

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 841 OF 2017
WITH
CIVIL APPLICATION NO. 1387 OF 2016

Shri Appasaheb Balu Latthe ... Applicant/Appellant
V/s.

Shri Rajaram Anna Patil and Ors. ... Respondents

Mr. Manoj A. Patil for the appellant/applicant.

Mr. Jayant Joseph Bardeskar for the respondent.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 12th FEBRUARY 2020

P.C. :

. Heard the respective parties.

2. The appellant herein is the decree holder in Special Civil Suit No. 121 of 2004 passed by the Civil Judge Senior Division, Jaysinghpur. The appellant herein happens to be the original plaintiff. The suit was filed for recovery of an amount of Rs.5 lakh from one Vilas Anna Patil. According to the plaintiff Vilas Patil had borrowed a sum of Rs. 5 lakh and failed to repay the same and therefore, a plaintiff was constrained to file a suit seeking recovery of the said amount. That Special Darkhast No. 12 of 2007 was filed by the plaintiff for execution of the said decree.

3. The plaintiff/decreed holder had sought attachment of half share in the building 'Snehankit'.

4. It is pertinent to note that in the said building Vilas Patil was allotted two rooms and Rajaram Patil i.e. his brother was residing in another portion of the said building which was constructed at his own costs. The plot on which 'Snehankit' building was built was admeasuring 1389 sq. ft. At the time of execution of decree the present respondent i.e. Rajaram Patil had objected to the attachment of the property, which was not in possession of Vilas Patil. The plaintiff had submitted that the Municipal records/Tax receipts showed the name of both the brothers and sister. It was believed by the decree holder that they were sharing half of the property which was admeasuring 1389 sq. ft. It was the contention of the obstructionist that beyond 238 sq. ft. portion which was in possession of Vilas Patil, was occupied by Rajaram Patil, his mother and his sister and therefore, 807 sq. ft. approximately was to be attached. Evidence was adduced in the application filed by Rajaram.

5. The applicant (therein) had placed on record a partition deed dated 7th December 1996. It appears that family arrangement was made by virtue of the said partition deed. It was agreed by the said deed that Vilas Patil was entitled to open space of 33x11 sq. ft. and two rooms admeasuring 13x9 sq. ft. and 6 inch and another room admeasuring 10x8 sq.ft. The applicants had not objected to attachment of the property which had fallen to the share of Vilas Patil by virtue of the said partition deed.

6. At the time of execution the plaintiff had not mentioned Snehankit building where Vilas Patil was residing but has given description of the entire joint family properties so as to claim the share of Vilas Patil in the entire properties. It was nobody's case that there was oral partition in respect of all the properties. However, the plaintiff had himself apportioned the properties falling to the share of Vilas.

7. The only requirement under Order XXI Rule 13 is that an application shall be made for the attachment of any immovable property belonging to the judgment debtor and it shall contain the description of such property, specifying the judgment debtors share or interest. Since it was a suit for money decree, it would be incumbent upon the plaintiff to even give the valuation of the properties for the purpose of recovery of the amount claimed. Order XXI Rule 13 reads as follows:-

13. Application for attachment of immovable property to contain certain particulars- Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot-

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

8. According to the learned counsel for the appellant the obstructionist petition would be hit by Order XXI Rule 58 (5) of C.P.C. which reads as under : -

“(5)... Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive”.

9. According to the learned Counsel for the Appellants, the obstructionist petition was rejected on the basis of the evidence that was recorded and more particularly the evasive answer given by the present respondent in respect of the scribe of the said document. The learned counsel vehemently submits that the obstructionist petitioner had failed to give the name of the scribe and therefore the very existence of that partition could not have been taken into consideration. It is a matter of record that the respondent herein i.e. obstructionist petitioner has examined two witnesses. Raosaheb Patil who happens to be the brother-in-law of Vilas and Rajaram and happens to be the attesting witness to the said document and he has proved the contents of the said document. The learned counsel for the appellant has further submitted that in fact, the Appellate court ought not to have relied upon the document without discussing evidence recorded thereupon and the same has caused failure of justice.

10. In the present case, the said provision would not be attracted, since the Court has not refused to entertain it, but had considered the objection, and the application was rejected after

adducing evidence.

11. The property that was sought to be attached was not in exclusive possession of the judgment debtor. That the plaintiff could seek attachment only of the property which belonged to Vilas. That, the plaintiff had not got the property valued as to show that, the attachment could be for the satisfaction of the money decree. The Executing Court cannot go beyond the decree.

12. The Apex Court in the case of *Bala Krishnan V/s. Malaiyandi Konar* reported in *A.I.R. 2006 SC 1458*, wherein the Apex Court has held thus:-

*“In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the Court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the Court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. The duty cast upon the Court to sale only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in *S.Mariyappa (Dead) by LRs. and Ors. V. Siddappa and Anr. (2005 (10) SCC 235)*”.*

13. The points for determination in the present second appeal are as follows:-

“1. Whether a decree holder in a case of money decree could

claim from a person or seek attachment of the property of the person who was not a party to the transaction”.

“2. Whether the decree holder can seek attachment of the property on the basis of the municipal extracts ascertaining for himself that the property was equally share by Vilas and Rajaram, while rejecting the claim of the mother and the sister of Vilas and Rajaram”.

14. It is to be noted that the municipal tax receipt or municipal records devolve any title. The probative value of the said document is only for the purpose of assessment of the tax of the said property as per the municipal corporation rules and therefore it can be safely said that the decree holder had fallen in error in calculating that half of the share of the property admeasuring 389 sq. ft. would fall to the share of Vilas.

15. According to learned counsel for the appellant the plaintiff along with Vilas and Rajaram had mortgaged the said property to a bank in the year 2000. The loan was cleared. It is submitted that in the said mortgage deed which is at Exh-111. Vilas Patil had not submitted that the said property is divided and that they had not placed on record the partition deed dated 17th October 1996 at the time of mortgage. The said submission deserves no consideration for the simple reason that Vilas and Rajaram happen to be brothers and they had mortgaged the properties which were in their possession at the time of executing the mortgage deed. It would have no relevance at the stage of attachment in consideration of different transaction altogether which was devoid of any claim either by the bank or against Rajaram.

16. The valuation of the property was not on record although the attachment was being sought in execution of money decree. The Executing Court cannot go beyond the decree and there can be no attachment of property, of a person who is not a judgment debtor as he was not a party to the suit. Both the issues are answered accordingly.

17. The learned Appellate Court had rightly considered the evidence, that the rest of the suit property which was not in possession of Vilas was built by Rajaram at his own expense and more over he had parted with an amount of Rs. 2500/- in favour of all the three other parties to the said partition deed i.e. Vilas, their Mother, and their Sister Mahadevi. They had waived their individual rights for a consideration in favour of Rajaram when he had constructed the said portion. It is in view of this, that the finding recorded by the Appellate Court does not call for any interference the second appeal being sans merits deserves to be dismissed. The decree be drawn accordingly as per the judgment of the Appellate Court.

18. Civil Application is accordingly disposed of.

(SMT. SADHANA S. JADHAV, J)