IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 6882 OF 2018

Sau. Kamalabai w/o Ranjitsingh Chandel
vs.
Mahadu Rama Pawara and others

Office Notes, Office Memorandum of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri. C. A. Joshi, counsel for petitioner.
Shri. Mohd. Abdul Mustaque, counsel for respondents No.1, 3 & 7.

CORAM : MANISH PITALE J

DATED : 21/11/2019

By this writ petition, the petitioner (original plaintiff and decree holder) has challenged order dated 14/09/2018 passed by the Court of Civil Judge, Junior Division, Mahagaon (executing Court), whereby an application filed by the respondents (judgment debtors) for leading evidence on their plea of alleged fraud, has been allowed.

2. The present case has a chequered history. The petitioner filed a suit for possession in the year 1992 bearing Regular Civil Suit No.48/1992. This suit was filed on the basis of that the respondents and their predecessor had encroached upon suit property and that such encroachment was required to be removed and possession was to be granted to the petitioner. By judgment and order dated

05/04/1993, the suit was decreed by the Court of Civil Judge Junior Division, Mahagaon. The said decree was challenged before the District Court at Pusad. The appeal was partly allowed and the matter was remanded to the Trial Court for appointment of cadastral surveyor, so as to assist the Court in determining the controversy on the basis of proper evidence and material on record.

3. Upon remand, the Trial Court partly decreed the suit directing the respondents to handover possession of part of the suit property to the petitioner. Both the parties were aggrieved by the said judgment and decree and therefore, two appeals were filed before the Court of Additional District Judge Pusad (Appellate Court). By judgment and order dated 25/02/2005, the Appellate Court allowed the appeal of the petitioner while dismissing the appeal filed by the respondents thereby decreeing the suit in its entirety.

4. The respondents filed two Second Appeals bearing No.399/2005 and 359/2005, before this Court and by order dated 16/07/2009, the Second Appeals were dismissed and therefore, the decree passed in favour of the petitioner stood confirmed.

5. The respondents did not stop at this and filed a suit bearing Regular Civil Suit No.42/2009, before the Trial Court. On this occasion, the respondents claimed that the aforesaid decree had been obtained by the petitioner by fraud and that she was not owner of the area of land that she

claimed. On this basis it was contended that the decree was vitiated by fraud. In this suit, the petitioner filed an application under Order 7 Rule 11 of the C.P.C. praying for rejection of plaint. The history of the litigation between the parties and decisions of the Courts was noted and it was pointed out that by merely using the word “fraud”, the respondents were seeking to avoid the decree passed against them and confirmed in the appeal upto this Court. By order dated 07/12/2009 the Trial Court allowed the application of petitioner and rejected the plaint under Order 7 Rule 11 (a) and (d) of C.P.C.

6. Aggrieved by the same, the respondents filed appeal bearing Regular Civil Appeal No.02/2010 before the Court of District Judge, Pusad. This appeal was dismissed on 25/09/2012 by the Appellate Court holding that the suit was not maintainable. A Second Appeal was filed bearing No.598/2012, by the respondents to challenge the said order of the Appellate Court. On 17/04/2015, the Second Appeal was dismissed. The order passed by this Court in the Second Appeal reads as follows :-

> “Heard.
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> This Second Appeal is abusive action on the part of the appellant. The appellant was party in Regular Civil suit No.48 of 1992. The suit was filed by respondent No.1-Kamalbai. In this suit, there was allegation that the appellant and others made encroachment on Kamalbai’s land. The suit was decreed. The appeals were dismissed. The claim of Kamalbai in this suit was based on a title

> document, it was a sale deed. In the sale deed, it was mentioned, that the vendor sold 2 H. of land to Kamalbai. The appellant now comes with a case that during his subsequent investigation it is found that Kamalbai could not have purchased the land to the extent of 2 H. because her vendor was not owner of 2 H. of land but was owner of 1.67 HR. of land only. This information was gathered after many days from the date of dismissal of appeal arising from Regular Civil Suit No.48 of 1992. On the other hand, respondent No.1-Kamalbai started execution. The present suit came with these averments. The appellant now stated that there should be declaration in his favour that Kamalgbai could not have purchased 2H. of land and that the decree passed in Regular Civil Suit No.48 of 1992 is based on the wrong assumption etc. The learned Judge of the Trial Court rejected the plaint on the ground that it does not disclose any cause of action. Indeed this suit is a futile exercise and an abuse of process. The learned Judge rightly nipped it at the right time.
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> There is no substantial question of law arising in the appeal. The Second Appeal is dismissed.”

7. At this stage, the respondents filed aforesaid application under Section 44 of the Evidence Act r/w Section 47 of the C.P.C. claiming that the petitioner had played fraud on the Court and that respondents were entitled to lead evidence to prove the fact that fraud was indeed played by the petitioner on the on the Court that vitiated the judgment and decree passed against the respondents. On this basis, the respondents sought dismissal of the execution petition.

8. By the impugned order, the executing Court has allowed the said application, observing that every question arising during the course of execution of a decree is to be decided properly and that therefore, an opportunity is required to be granted to the respondents to lead evidence on their contention regarding fraud.

9. The learned counsel appearing for the petitioner invited attention of this Court to the above referred judgments and orders passed by Courts below and this Court, starting from 1992. It was pointed out that the respondents had resorted to every kind of tactics to avoid the decree passed against them and the application filed before the executing Court was a complete abuse of the process of law, which the executing Court failed to appreciate while passing the impugned order.

10. On the other hand, the learned counsel appearing for the respondents submitted that since fraud vitiated everything, the respondents were entitled to lead evidence to demonstrate why the decree passed in favour of the petitioner was not executable and that it was vitiated by fraud.

11. The history of the entire litigation noted above shows that a decree passed in favour of the petitioner, more than a decade ago, has still not been executed. Although a judgment debtor is entitled to exhaust the procedure of appeals and remedies available in law, it is to be examined as

to whether in the present case, the executing Court could have entertained the application filed on behalf of the respondent.

12. The history of the present litigation shows that the matter was remanded once by the Appellate Court and thereafter, the proceedings before the Trial Court included the procedure of appointment of the cadastral surveyor and all contentions raised on behalf of the respondents were considered on their merits after sufficient opportunity of leading evidence was granted to the rival parties. There is no dispute about the fact that the decree passed in favour of the petitioner stood confirmed by dismissal of the Second Appeal on 16/07/2009. Thereafter, the respondents filed a separate suit raising the plea of fraud and the same was rejected repeatedly by the Trial Court from the Appellate Court and even this Court by dismissal of the Second Appeal on 17/04/2015. Therefore, the decree was confirmed a decade ago and subsequent litigation initiated by the respondents terminated more than five years ago against the respondents and yet we are facing a situation where the decree holder has not been able to enjoy the fruits of the decree.

13. This backdrop was not at all appreciated by the executing Court while passing the impugned order on 14/09/2018. It appears that mere use of expressions like “fraud” and “fraudulent” asserting that such fraud has vitiated entire proceedings and decree passed in favour of decree holders, seems to have impressed the executing Court to pass

the impugned order. The executing Court failed to appreciate that such an attempt to raise plea of fraud and to frustrate the decree had been repulsed by three Courts in a row. This Court in its order dated 17/04/2015 categorically found that the plea of fraud has been raised as abuse of the process of law and that the Trial Court had rightly nipped the attempt on the part of the respondents by allowing application under Order 7 Rule 11 of the C.P.C. The said order of this Court dismissing Second Appeal in the second round of litigation was not even adverted to by the executing Court, while passing the impugned order. This Court finds that the present case is a classic case of abuse of the process of law and the fact that in our system of multiple appeals and opportunities to decree holders to raise all kinds of objections before the executing Court, is leading to a situation where the decree holders are unable to enjoy the fruits of the decree for decades, which clearly leads to loss of confidence in the entire justice dispensation system. Such attempts by judgment debtors to abuse the process of law and Courts has to be stamped out. The executing Court completely failed to appreciate this aspect of the matter while passing the impugned order. It appears that executing Courts are moved by the mere use of expressions like “fraud” and “fraudulent” and in a routine manner orders are passed granting fresh lease of life to judgment debtors, so as to delay execution of decrees passed years ago. Such an approach needs to be deprecated.

14. In the present case, this Court is of the opinion

that the impugned order is wholly unsustainable, as it has been passed in ignorance of the aforesaid chequered history of the present litigation. The executing Court is expected to peruse the record and see the history of litigation to arrive at any conclusion before passing orders on applications like the one filed by the respondents in the present case.

15. In view of the above, it is found that the impugned order is unsustainable. Accordingly, the writ petition is allowed. The impugned order is quashed and set aside and the application filed by the respondents (Exh.147) is dismissed.

16. Considering the facts and circumstances of the present case, the executing Court is expected to expedite the execution proceeding to ensure that the decree is satisfied at the earliest.

JUDGE

KOLHE/P.A.