

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO. 566 OF 2017
WITH
CIVIL APPLICATION NO. 368 OF 2017**

Smt.Kesharben Kanjibhai & Ors.	...	Applicants
V/s.		
Babubhai Devabhai & Ors.	...	Respondents

- Mr.Ralston Fernandes for the Applicants.
- Mrs.Teja Katdare i/b.Ms.Alpa Jhaveri for Respondent Nos.1 to 5.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 26th FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the Applicants and the Respondents.

2] By this Civil Revision Application, filed under Section 115 of the Civil Procedure Code (*for short, "C.P.C.*), the Applicants are challenging the order dated 29th June, 2017, passed by the Civil Judge Senior Division, Daman, in S.E.A. No.11 of 2008 below Exhibit-90, thereby rejecting the said application.

3] The application at Exhibit-90 was filed by the present Applicants under Section 47 read with Order-21 Rule 97 of the C.P.C..

The present Applicants are the judgment debtors in the trial Court.

4] It was contended by the present Applicants that the Decree is passed in respect of the property bearing Survey No.204/10, admeasuring 2001 sq. meters situated at Village “Devka”, Nani-Daman, whereas in the Darkhast or the execution proceeding, the description of the suit property is given as Survey No.204/10, admeasuring 2001 sq. meters of village “Marwad”, Nani-Daman.

5] It is submitted that village Devka and village Marwad are the different areas and therefore, the Applicants were justified in taking an objection to the execution of the decree. The earlier objection raised by the Applicants to the execution of the decree was rejected by the trial Court, hence the Applicants had preferred Civil Revision Application No.54 of 2016 in this Court. In the said Revision Application, the Applicants had raised this objection but as it was not raised before the trial Court, Applicants sought permission of this Court to withdraw the Civil Revision Application, with liberty to take out appropriate proceeding before the executing Court, raising these contentions amongst others. The Applicants had also sought the permission to lead oral evidence in respect of the contentions. As per the order passed by this Court, on 2nd February, 2016, the Civil Revision Application was allowed to be withdrawn with liberty as

sought and all the contentions of the parties were expressly kept open and trial Court was directed to decide such application in accordance of law, if such application is filed.

6] Thereafter, the Applicants have preferred this application before the trial Court raising these contentions and also seeking permission to lead evidence in respect of their contentions.

7] This application came to be resisted by the Respondents/Decree-Holders and the trial Court was, after considering the averments made in the plaint and the written statement pleased to hold that the suit property, as described in the plaint and in the execution proceeding is one and the same and therefore, no ground is made out to reopen the original proceeding of the suit by giving an opportunity of leading evidence to the Petitioner. The trial Court, accordingly, rejected the application.

8] While challenging this impugned order passed by the trial Court, the submission of learned counsel for the Applicants is that when any application is filed under Order 21 Rule 97 and Section 47 of the C.P.C., it was incumbent on the trial Court to give an opportunity to lead evidence of the Petitioner, especially in the light of the fact that, this Court has granted such liberty keeping all the contentions of

the parties expressly open. It is urged, therefore, that the impugned order passed by the trial Court rejecting such permission to lead oral evidence needs to be quashed and set-aside.

9] Per contra, learned counsel for Respondents/Plaintiffs has supported the impugned order by pointing out that the affidavit filed by the Respondents along with the relevant documents go to show that the village “Devka” and village “Marwad” are adjacent to each other. Beach area is known as Devka; whereas village is known as Marwad. She has also pointed out to the Certificate issued by the Marwad Group Gram Panchayat on 8th January, 2018 to that effect.

10] Learned counsel for the Applicants also points out to the letter written by the Mamlatdar, Daman dated 6th December, 2017, stating that the village Marwad and Devka are different revenue villages in Revenue Record; the boundaries of both the villages are adjacent to each other, however, both the villages have their different survey numbers. The Applicants have also produced on record the Map of Daman District showing that both the villages are having different survey numbers with respective areas.

11] Thus, admitted position on record is that Village Devka and village Marwad are adjacent to each other. Hence, only question

for consideration is whether there can be any confusion about the identity of the suit property, as described in the plaint and whether the Applicants, at the time of hearing of the suit were misled on account of the description of the suit property, as given in the plaint, to be situated at village Devka, though actually it may be situated in the Marwad.

12] In this respect, the learned trial Court has, in its order in paragraph (11), given a Chart, as to how the contents in the plaint are admitted by the Applicants/Defendants and how there was absolutely no confusion as to which property the Respondents/ Plaintiffs were referring in the plaint, even assuming that the description of the said property as situated at “Devka” instead of “Marwad” was not correctly given in the plaint. The chart clearly goes to show that the Respondents have in the plaint stated that the suit property is situated at village “Devka” and in the written statement, the Applicants have admitted the contents thereof to be true and correct. They have further admitted that the suit property was one of their isolated property, having no potential of better cultivation, which is far away from residence and other lands. In paragraph No.(2) of the plaint, Respondents have further described how the suit property is inherited by them and in paragraph No.2 of the written statement, the

Applicants have not denied the said facts; only the ignorance is feigned about the same.

13] Then, in paragraph No.(3) of the plaint, the Respondents have further given the relationship between the parties and stated that the Applicants are the owners of Hotel Dariya Darshan, which is constructed over the property bearing Survey No.13, 12/8 and the other properties situated at village Devka, Marwad, Nani-Daman. In paragraph No.(4) of the plaint, the Respondents have further stated that Hotel premises of the Applicants i.e. Hotel Dariya Darshan and the suit property are adjacent to each other. In their written statement, the Applicants have not disputed these contents in paragraph No.3 and 4 of the plaint.

14] Conversely, it is admitted by them that the contents of paragraph No.(4) of the plaint as true and correct and further stated that the suit property is situated to the north side of their Hotel Dariya Darshan. Therefore, if there was any confusion about the identity of the suit property, the Applicants could have very well said that the suit property is not situated adjacent to his own Hotel Dariya Darshan. The Respondents have also produced on record the visiting card of Applicant's Hotel Dariya Darshan, which shows that it is situated at Devka Beach, Nani Daman. Thus, the Applicants have also

given the description of their Hotel as situated at Devka Beach, Nani-Daman, though actually, according to them, it is situate at Marwad.

15] Further, the Certificate issued by Marwad Group Gram Panchayat on 8th January, 2018, also goes to show that, “the Survey No.204/10 that is the suit property is situated behind Hotel Dariya-Darshan at Devka Beach. This area is known as Devka but in Government Revenue Record it is a part of village Marwad and the said area because of Devka beach is known as Devka and therefore, village Marwad is not mentioned”. It is further certified that, “for the same reason, the Hotel Dariya Drshan, Cida-de-Daman, Hotel Mira Mar in their address write only Devka beach, as this beach popularly known as Devka everywhere”.

16] Thus, it is clear that though village Devka and village Marwad are two different villages, in view of popularity of the area of the beach, the said area is known as Devka Beach, even though actually the suit property comes within the territorial limits of village Marwad. Even the letter written by the Mamlatdar, Daman, on 6th December, 2017, relied upon by learned counsel for the Applicants, shows that the village Marwad and village Devka are though difference revenue villages, they are adjacent to each other. Even if it is accepted that, they are having different survey numbers,

considering the admissions given by the Applicants in their written statement, that the suit property is situate to the north side of the Hotel Dariya Darshan and also having regard to other admissions in the written statement, not disputing the identity of the suit property, there hardly remains any confusion about the same. In such situation, there was no necessity of recording of any oral evidence.

17] Moreover, the order passed by this Court merely directs the trial Court to decide the said application, “in accordance with law”. The executing Court has accordingly considered whatever material was available on record and found that as regards the identity of the suit property, there should not be any dispute, hence there is no reason to record any oral evidence. Therefore, as regards this objection, I do not find any reason to interfere in the impugned order passed by the trial Court.

18] At this stage, learned counsel for the Applicants, points out that Applicants had taken objection to the execution of the decree also on the ground that the Applicants have raised contention in the written statement that they have purchased the suit property from the father of the Respondents and the Respondents had never taken any objection for considerable long time since 1972. Hence, the Court ought to have considered that, as per Section 53A of the Transfer of

Property Act, there is presumption in favour of the Applicants regarding part performance i.e. having possession, which is not denied by the Plaintiffs.

19] However, in my considered opinion, to entertain such objection in execution proceeding which is already raised in the written statement and decided by the Court while passing the decree is as good as the opening of the entire decree, which is beyond the scope of Section 47 and Order 21 Rule 91 of C.P.C., hence there is no merit or any reason to interfere in the trial Court's order also. Therefore, Civil Revision Application stands dismissed.

20] Learned counsel for the Applicants submits that during *pendency* of this Civil Revision Application, the statement was made by learned counsel for the Respondents that they would not pursue the execution, that statement is continued till the date and it may be continued for further eight weeks.

21] Learned counsel for the Respondents/Plaintiffs takes an objection to grant further extension on the count that the suit is of the year 2003, the judgment was delivered in the year 2008 and since then the Respondents/Plaintiffs are seeking execution of the decree, which is on one ground or the other, is protracted or denied.

22] In my considered view, therefore, no reason is made out to extend the said statement as such which was made at bar. This prayer therefore stands rejected.

23] In view of disposal of the Civil Revision Application, nothing survives in the Civil Application No.368 of 2017 and accordingly, it stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]