

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13415 OF 2018

Nivrutti Keshav Shinde
(since deceased through legal heirs) ...Petitioner
vs.
Vitthal Bhau Chavan ...Respondent

Mr. Rahul Kadam, for the Petitioner
Mr. K.D. Bhosale, for Respondent No. 2.

CORAM : M. S. SONAK, J.

DATE : MARCH 11, 2019

ORAL JUDGMENT

. Heard Mr. Kadam, learned counsel for the Petitioner and Mr. Bhosale, learned counsel for Respondent No. 2.

2. The challenge in this Petition is to the order dated 17th August, 2018 passed by the learned Civil Judge Junior Division, Indapur. The operative portion of this order read thus:

(1) Application at Exh. 95 and 99 are hereby allowed.

The stay order is set aside.

(2) The objection that the decree passed in RCS No. 113 of 1979 as nullity raised by J.D is not sustainable.

(3) The execution proceeding to proceed further.

(4) Note of this order be taken on Exh.1.

3. The aforesaid order has been made in execution proceeding arising out of the execution of decree in RCS No. 113 of 1979. The Petitioner was original Defendant No. 2 and Respondent No. 2 was original Defendant No. 1 in the said suit. The operative portion of the judgment and decree dated 6/8th February, 1988 read thus:

The suit is decreed as under:

(a) It is declared that suit Land shown in para No.

1(a) of the Plaint, H.No. 14 of S.No. 97 has included in B.No. 535 is of the ownership of the Plaintiff.

(b) It is declared that the Plaintiff is entitled to get it redeemed/ reconveyed from Deft.Nos. 1, 2 and 4, jointly or severally, on making payment of Rs. 1,000/- to them, on behalf of Deft. No. 1 and incurring expenditures for execution of reconveyance deed from them.

(c) Defts. 1,2 and 4 are ordered to execute reconveyance deed in respect of Plaint para No. 1(a) property in favour of the Pltf on his paying Rs. 1,000/- and expenditure of reconveyance deed.

(d) On failure/ evidence of Deft. Nos. 1,2 and 4 to executed reconveyance/ redemption deed in favour of the Plaintiff, he shall be entitled to get it executed through the Court.

(e) The Plaintiff is held entitled to possession of the said land and Defts. 1, 2 and 4 are ordered to put the Defendant in possession of it, forthwith.

(f) If necessary, the Plaintiff shall be entitled for correction of consolidation record as per provisions of sec. 32 and 33 of the Consolidation Act.

(g) Defts. 1 to 4 are ordered to bear their own costs and Deft. Nos. 1, 2 and 4 are ordered to pay costs of the Plaintiff in the suit to him.

Decree be drawn accordingly.

4. Mr. Kadam, learned counsel for the Petitioner (original

Defendant No. 2) begin by stating that the Petitioner, in the strict sense, is not a judgment debtor. Mr. Kadam however, submits that this is because the observation in paragraph Nos. 21 and 22 of the impugned judgment and decree would indicate that the interest of the Petitioner had in fact been protected by the impugned judgment and decree. He submits that in the execution is to proceed in accordance with the protection already granted to the Petitioner, then, the Petitioner will have no substantial grievance. However, Mr. Kadam point out that the execution proceeding is without regard to the protection extended to the Petitioner in the judgment and decree.

5. Mr. Kadam however points out that if the judgment and decree of which execution is applied for is to proceed without any respond to the Petitioner then the judgment and decree is a nullity. He submits that the Civil Court has no jurisdiction when it comes to enforcement of any rights or determination of any issues under the Bombay Prevention of the Fragmentation and Consolidation of Land Holdings Act, 1947 ("said Act"). He points out that the Petitioner is an allottee under the said Act. He point out that if the execution is permitted to proceed on the basis of misinterpretation

of judgment and decree or without having any regard to the protection granted to the Petitioner in the judgment and decree, then consequently the judgment and decree will have to be regarded as nullity, because Civil Court lacks the jurisdiction to make such decree.

6. Mr. Kadam finally points out that several applications were made by the Petitioner resisting the execution of decree, but they are still pending. He point out that the impugned order could not have been made without consideration of such applications which are pending adjudication before the executing Court.

7. Mr. Bhosale, learned counsel for Respondent No. 2 supports the submissions made by Mr. Kadam. He point out that the executing Court in the present case was required to summon the authorities under the said Act and without such summoning the execution cannot proceed.

8. Upon due consideration of aforesaid contention as also perusal of the record, in my judgment, no case is made out to interfere with the impugned order. This is nothing but an attempt on the part of the Petitioner and perhaps even the Respondent No.

2 to delay the execution proceeding and thereby see if the decree holder is deprived of the fruits of decree obtained by him.

9. In paragraph Nos. 21 and 22 of the judgment and decree dated 6/8th February, 1988 the learned trial Court has observed thus:

21. Issue No. 9: As already held land which was numbered as H.No. 14 of S.No.97 was mortgaged by the Plaintiff by conditional sale in favour of Defendant No.1, hence, the Plaintiff is entitled for its redemption reconveyance on payment of Rs. 1,000/- and expenses for registration of reconveyance deed because he has proved that he was and always has been ready and willing to act as per terms of transaction dated 29.12.1970 and to get the property redeemed/reconveyed from Defendant No. 1. It has come in evidence that the property has gone to Defendant No. 2 in exchange with Defendant No. 1 in the consolidation scheme. The record shows that it was done by consent of Defendant Nos. 1 and 2 which shows their mala fide intention, else a block of 40 R could have very well prepared as in the case of B. No. 539. Evidence of PW. 2

shows that the record was clearly showing the Defendant being the seller of H.No. 14 by conditional sale. In these circumstances, the concerned authorities should hence allotted it a distinct number and certificate should have been given to Defendant No. 1 in view of the provisions contained in Sec. 29 of the consolidation Act. Any way, Defendant No. 2 can be said to be a transferee from the mortgage and stands in the shoes of Defendant No. 1. Hence, he is also beared by this judgment and the matter be set at right ... 32 and/or 33 of the Consolidation Act.

22. In short, in view of my affirmative findings against issue Nos. 1 to 5 and negative findings against issue Nos. 6 to 8, 9 held that the Plaintiff is entitled to redeem his property – H.No. 14 of S.No. 97 and get executed a reconveyance deed of the sale from Defendant Nos. 1, 2 and 4 by depositing Rs. 1,000/- in the Court along with expenses of such a deed and he is also entitled to its possession. It necessary, the concerned consolidation authority should reconsider the scheme so far it relates to H.Nos. 1012 in of S.NO. 97

and reallocate the same to Defendant No. 2 and Defendant No. 1 respectively. Hence, issue No. 9 is answered in affirmative.

[emphasis supplied]

10. Significantly, the Petitioner did not institute any Appeal to question the decree. Mr. Kadam explains that since the decree had protected the Petitioner, no Appeal shall be instituted. The judgment and decree, as noted above, has recorded the finding that the original Defendant Nos. 1 and 2 i.e. the Petitioner and Respondent No. 2 with *malafide* intent, secured an exchange of the properties in the consolidation scheme. Surely such finding cannot be regarded as a finding in favour of the Petitioner. The decree also records that the Defendant No. 2 is a transferee from mortgagee and therefore reliance is shown on Defendant No. 1. This is also not a finding in favour of Petitioner. Yet the Petitioner, chose not to Appeal the judgment and decree. The Petitioner in the present case at one hand contends that the Petitioner has been protected under the decree and on the other hand urges that decree itself is a nullity. There is no merit in either of the stands, which have been raised, only to frustrate the execution proceedings.

11. The judgment and decree in the present case is quite clear and even the relief granted, admit no ambiguity. There is absolutely no case of nullity made out by the Petitioner or for that matter by the Respondent No. 2.

12. The ruling in ***Chandrika Misir and Ors. vs. Bhaiyalal, AIR 1973 SC 2391*** only states that where the Court is inherently lacking in jurisdiction the plea as to jurisdiction may be raised at any stage, even if it was not raised in trial Court. There can be no dispute whatsoever with regard to such proposition. However, the judgment and decree in the present case cannot be said to be a nullity.

13. The reliance placed on ***Ashok Yeshwant Dhumal vs. Shankar Maruti Dhumal, 2001 BCR 3-27*** is not apposite. In the said case the learned single Judge of this Court (Shri Bobade, J., as His Lordship then was) has held that under the said Act, where owner is entitled to be in possession of holding, to which he is entitled under the scheme, suit for possession of such holding will not be tenable in Civil Court. The position in our case, is entirely

different. The original Plaintiff or the decree holder is not claiming for possession of holding to which he was entitled under the said Act or any scheme thereunder. Merely because there is some reference to the said Act, there is some of such reference the decree in question does not become a nullity. The executing Court has correctly dealt with the issue of nullity and answered the same against the Petitioner. There is really no jurisdictional error in the decision making.

14. It is true that the Petitioner has made several applications. However, if the applications are perused, it is clear that the main contention is that the judgment and decree is nullity and therefore the execution ought not be allowed to proceed. Since there is no merit in the main contention, there is no question of upholding any of the plea in such ancillary applications.

15. It must be remembered that execution proceeding cannot be permitted to be frustrated by such repeated application to stall the progress therein. When the suit was instituted no objections were raised on the aspect of jurisdiction. The decree was made the same was not Appealed on the ground of lack of jurisdiction. Although

this may not constitute any estoppel for raising plea of nullity, the plea of nullity has to be equally made out. In the present case, on the basis of vague plea that the judgment and decree, of which execution is applied for, cannot be styled as nullity.

16. The Hon'ble Supreme Court in the case of **Satyawati vs. Rajinder Singh and Anr., (2013) 9 Supreme Court Cases 491** has made the following observations in regard to execution proceedings.

12. It is really agonizing to learn that the appellant- decree holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant- plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of The General Manager of the Raj Durbhnga under the Court of Wards vs. Maharajah Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforesaid judgment of the Privy Council in the case of [Kuer Jang Bahadur vs. Bank](#)

of Upper India Ltd., Lucknow [AIR 1925 Oudh 448],

Court was constrained to observe that “Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.”

13. In spite of the aforesaid observation made in 1925, this Court was again constrained to observe in Babu Lal vs. M/s. Hazari Lal Kishori Lal & Ors. [(1982) 1 SCC 525] in para 29 that “Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections”.

14. This Court, again in the case of Marshall Sons

& Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. & Anr.

[(1999) 2 SCC 325] was constrained to observe in para 4 of the said judgment that “.....it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes long time.”

15. Once again in the case of Shub Karan Bubna alias Shub Karan Prasad Bubna vs. Sita Saran Bubna and Ors. [(2009) 9 SCC 689] at para 27 this Court observed as under :

“In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.”

16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that

there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.

17. We are sure that the Executing Court will do the needful at an early date so as to see that the long drawn litigation which was decided in favour of the appellant is finally concluded and the appellant-plaintiff gets effective justice.

17. Applying the aforesaid principles, there is no case made out to interfere with the impugned order. This Petition is therefore liable to be dismissed and is hereby died.

18. There shall be no order as to cost.

(M. S. SONAK, J.)