

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

WRIT PETITION NO. 9022 OF 2019

**NARSING APPARAO DAMODARE
VERSUS
KONDOPANT DIGAMBARAO KULKARNI**

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Advocate for the Petitioner : Shri S. G. Chapalgaonkar
Advocate for the Respondent - sole : Shri H. V. Tungar

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 14th AUGUST, 2019.

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PER COURT :

1. The petitioner, original Judgment Debtor, is aggrieved by the order dated 15/03/2019 passed by the executing Court, by which, his application Exhibit 98 filed in Regular Darkhast No.22/2002, has been rejected.

2. Contention of the petitioner Narsing (J.D.) is that the decree delivered by the Trial Court in RCS No.178/1997, dated 19/03/2001 is rendered inexecutable. The respondent Decree Holder (D.H.) had set out in the description of the suit property in the 1997 suit that the petitioner Narsing had occupied 60 x 50 ft. area on the west side of Gat No.154.

Unfortunately, the petitioner did not contest the said suit and it was decreed *exparte*. The said decree has now attained finality. However, after the execution proceedings began in 2002, the Judgment Debtor (J.D.) claimed to have been put in possession of 15 x 68 ft. area in Gat No. 154 on the same side, by the government. Presently, the J.D. is occupying that portion which is 15 x 68 ft.

3. Further contention is that the same plaintiff D.H. filed a subsequent suit bearing RCS No.79/2017 wherein the J.D. has been arrayed as defendant No.9 and a sketch map is placed on record to indicate that the petitioner is occupying 15 x 68 ft. area. He was put in possession by the government by a 'Kabala' and the J.D. is occupying that portion. As the government has put the J.D. into possession, the D.H. cannot seek execution of the earlier decree until the suit of 2017 is decided. The earlier decree has, therefore, become inexecutable.

4. The learned Advocate for the D.H. submits that the earlier judgment and decree dated 19/03/2001 was on the

basis of the land, which was occupied by the J.D. The D.H. had given the land on rent to the J.D. and thereafter he declined to evict himself from the said property. The 1997 suit was filed for the purpose of recovering the possession of the said property. The execution proceedings were initiated with promptitude on 06/07/2002.

5. He further submits that as it was noticed in 2017 that some more persons had occupied the same plot in Gat No. 154, the 2017 suit was instituted. Based on information, the D.H. averred in the second suit that the J.D. was now occupied 15 x 68 ft. land. There are certain other persons who have occupied adjacent areas. The D.H. has a right to acquire possession of land admeasuring 50 x 60 ft. The execution proceedings are purely as against the J.D. and if the J.D. admits that he is in possession of 15 x 68 ft. land, he needs to be removed from the said area in view of the decree in favour of the D.H. dated 19/03/2001.

6. It appears from the record and the submissions of the learned Advocates that there are several disputed issues raised.

The 2017 suit is also pending. The D.H. has put the 2001 decree for execution and the execution proceedings have to be taken to a logical end. If there are any obstacles or impediments, the executing Court, in my view, can deal with the said aspects.

7. It also needs to be noted from the records that if the J.D. claims to be occupied only 15 x 68 ft. land and claims to be put in possession by the Government, this contention cannot be tested in the backdrop of the decree against him delivered on 19/03/2001. The said decree cannot be rendered an empty formality. If the decree is not set aside by any superior Court, it will have to be executed in accordance with law. The Trial Court has recorded in the impugned order that if any the J.D. is now occupying a small portion, that cannot be a ground for declaring that the decree is inexecutable.

8. The D.H. has relied upon the judgment of the Honourable Apex Court in the matter of *Dhurandhar Prasad Singh Vs. Jai Prakash University, AIR (SC) 2001 2552*, wherein the Honourable Apex Court has concluded in

paragraph Nos. 12 and 23 as under :-

"12. Again, in the case of Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, AIR 1970 SC 1475, the Court was considering scope of objection under Section 47 of the Code in relation to the executability of a decree and it was laid down that only such a decree can be subject-matter of objection which is nullity and not a decree which is erroneous either in law or on facts. J.C.Shah, J. speaking for himself and on behalf of K.S.Hegde and A.N.Grover, JJ., laid down the law at pages 1476-77 which runs thus:-

"A Court executing a **decree cannot go behind** the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties."

"23. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing Court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and nullity, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. In the case on hand, the decree was passed against the governing body of the College which

was defendant without seeking leave of the Court to continue the suit against the University upon whom the interest of the original defendant devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law."

9. Considering the above and keeping in view that the D.H. has a right to have the decree executed and it being within the domain of the executing Court to have the decree executed, I find that this Court should refrain from interfering in the jurisdiction of the executing Court, especially when the J.D. admits of having occupied with 15 x 68 ft. area. The J.D. need not be worried about the adjoining occupants or persons, who may have occupied the said areas authorizedly or unauthorizedly. The decree to be executed is restricted to the verdict of the Trial Court set out in the decree and the law

cannot declare its helplessness in concluding that because the second suit is pending, the decree in the earlier suit has become inexecutable.

10. In view of the above, this petition, being devoid of merit is, therefore, dismissed.

11. Needless to state, all contentions of the J.D. as are permissible by law to be raised in execution proceedings or in the subsequent 2017 suit, are kept open.

(RAVINDRA V. GHUGE, J.)

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