 which requires the Defendant Nos.1 to 4 to do all acts, deeds and matters and things and to sign and execute all papers, documents, writings more perfectly and effectually vesting the suit property in the Plaintiffs, does not mean that the Plaintiff is entitled to any further assistance from this Court by executing the conveyance.

13. It is evident from Mr. Krishna's submissions that although 1148 sq.mtrs are to be conveyed, the Defendants are not in position to convey the said area since they do not have the same in their possession. The Defendants have not obtained conveyance of area beyond 881 sq.mtrs. In other words, in respect of 267 acres, they were yet to be obtain a conveyance. It is for this reason that the Defendants cannot convey the entire area of 1148 sq.mtrs. These state of affairs obviously entails that the consent decree cannot be executed in its entirety at present. However, to my mind, there is no reason as to why the decree cannot be executed to the extent of 881 acres. In the course of his submissions and upon a query from the Court, Mr. Kamdar had tendered a plan showing the demarcation of the area of which conveyance is sought. He also relied upon the statement showing the total area of the land Gaon Namuna from the extract of the lands record office maintained by the Talathi's office at Village: Jambivali, Taluka: Ambernath and submitted that this extract shows total area of 356.45 hectares was available which is equivalent to 883.43 acres.

14. As far as the plan is concerned, I must observe that the plan may not be accurate. Although it is prepared by an Architect, it does not appear to be based on any official record. In the circumstances, it will become necessary for the Plaintiff to first establish that such a plan corresponds to the records of the

authorities, failing which it would be necessary to provide for the manner in which a conveyance can be effectively executed. In course of the submissions, Mr. Krishna also submitted that the Defendant No.2 holds in his name more than sixty deeds which were executed by the original owners and none of these deeds contain any plan. They merely referred to the schedule of land denoting certain area. Mr. Krishna relied upon such two conveyances dated 5th and 8th January, 1990 in respect of two pieces and parcels of land sold by Ramanlal Dalsukhbhai Shroff and another to Jambivali Estates Agricultural and Allied Products Private Limited and submitted that perusal of this plan reveal that it is not possible to entertain the present application for want of particulars, demarcation of the property including demarcation and proper description with the boundaries. For the aforesaid reasons Mr. Krishna submitted that reliefs sought should be refused.

15. I am not satisfied any of these contentions will result in the plaintiff being deprived of their rights under the Consent Decree and in the circumstances I am of the view that the plaintiffs are entitled to reliefs in the present notice. However, this will entail a careful exercise in order to demarcate the land. In my view, it is not possible to identify the subject matter of the proposed conveyance in its present form. Accordingly, before effective steps can be taken by the Prothonotary & Senior Master, to execute the deed of conveyance on behalf of the Defendants, a survey will have to be conducted for

the purposes of measuring the land and demarcating the same so as to effectively convey the property. The Defendants have consciously tried to avoid compliance with the Consent terms and have raised frivolous defences. Their attempt must be met with an order for payment of costs. In the circumstances, I pass the following order:

(I) The Notice is made absolute in the following terms.

(II) The Prothonotary & Senior Master shall appoint a chartered surveyor from the panel maintained by this Court within a period of two weeks from today to identify, measure and demarcate the land admeasuring 881 acres forming subject matter of the Consent terms.

(III) Upon the surveyor being appointed, he shall tender an estimate of costs to the Plaintiffs who shall deposit the amount so indicated and further amounts as required with the Prothonotary & Senior Master from time to time so as to cover the costs of survey, demarcation preparation of the final plan of the land to be conveyed and the final report of the surveyor.

(IV) After verifying the schedules in the said

conveyance deeds in respect of the 881 acres and after ensuring that the same is reflected in the land records, the Chartered Surveyor shall file a report on that basis along with a plan to be prepared by the Chartered Surveyor. This plan will thereafter annexed to the conveyance. Necessary changes shall be made to the draft conveyance in accordance with the said plan. The Prothonotary & Senior Master shall thereafter execute the conveyance at the cost of the Plaintiffs.

(V) The defendants shall pay costs fixed at Rs.15,000/- to the State Legal Services Authority within two weeks from today.

(A. K. MENON, J.)

After this order was pronounced Mr. Krishna, the learned Advocate on behalf of the defendants seeks a stay on the operation of the order. The request is declined.

(A. K. MENON, J.)