

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

902 SECOND APPEAL NO.406 OF 2019
WITH
CA/8528/2019
IN
SA/406/2019

CHANDRAKANT PANDURANG LOHAR AND OTHERS
VERSUS
PANDURANGRAO DIED HIS LRS. VASUDEORAO
PANDURANGRAO RATNALIKAR AND OTHERS

...
Mr.R.R.Mantri, Advocate for applicants.
Mr. U.B.Bilolikar, Advocate for R-1/1 to
1/3. ...

CORAM: V.L.ACHLIYA,J.

DATE : 15.11.2019

...

ORAL ORDER:

1. Being aggrieved by the Judgment and Order dated 08/04/2019 passed in R.C.A. No. 1400027/2011 by District Judge-1, Biloli, district Nanded to dismiss the appeal preferred by appellants/Judgment Debtors and confirmed the order dated 22/07/2011 passed by learned Civil Judge [Sr.Division], Biloli, District Nanded in R.D.No. 76/2003 arising out of R.C.S.No. 238/1984, the appellants have preferred this Second Appeal.

2. Heard learned counsel for appellants and respondents/Decree Holders.

3. Before dealing with with the submissions advanced, it is necessary to consider few facts leading to filing of this appeal. Late Dr.Pandurangrao Ratnalikar, the original plaintiff and father of present appellants, had filed R.C.S.No. 238/1984 seeking declaration of ownership and recovery of possession of suit property which has been described in plaint as under :

"The suit portion mentioned below are the part and parcel of the suit land S.No. 200/2 and 200/3 and as per the map drawn by D.I.L.R. Nanded vide file bearing No. BIMR/68/dt. 03/11/77 are the part of the portion of 34-R shown under the map mentioned as huts. But for the purposes of this suit and the claim of recovery of possession of the plaintiff is describing the area on approximation in possession of the defendant.

In possession of the defendant :

(Raghunath s/o Dhondiba)

Length 8.5 mtrs x 8 mtrs breadth

East : Ratnali road

West : Open space

North : Gyanoba Nagorao Bedke

South : Pandu Shankar Hake

*situated at village 'Ratnali',
Taluka Biloli, District Nanded."*

4. By the Suit filed, the plaintiff has claimed ownership of land bearing S.No. 2002 and 2003 situated at village Ratnali, Taluka Dharmabad, District Nanded and further claimed decree of possession to the limited extent of part of suit lands described in the schedule [as quoted above]. The Suit was originally instituted against late Raghunath Dhondiba Lohar, the original defendant. The present appellants are the legal heirs of late Chandrakant Pandurang Lohar. By the Judgment and decree passed in R.C.S.No. 238/1984 dated 31/10/1993 by trial Court, partly decreed the Suit to the extent of granting of declaration of ownership in favour of original plaintiff. The relief of recovery of possession of suit land occupied by defendant was dismissed by recording reason that no effective decree could be

passed in absence of proper description of suit property. The Judgment and decree passed by trial Court carried in Appeal by the original plaintiff. By Judgment and Order dated 05/10/2002 passed in R.C.A. No. 522/1993 filed by the father of respondent as against present appellants came to be allowed. The Judgment and decree passed by trial Court to dismiss the Suit for recovery of possession of suit property came to be set aside. The appellate Court directed the defendant to deliver vacant possession of the disputed land as described in plaint schedule to the appellants within 3 months from the date of Judgment. The operative order passed in Appeal reads as under.

ORDER

[i] The Appeal stands allowed with costs.

[ii] The impugned Judgment and decree to the extent of dismissal of suit for recovery of possession of suit lands is hereby set aside.

[iii] The defendant shall deliver vacant possession of disputed lands, as described in plaint schedule, to the appellant/plaintiff within three months from today.

[iv] Decree be drawn up accordingly.

5. Being aggrieved by the decision of first appellate Court, the appellants filed Second Appeal No. 2/2003 before this Court, which was dismissed by this Court.

6. The respondents/original plaintiffs have filed execution proceeding seeking execution of decree passed in their favour. The proceeding came to be registered as R.D.No. 76/2000. The appellants/Judgment Debtors appeared in the execution proceeding and filed application vide Exh.32 to keep the warrant of possession in abeyance. The appellants/Judgment Debtors filed another application [Exh. 46] u/s 47 of C.P.C. raising objection to the execution of decree and prayed to held decree not executable. By order dated 22/07/2011, the executing Court rejected both the applications moved by the appellants/Judgment Debtors after hearing the parties. Being aggrieved, the appellants preferred first appeal before the District Court vide R.C.A. No. 27/2011. By the Judgment and order dated 08/04/2019 the appellate Court has dismissed the appeal. Being aggrieved the appellants/Judgment debtors have preferred this appeal.

7. Learned counsel for appellants strenuously contended that the appeal raises substantial questions of law. By referring the grounds of appeal, learned counsel submits that ground Nos. 5,7 and 8 raised in the memo of appeal be treated as substantial questions of law. It is contended that the Suit was filed without compliance to the provisions of Order VII Rule 3 of C.P.C. The description of suit property was not given in accordance with the mandate contained under Order VII Rule 3 of C.P.C. The exact area of the suit property was not given. In spite of direction given by executing Court, the Decree Holders have not produced the map drawn by District Inspector of Land Records. It is submitted that the Courts below have failed to consider that in absence of suit property being sufficiently identified, the decree is not liable to be executed.

8. On the other hand, learned counsel for respondents/Decree Holders supported the order passed by trial Court and confirmed in appeal. It is submitted that respondents/Judgment Debtors who have lost the battle in first round of litigation up

to this Court and decree passed in the matter attained finality, initiated another round of litigation by raising false and frivolous objection as to execution of decree. It is submitted that the Suit has been filed in due compliance of Order VII Rule 3 of C.P.C. By inviting attention to the order passed by trial Court and confirmed in appeal, learned counsel submits that the contentions of appellants have been thoroughly examined by the Courts below. It is further pointed out that at no point of time, deceased defendant has not disputed the identity of property. It is submitted that in the Written Statement filed by original defendant, the defendant has claimed that he become owner of the suit property by way of adverse possession and alternatively claimed that plaintiff has granted lease of suit property which is irrevocable. It is submitted that in the Suit filed by plaintiff, the defendant then never raised objection regarding identity and description of suit property. After the decree confirmed up to this Court, the objection has been raised in the execution proceeding by Judgment debtors with the L.Rs. Of deceased defendant with ulterior motive to any-how protract their unauthorized

possession. It is submitted that the orders passed by Courts below are reasoned and suffers from no perversity and appeal raises no substantial question of law.

9. I have carefully considered the submissions advanced in the light of impugned order passed by executing Court and confirmed by first appellate Court. Also perused copy of plaint, the Judgment and decree passed by trial Court and first appellate Court. Perusal of plaint clearly spell out that the plaintiff has given description of suit property with the boundaries. The schedule of suit property as quoted above clearly depicts that the objection as raised made with oblique motive to protract execution. There is no merit in the submission advanced that the Suit was filed without description of suit property as provided under Order VII Rule 3 of C.P.C. The orders passed by Courts below are well reasoned and suffers from no perversity so as to entertain this appeal. It is apparent from the Judgment and decree passed by trial Court that the original defendant has not disputed nor raised any objection as to the description or identity of suit property. The decree passed by trial

Court has been confirmed up to this Court. After lost the battle up to this Court, the respondents/Judgment Debtors have raised objection in execution proceeding as to to identity of suit property. The objection raised appears to be frivolous and without any basis. It is pertinent to note that original defendant has resisted the suit claim by claiming right over the suit property by way of adverse possession as well as irrovocable lease of suit property. He has never objected maintainability of suit property on the ground of not providing description of suit property as contemplated under Order VII Rule 3 of C.P.C. The objection to execution of decree on the ground of identity of property first time raised by appellant who become party to proceedings and stepped in the shoes of original defendant as his legal heir against whom decree has been passed.

10. Learned counsel for appellants has referred and relied upon the decision of Apex Court in the case of ***Shafiqur Rehman Khan Vs. Mohammad Jahan Begum reported in 1982 (2) SCC 456*** and contended that unless the identity of suit property is established, the decree can

not be executed. In my view, the ruling referred and relied have no bearing upon the facts of the case. In the case in hand, the suit property has been described in plaint by producing measurement as well as boundaries. The objection raised as to the identity of suit property is without any basis. The appellants/objectors have stepped into the shoes of original defendant as legal heirs. They can not independently raise objection as to the executability of decree on the ground of description of suit property in absence of such objection being raised by the deceased defendant. The Courts below have thoroughly examined the contention raised by the objector.

11. In the objection raised by objectors they claimed that they are in long standing settled possession and carrying the profession as Black-smith, artisian, etc. and their possession can not be disturbed by decree holder in execution of decree. So also they have objected the execution of decree even to the extent of property described in schedule annexed with the plaint. The appellants/objectors can not raise objection to the execution of decree on

the ground of their possession, which they have acquired during pendency of proceeding as they have stepped into shoes of original defendant as his legal heirs. They have no independent right to raise objection as to the executability of decree. In that view, the objections raised are frivolous and are made with object to protract execution of decree. The executing Court in its order has observed in para Nos. 7 to 9 as under :

"7. From the proposition of law enunciated in the aforesaid decision, it is palpably clear that the scope of section 47 is very limited. Therefore, this Court being the executing Court can not again embark upon reappreciation of the evidence adduced in R.C.S.No. 283/1984 as called upon by the learned Advocate for the J.D.No. $\frac{1}{4}$ and J.D.No. 1/7.

8. It can not be gain said that provisions of Order XXI Rules 97 to 103 are available only to the obstructor, who has independent right over the property and not to

the person, who has acquired rights from any of the party to the decree. In the case in hand, neither the application at Exh. 32 nor the application at Exh. 46 discloses that the J.D.No. $\frac{1}{4}$ and J.D.No. 1/7 have any independent right in the suit property, but it is clear that they have filed these applications in the capacity of the legal representatives of deceased J.D./the original defendant. Be that as it is.

9. From the copy of the plaint in R.C.S.No. 238/1984 at Exh. 4/1, it is clear that the D.H. i.e. the plaintiff in that suit had given description of the suit property as envisaged under Order VII Rule 3 of C.P.C. It is manifest from the copy of the decree in R.C.A. No. 522/1993 at Exh. 4/3 that the Hon'ble Additional District Judge, Biloli is pleased to direct the original defendant to deliver vacant possession of the suit property as described in schedule to the plaint in R.C.S. No.

238/1984. The copy of S.A.No. 2/2003 filed along with the list at Exh. 12 discloses that the appellant, who was the original defendant in R.C.S.No. 238/1984 did not take any objection as regards the description of the suit property in that suit. On the contrary, he had asserted his title to and possession over it. Under these circumstances, the J.D.No. $\frac{1}{4}$ and J.D.No. 1/7, who are the legal representatives of the original defendants in R.C.S.No. 238/1984 are estopped from rising objection as regards the description of the suit property, more particularly when S.A.No. 2/2003 has been dismissed by the Hon'ble Bombay High Court. "

11. The appellate Court has thoroughly considered the contentions as raised before this Court and observed in para No. 18 as under :

" Here in this case decree holder are the owner of the immovable property, which is in

unauthorized possession of the judgment debtor/appellant. The respondents and their predecessor in title in the aforesaid proceeding has given the description of the property, which is occupation of the appellant. The said portion of the property is a part of 34 R land. The appellant is concerned only in respect of his structure standing over the immovable property owned by the respondents. The description of the property in possession of the appellant has been given in all aforesaid proceeding. The description of the property given by the respondent is sufficient to identify the property in possession of the appellant. But it seems that the appellant is trying to take advantage of the description of the property given in approximation by the respondent. However, the points raised by the appellant in the aforesaid two applications do not

require adjudication since, the said point has been already adjudicated. The appellants are not claiming any independent right, title and interest in the suit property. Therefore, merely for the sake of appellant the point raised can not be adjudicated. There is nothing to be adjudicated in this matter as the description of the property given by the respondents is sufficient to identify the property in question. The executing Court has got every right to consider the pleadings of the parties and the order passed by the courts while executing the decree in question. "

12. Thus, on due consideration of submissions advanced in the light of orders passed by Courts below, I am of the view no case is made out to entertain this appeal. The appeal raises no substantial question of law. The Judgments and orders passed by Courts below are well reasoned and suffers from no

infirmity and perversity. In order to maintain Second Appeal, it is incumbent upon the appellants to show that the appeal raises substantial question(s) of law. Only in the event the appellate Court is satisfied that appeal raises substantial question of law, Second Appeal can be entertained. The existence of substantial question(s) of law is a *sine-quo-non* for admitting appeal. In the instant appeal, no substantial question(s) of law are involved. In that view, the appeal deserves to be dismissed. Accordingly, the appeal is dismissed. In view of dismissal of Appeal, civil application seeking stay stands disposed of.

[V.L.ACHLIYA]
JUDGE

KNP