

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2175 OF 2018

SITARAM TULARAM PRADHAN. DECEASED THROUGH HIS L.RS.
SUMAN SITARAM PRADHAN AND OTHERS.
-VERSUS-
DR.KESHAV TULARAM PRADHAN.

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Shri K.C.Sant, Advocate for the Petitioners.
Shri P.R.Katneshwarkar, Advocate for the Respondent.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 24th February, 2018

Per Court:

1 The Petitioners are aggrieved by the order dated 11.01.2018 by which, the Executing Court has rejected the application Exhibit-61 filed by the Petitioners praying for the dismissal of the execution petition Regular Darkhast No.220/2012 (old Special Darkhast No.72/2002).

2 I have considered the submissions of the learned Advocate for the Petitioners/ Judgment Debtors and the learned Advocate appearing on behalf of the sole Respondent/ Decree Holder.

3 The issue raised before this Court is only as regards whether, the Decree Holder could seek execution of the decree of the Trial Court after the judgment of the first Appellate Court has been delivered.

4 The contention of the Petitioners/ Judgment Debtors is that the Respondent/ Decree Holder had sought execution through Special Darkhast No.72/2002 (new Regular Darkhast No.220/2012) after the first Appellate Court dismissed Regular Civil Appeal No.390/2000 by the judgment dated 13.03.2002. It is, therefore, contended that once the judgment and decree of the Trial Court dated 31.03.1987 has merged in the judgment of the Appellate Court dated 13.03.2002, the Decree Holder can only seek execution of the judgment and decree delivered by the Appellate Court dated 13.03.2002 in the light of the doctrine of merger. Thus, any attempt to seek execution of the decree dated 31.03.1987, which is delivered by the Trial Court, would render the execution proceedings unsustainable.

5 The Judgment Debtors have placed reliance upon the judgments of the Honourable Supreme Court in the matters of Kunhayammed and others vs. State of Kerala and another, AIR 2000 SC 2587 and State of Kerala and another vs. Kondottyparamban Moosa and others, AIR 2008 SCW 5677.

6 The learned Advocate for the Respondent/ Decree Holder submits that he succeeded in his Special Civil Suit No.23/1983 by the judgment and decree dated 31.03.1987 delivered by the learned Civil Judge, Senior Division, Aurangabad. The operative part of the order passed by the Trial Court reads as under :-

"Plaintiff's suit is decreed with costs as :

"a" *The plaintiff is declared as the owner and that the defendant is a Benamidar and ostensible owner for the plaintiff with respect to plot bearing Municipal No.7-5-7/1 old and 2-1-128 new, at present 5-4-44 C.T.S. No.2452 from Sheet No.3857 admeasuring 1749 Sq.meters situated at Bhadkalgate, Aurangabad.*

"b" *The defendant to execute a conveyance deed in favour of the plaintiff, so as to vest the title in him.*

"c" *The plaintiff to get possession of the suit property after 3 months from the date of this judgment.*

"d" *The defendant is hereby restrained that he should not transfer the property by way of transfer, mortgage, exchange, assignment, etc. in favour of anybody."*

("a" to "d" are marked by me).

7 Thereafter, the Judgment Debtors had approached the first Appellate Court by filing RCA No.390/2000 which was also dismissed with costs vide judgment dated 13.03.2002. The operative part of the said judgment reads as under :-

*"The appeal is dismissed with costs.
The declaration made in favour of plaintiff to be Benamidar of property is hereby withdrawn.
Rest of the decree of Trial Court is kept intact."
(Emphasis supplied)*

8 It is then informed that the Second Appeal preferred by the Judgment Debtors was also dismissed by this Court and the Special Leave Petition preferred by them was also dismissed by the Honourable Supreme Court.

9 The learned Advocate for the Decree Holder submits that the Decree Holder migrated to England for his medical practice. He married a British national and ever since he is residing in the United Kingdom. It is on account of the litigation that he has to make several visits to India and spend at least Rs.2 lac per visit. He desires that the litigation is concluded at the earliest.

10 He further submits that the Judgment Debtors have earlier approached this Court on trivial grounds. Once, on the ground that the Decree Holder is not an Indian national. After the decree of the Trial Court was sustained upto the Honourable Supreme Court, these Judgment Debtors have made every effort to frustrate the Decree Holder and tire him out with an intention of grabbing the property.

11 He further submits that though this Court, by order dated 27.03.2014 in Writ Petition No.1232/2014 filed by some of the Judgment Debtors (Dr.Vaishali Sitaram Pradhan and another vs. Dr.Keshav Tularam Pradhan), had directed the Executing Court to decide the execution proceedings on or before 30.08.2014, the said proceedings have still not been concluded on account of every obstacle created by the Judgment Debtors at every stage in the execution proceedings. He points out that this Court has earlier dismissed two Writ Petitions filed by the Judgment Debtors being Nos.1232/2014 on 27.03.2014 and 4516/2017 on 12.07.2017. This Court was on the verge of imposing costs on the

Petitioners while dismissing Writ Petition No.1232/2014 on 27.03.2014, but refrained from doing so. Writ Petition No.4516/2017 was withdrawn by the Judgment Debtors on 12.07.2017, when this Court was about to dismiss it.

12 Insofar as the doctrine of merger is concerned, it requires no debate as this issue has been settled by the Honourable Supreme Court that the decree of the Trial Court would merge in the order of the Appellate Court notwithstanding whether, the Appellate Court has sustained the decree or modified the decree or has set aside the decree. This issue does not require debate as the learned Advocates for both sides have submitted that the doctrine of merger is settled law.

13 The issue, therefore, is as to whether, the application Exhibit-61 filed by the Judgment Debtors on 27.09.2017 in Special Darkhast No.72/2002 (new number Regular Darkhast No.220/2012) after a period of 15 years, can be said to be a bonafide application and more so, in the backdrop of the litigation between the parties and the Judgment Debtors having unlawfully kept the possession of the suit property.

14 The thrust of the contention of the Judgment Debtors is that though the Decree Holder preferred the execution proceedings on 03.07.2002, whether, the execution proceedings pertaining to the decree dated 31.03.1987 of the Trial Court could be maintained when the said decree had merged in the judgment of the Appellate Court dated

13.03.2002.

15 It cannot be ignored that the Judgment Debtors have been unsuccessful in grabbing the suit property right upto the doors of the Honourable Supreme Court. The Decree Holder is, therefore, entitled to the suit property and the Trial Court has directed the Judgment Debtors to execute a Conveyance Deed in favour of the Plaintiff/ Decree Holder so as to vest the title in him. It also cannot be ignored that the said decree is dated 31.03.1987 and for more than 31 years, the Judgment Debtors have succeeded in killing time and for such conduct, this Court was about to impose costs.

16 The peculiarity of the facts emerging from this case are as under:-

- (a) As is seen from the reproduced portion of the decree of the Trial Court dated 31.03.1987, the Trial Court had declared the Defendant as a Benamidar and ostensible owner for the Plaintiff, who was held to be the actual owner of the property.
- (b) The second direction was that the Defendant should execute a Conveyance Deed in favour of the Plaintiff and vest the title in him.
- (c) The third direction was that the Plaintiff would get the possession of the suit property after three months from the date of the judgment, which is 31.03.1987.

- (d) The first Appellate Court, as is seen from the reproduced portion of its order dated 13.03.2002, had dismissed the appeal and the declaration as regards the Defendant being the Benamidar was withdrawn. It was specifically ordered as "REST OF THE DECREE OF TRIAL COURT IS KEPT INTACT".

17 In the above backdrop, it would be apposite to reproduce the cause title of the application filed by the Decree Holder for execution of the decree under Order 21 Rule 11 of the Code of Civil Procedure, as per the format, as under:-

*"APPLICATION FOR EXECUTION OF DECREE
(Order XXI Rule 11 CPC)
IN THE COURT OF THE CIVIL JUDGE (SENIOR DIVISION)
AT AURANGABAD.
Special Darkhast No.72 of 2002.
R.D. No.220/2012.*

*I, Dr.Keshav s/o Tularam Pradhan decree holder
hereby apply for execution of the decree hereinbelow
setforth:*

- 1. Name of Suit : Special Civil Suit No.23/1983*
- 2. Name of parties : Dr.Keshav s/o Tularam Pradhan.
Ptffs. (DH). (Through his power of Attorney
Mr.Sidharth s/o Tularam Pradhan, Approved Guide in
Department of Tourism, Government of India,
"Sudharshan" Niwas, Bhadkal Gate, Aurangabad.*

-Versus-

*Sitaram s/o Tularam Pradhan. Defts. (JD)
Age : 68 years, Occupation : Lecturer,
R/o "Sudharshan" Niwas, Bhadkal Gate, Aurangabad.*

3. *Date of Decree : 31st March 1987. Copy Enclosed.*
4. *Whether any appeal preferred from decree : Yes. The Defendant (J.D.) had referred an appeal being Regular Civil Appeal No.390 of 2000, which came to be dismissed and the lower court decree dated 13.03.1987 was confirmed. (copy enclosed)."*

18 The Decree Holder as well as the Executing Court were, therefore, aware of the above cause title of the execution proceedings wherein, the Decree Holder had specifically mentioned the date of the original decree as 31.03.1987. Below the date, it is also mentioned that the copy of the decree is enclosed. In clause (4), as to whether, any appeal was preferred from the decree, the Decree Holder has specifically mentioned about the Regular Civil Appeal and which was dismissed on 13.03.2002. The copy of the said judgment was also enclosed.

19 It, therefore, indicates that a specific format available for making an application for execution of the decree under Order 21 Rule 11 of the Code of Civil Procedure was filled in by the Decree Holder and was presented to the Executing Court. Considering the format, the Decree Holder declared the date of the first decree and also declared the decision of the first Appellate Court by which, the decree of the Trial Court was practically kept intact except the declaration of Benamidar.

20 In the above backdrop, in my view, the Decree Holder has specifically narrated the details of the first Decree as well as the fate of the appeal and the judgment of the Appellate Court and had enclosed the

copies of both judgments.

21 An additional factor in this matter is that if the original decree of the Trial Court was overturned or completely changed or replaced by the judgment and decree of the Appellate Court, the decree of the Trial Court would have completely lost its identity. However, in the instant case, the declaration of Benamidar alone was deleted by the Appellate Court and rest of the decree was specifically kept intact as is seen from the reproduced portion of the order of the Appellate Court. Both the judgments are before the Executing Court and whether, it be the decree of the Trial Court or the judgment of the Appellate Court, specific directions of the Trial Court (b to d) reproduced above, have been kept intact and are, therefore, identical.

22 The Executing Court has considered the above factors and has concluded that the application Exhibit-61 filed by the Judgment Debtors was devoid of merit and was hence rejected. Considering the law laid down by the Honourable Supreme Court in the matters of *Syed Yakoob v/s K.S.Radhakrishnan*, **AIR 1964 SC 477** and *Surya Dev Rai v/s Ram Chander Rai*, **AIR 2003 SC 3044**, unless the impugned order is perverse, erroneous and likely to cause gross injustice, no interference is called for.

23 Coming to the bonafides of the Judgment Debtors in filing the application Exhibit-61, I find that the following factors need to be noted :-

(a) The Decree Holder/ Plaintiff succeeded by the judgment

dated 31.03.1987.

- (b) The decree of the Trial Court has been sustained upto the Honourable Supreme Court when the Special Leave Petition was dismissed.
- (c) At least on two occasions, the Judgment Debtors were before this Court raising trivial issues like the Decree Holder being a British national and for framing issues on the objection petition, without even canvassing any such contention in the objection petition.
- (d) Though this Court was inclined to impose costs on the Judgment Debtors for having made the Decree Holder suffer rigours of litigation for more than 14 years, this Court had refrained from doing so on the earlier occasion.
- (e) The decree was put to execution by the execution proceedings dated 03.07.2002.
- (f) The Judgment Debtors have not raised any issue about the doctrine of merger for the past 15 years.
- (g) When several efforts to delay the execution proceedings failed upto this Court, the application Exhibit-61 is filed on 27.09.2017.
- (h) The Honourable Supreme Court (Three Judges Bench) in the matter of Merla Ramanna vs. Nallaparaju and others, AIR

1956 SC 87, has concluded in paragraph 13 that "*if objection to the jurisdiction is not taken at the earliest opportunity, it must be deemed to have been waived and cannot be raised at any later stage of the proceedings.*" It is further held that "*We agree with the decision in Balakrishnayya vs. Linga Rao, ILR (1943) Mad. 804, and hold that the objection to the District Court entertaining an application to execute the decree in O.S. No.25 of 1927 is one that could be waived and not having been taken in the written statement is not now available to the appellant.*"

24 Taking into account the entire facts as recorded above, I find it appropriate to dismiss this Writ Petition by imposing costs of Rs.25,000/- upon the Petitioners. Before commencing the dictation of this order in open court, the view which has been taken, was made known to the learned Advocate for the Petitioners including that costs of Rs.25,000/- are being imposed. The learned Advocate for the Petitioners has taken instructions from one of the Petitioners, present in the Court and has stated that the Petitioners request for a judgment in this matter.

25 As such, this Writ Petition is dismissed.

26 The seven Petitioners jointly or severally, shall pay costs of

Rs.25,000/- (Rupees Twenty Five Thousand) to the Power of Attorney of the Decree Holder, by depositing the said amount before the Executing Court in Regular Darkhast No.220/2012 on or before 15.03.2018, failing which, the Executing Court shall pass necessary orders for discarding their objections.

27 If the above amount is deposited, the Power of Attorney of the Decree Holder is at liberty to withdraw the said amount, without conditions.

28 Since the Regular Darkhast No.220/2012 (old Special Darkhast No.72/2002) is pending for 16 years, the Executing Court shall dispose of the same expeditiously and before 31.07.2018.

kps

(RAVINDRA V. GHUGE, J.)