

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11344 OF 2017

Sharad Suratsingh Ostwal

...Petitioner

versus

Lachmandas s/o Bansilal Rathod
(Died through his L.Rs.)

Shivshankar s/o Lachmandas Rathod and others ...Respondents

.....
Mr. Amol S. Gandhi, advocate for the petitioner

Mrs. Anjali Dube (Bajpai), advocate for respondent No.2.
.....

CORAM : V. K. JADHAV, J.

DATED : 16th NOVEMBER, 2017

PER COURT :-

1. By way of this writ petition, the petitioner is challenging the order dated 14.06.2017 passed below Exh.297 in Regular Darkhast No. 216 of 1982, by the 3rd Joint C.J.S.D. Ahmednagar by which the learned executing court allowed the application filed by respondent Nos. 1 to 4 seeking amendment in Regular Darkhast No. 216 of 1982.

2. Learned counsel for the petitioner submits that respondent Nos. 1 to 4 herein and others filed Regular Civil Suit No. 494 of 1968 for redemption of mortgage deed dated 8.11.1924 in respect of

Municipal House No. 2600 and 2531 (C.T.S. No. 969 and 753) situated at Ahmednagar. By judgment and decree dated 27.9.1971, the learned C.J.J.D. Ahmednagar dismissed the said suit. Being aggrieved by the same, respondent No.1 and others filed Regular Civil Appeal No. 302 of 1971 and the same was decreed by the appellate court by setting aside the decree passed by the trial court. The appellate court held that the plaintiffs are entitled to redeem the suit mortgage and also to a decree for actual possession against defendant Nos. 8A and 8B (respondent Nos. 5A and 5B). The appellate court further remanded the suit to the lower court for taking accounts of the amount due under the mortgage in view of Sections 76 and 77 of the Transfer of Property Act and further directed to decide the issue No.10 as framed by the trial court.

3. Learned counsel for the petitioner submits that though the appellate court remanded the suit to the lower court for taking accounts, as aforesaid, and then to decide issue No.10 as framed by the lower court and then proceed to dispose of the suit in accordance with law, by passing necessary preliminary decree in redemption suit, the said suit is still pending and no decree is passed in the said suit. Learned counsel submits that despite the said fact, respondent Nos. 1 to 4 herein filed Regular Darkhast No. 216 of 1982 seeking possession of the suit land from defendant Nos. 8A and 8B

(respondent Nos. 5A and 5B). The predecessor in title of the petitioner made application to clear the position in the matter and accordingly respondent Nos. 1 to 4 herein clarified by filing application below Exh.86 on 7.6.1988 that they are not claiming any relief against Ostwal family and they are not judgment debtors in the execution proceedings.

4. Learned counsel for the petitioner submits that objection came to be raised in the execution proceeding about maintainability of execution petition and the said objection was upheld by order dated 15.7.1988. Being aggrieved by the same, respondent Nos. 1 to 4 herein filed Civil Revision Application No. 57 of 1989 before this Court. In the said revision application, respondent Nos. 1 to 4 herein had deleted defendant Nos. 8A and 8B (respondent Nos. 5A and 5B). By order dated 21.6.2007 this Court has allowed the Civil Revision application No. 57 of 1989.

5. Learned counsel for the petitioner submits that the decree holder without any application filed for bringing legal heirs of Suratsingh Ostwal and without permission of the executing Court brought them on record. The decree holder has also filed application below Exh.123 for issuance of possession warrant against the legal heirs of Suratsingh Ostwal and without verifying the record and

ignoring the fact that the decree holders have not filed any application for bringing the legal heirs of Suratsingh Ostwal on record, the executing Court issued notice against them under Order XXI Rule 22 of C.P.C. Thereafter, the legal heirs of Suratsingh Ostwal filed their objection below Exh.143 and resisted the application with contention that Suratsingh Ostwal died on 15.12.1988 and decree holders have not filed any application for bringing the legal heirs of Suratsingh Ostwal on record. They also raised objection that as per the statement and the application filed by the decree holder, the execution petition has been filed only against defendant Nos. 8A and 8B (respondent Nos. 5A and 5B) i.e. Bapusaheb Ingle and Hirabai Baburao Ingle.

6. Learned counsel for the petitioner submits that thereafter the decree holder has filed application on 7.2.2010 below Exh. 190-A seeking amendment in the execution petition. The judgment debtors have resisted the said application. The executing court by order dated 4.3.2010 rejected application Exh.190-A filed by the decree holder. On 20.4.2010, the decree holders have filed application below Exh.195-A for bringing legal heirs of Suratsingh on record and for amendment of execution petition and also sought permission to carry out the amendment in para 10 to the effect that "Possession warrant be issued against judgment debtors 4-A to 4-I and anybody

on behalf of them obstructing in the possession.” Though the judgment debtors resisted the said application, the executing court partly allowed the same by order dated 3.2.2011 and directed the decree holder to carry out the amendment only in respect of bringing legal heirs on record within stipulated period and rejected the prayer in respect of amendment in the prayer clause. The said order is not challenged by either of the parties. However, the decree holder again filed application below Exh.202 for carrying out amendment to incorporate the same prayer which earlier came to be rejected sought for by application Exh.185-A. Even thereafter the decree holder again made mischief and added judgment debtors 5 to 8 without any order of the Court, thereafter filed amended execution petition. The advocate for the decree holder has tendered his unconditional apology in the proceeding initiated by the executing Court for taking out the copy of documents from the record without permission of the Court.

7. Learned counsel for the petitioner submits that as per order dated 3.2.2011, the decree holder would carry out the amendment as per law and after a period of almost five years i.e. on 14.01.2016 filed an application below Exh.297 seeking amendment that they may be permitted to add the judgment debtors 4-A to 4-I in the execution petition and also prays to carry out amendment as “possession

warrant be issued against judgment debtors 4-A to 4-I and anybody on behalf of them obstructed for the said possession warrant and police aid also be granted". Though the petitioner and the other judgment debtors resisted the said application on various grounds, the executing court allowed the said application by order dated 14.6.2017.

8. Learned counsel for the petitioner submits that the decree holder without making any application amended the execution petition and brought the present petitioner and others on record of execution petition. Moreover, when the petitioner and others pointed out this fact to the executing court, the decree holder made an application for bringing them on record in the execution petition. Though the said application was partly allowed directing the decree holder to carry out amendment within stipulated period, the decree holder did not carry out the amendment. Thus, the second application without setting aside the abatement order and without filing any application for condonation of delay, is hit by the principles of res-judicata. Learned counsel submits that even though the prayer of decree holders to carry out the amendment in respect of possession warrant be issued against the judgment debtors 4A to 4I and anybody on behalf of them, they again filed application Exh.297 for the said relief. Thus, the second application for the similar prayer

is barred by the principles of res-judicata. However, the executing Court has not considered the same and passed the impugned order erroneously.

9. Learned counsel for respondent No. 2 original plaintiff submits that the petitioner is making repeated attempts to resist the execution proceeding of Regular Darkhast No. 216 of 1982. Same objections are being raised before the executing court as well as this Court in resisting Regular Darkhast proceeding and even though every objections are dealt with by this Court in various proceedings and even the matter had gone up to the Supreme Court, the petitioner is protracting the execution of decree by all available means. Learned counsel submits that this writ petition is liable to be dismissed with costs.

10. Respondent Nos. 1 to 4 herein instituted R.C.S. No. 494 of 1968 for redemption of mortgage of property bearing Municipal House No. 2600 and 2531 (C.T.S. No. 969 and 753) situated at Ahmednagar. Learned C.J.J.D. by its judgment and decree dated 27.9.1971 dismissed the said suit with costs.

11. Being aggrieved by the same, the original plaintiff Nos. 1 to 4 and defendant Nos. 5, 6 and 7 preferred Regular Civil Appeal No.

302 of 1971 in the District Court at Ahmednagar. Learned Extra Assistant Judge, Ahmednagar, by judgment and order dated 22.3.1974 allowed the appeal with costs. The judgment and decree passed by the trial court was set aside. The learned Judge held that the plaintiffs are entitled to redeem the suit mortgaged and decree for actual possession against defendant Nos. 8A and 8B (respondent Nos. 5A and 5B). The learned Judge however, remitted the suit to the trial court for taking accounts of the amount due under the mortgage in view of Sections 76 and 77 of Transfer of Property Act and then to decide the issue No.10 as framed by the lower court. The learned Judge has also directed for facilitating such taking of the accounts the lower court shall allow the contesting parties to adduce necessary oral and documentary evidence and then lower court shall proceed to dispose of the suit by passing necessary preliminary decree in redemption suit.

12. Being aggrieved by the said judgment and order passed by the Extra Assistant Judge, Ahmednagar dated 22.3.1974 in Regular Civil Appeal No. 302 of 1971, two second appeals came to be filed in this court, bearing Second appeal No. 794 of 1974 and 795 of 1974 by the judgment debtors Ostwal and tenants-defendant Nos. 8A to 8B, respectively. Both the second appeals came to be dismissed by this Court by common judgment and order dated 10.9.1981.

13. Thereafter the decree holders had initiated execution proceeding by Regular Darkhast No. 216 of 1982 for possession of aforesaid mortgaged property from the defendants/judgment debtors. However, the judgment debtors resisted the said execution proceeding by raising objection to the effect that in view of remittance of matter by the lower appellate court, the decree has not attained finality and the said decree is preliminary in nature.

14. Learned Joint C.J.J.D. Ahmednagar/executing court by order dated 15.7.1988 below Exh.1 in Regular Darkhast No. 216 of 1982 dismissed the said execution proceeding against all judgments debtors with observations that as per the directions of lower appellate court the Regular Civil Suit No. 494 of 1968 is yet not finally decided and as such, preliminary decree cannot be drawn. In absence of statement of accounts, which is yet to be decided by the trial court, the decree cannot be executed. The executing court further observed that in the facts and circumstance of the case, the possession warrant under Order 21 Rule 35(1) of C.P.C. cannot be issued and the Darkhast is also not maintainable for want of decree. The executing court has granted liberty to the decree holders to file execution proceedings only after final decree is passed in R.C.S. No. 494 of 1968.

15. Being aggrieved by the same, the decree holders have filed Civil Revision Application No. 57 of 1989 before this Court. This Court by order dated 21.06.2007 allowed the said revision application in terms of prayer clauses B, C and D and the order dated 15.7.1988 as aforesaid, passed by the executing court, dismissing the Regular Darkhast came to be quashed and set aside. This court has directed the executing court to restore the Darkhast and proceed with it. Being aggrieved by the same, the judgment debtors had approached the Supreme Court by filing Special Leave Petition (Civil) No. 28765 of 2008. The said Special leave petition came to be dismissed as withdrawn vide order dated 19.8.2011. Even thereafter, the judgment debtors made an attempt to review the order of this Court passed in civil revision application No. 57 of 1989 by filing civil application No. 1945 of 2012. However, the said civil application was rejected by this Court on 12.3.2012.

16. During pendency of Civil Revision Application, original decree holder Lachmandas died and his legal heirs, present respondent Nos. 1 to 4 were brought on record. Meanwhile, the judgment debtors again filed an application Exh.271 raising almost same objection contending that R.C.S. No. 494 of 1968 is still pending for decision on issue No.10 and thus the execution proceeding in

Regular Darkhast No. 216 of 1982 are required to be stayed or tried together with the said suit. The decree holders have opposed the application Exh.271. The executing court, taking into account that the decree passed in the said suit has been confirmed by the apex court, has held that the decree holders are entitled for actual possession of the property from judgment debtors and rejected application Exh.271 filed by the judgment debtors, by order dated 31.7.2012. The judgment debtors have challenged the said order in writ petition No. 6752 of 2012 in this Court and this Court by order dated 17.1.2014 dismissed the said writ petition. In para 20 of the order, this Court has made the following observations:-

“20. Thus, position emerges that application Exhibit 271 by judgment debtor-present petitioner purports to resist execution of decree for possession once again on the similar grounds which were decided in earlier round of litigation and are not open for reconsideration under this writ petition. It has to be considered that the decree holders having succeeded right upto the Supreme Court are entitled to possession of the property and, as such, resistance to execution of decree for possession at the behest of the judgment debtors under the garb of issue regarding taking of accounts is yet not decided is a lame excuse.”

17. The judgment debtor has carried out the said order passed by this court to the Supreme court and by order dated 22.8.2014 the Supreme Court has dismissed the Special leave petition.

18. Meanwhile, in the pending execution petition No. 216 of 1982 the decree holders have filed an application Exh.190 and prayed therein to allow the amended execution petition to be taken on record and also to pass order below Exh.123. It has been contended in the said application that pending civil revision application No. 57 of 1989 before this Court, most of the plaintiffs and defendants died and their legal heirs were brought on record and as such, in original execution petition, it is necessary to carry out such change. The executing court by order dated 4.3.2010 has rejected the said application. Consequently, the decree holders have filed an application Exh.195-A for bringing on record the legal heirs of decree holders and also judgment debtor by pointing out that application Exh.190 came to be rejected by the court on the ground that the same was not filed in format and one cannot be able to understand the actually changes that has taken place and as to how the original execution petition was amended. The executing court while rejecting application Exh.190 observed that, it is necessary that the amendment application should be in proper format so that what sort of amendment actually taken place and what purpose will be served can be easily understand. The executing court in the backdrop of the observations made while rejecting application Exh.190 entertained the application Exh.195-A and allowed the said application partly and

permitted the decree holders to bring the legal heirs of deceased judgment debtors No.4 as 4A to 4I, on record. Thereafter, the judgment debtor has filed an application Exh.205 to initiate action under Section 340 of Cr.P.C. against the decree holders and their counsel. The decree holders have filed pursis Exh.208 contending that as per order passed in civil revision application No. 57 of 1989, in which civil application was filed to this Court and order has been passed on 25.1.1990 and accordingly four ladies were to be added in the said civil revision application. The decree holders have accordingly requested to proceed as the judgment debtors are protracting the execution proceeding under one or the another pretext. The executing court by order dated 18.4.2012 rejected the said application Exh.205.

19. Thereafter, the decree holders have filed an application Exh.297 for carrying out certain corrections in original Darkhast. The decree holders have contended in the said application Exh.297 that in earlier proceedings, including the civil revision application, filed in this Court, certain changes have taken place in the title cause as well as by bringing legal heirs of the parties, who died during pendency of those proceedings and as such, original execution petition required to be corrected to some extent. It had been also brought to the notice that said correction is extremely formal and technical in nature. The

petitioner herein has objected to the said application by filing say at Exh.301 and again raised the same objections those are dealt with by this Court, as discussed in the foregoing paras. The learned executing court has considered the entire aspects and accordingly allowed the said application Exh.297. Aggrieved by the same, the petitioner original judgment debtor has again approached this Court by filing present writ petition by raising almost same objections.

20. It is to be repeated here that the possession of the suit property had been transferred to the judgment debtor/Ostwal family, by defendant Nos. 8A and 8B, who were tenants of the mortgagee and against whom decree of possession is directed. The petitioner-original judgment debtor has repeatedly raised the objection that the execution proceeding for recovery of possession against mortgagee/judgment debtor is not tenable. This Court, while deciding civil revision application No. 57 of 1989 preferred against dismissal of Regular Darkhast No. 216 of 1982 has observed that lease in favour of defendant No. 8 was certainly subsequent to the execution of mortgage and defendant Nos. 8 came to put in possession of property only through the mortgagee. The view taken by the first appellate court was reiterated by this court in the second appeals. In the backdrop of these observations, and further considering the objection raised by present petitioner vide application Exh.271 this

court while disposing of writ petition No. 6752 of 2012 has specifically observed that the petitioner-judgment debtor purports to resist execution of decree for possession once again on the similar grounds which were decided in earlier round of litigation. On careful perusal of order passed below Exh. 190, 190-A, 195, 202, 205 and finally 297, I do not find that any case is made out by the petitioner -original judgment debtor to interfere in the order passed by the executing court. The writ petition is devoid of any merits. The writ petition is hereby dismissed.

21. At this stage, learned counsel for the petitioner requested to continue the interim relief so as to enable the petitioner to approach the Apex Court. Even though the decree passed in the year 1974 and it attained the finality, the decree holders are not getting the fruits of the said decree. The petitioner has challenged only the order passed below Exh.297. The petitioner's submissions have been dealt with in the civil revision application by the Apex Court against the decision rendered in the second appeals and also in the writ petition No. 6752 of 2012. It appears that the petitioner is repeatedly approaching the Courts of law with the same contentions, and thus, I am not inclined to accept the request made by the learned counsel for the petitioner. The request is refused.

(V. K. JADHAV, J.)

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