

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10455 OF 2012

Deelip s/o Balasaheb Shinde & anr. ... **PETITIONERS**

VERSUS

Madan s/o Bhausahab Shinde & anr. ... **RESPONDENTS**

.....
Shri Joslyn Menzes, Advocate holding for
Shri P.S. Paranjape, Advocate for petitioners
Shri A.N. Patil, Advocate for respondent No.1
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 5th March, 2021

Date of pronouncing order : 9th April, 2021

ORDER :

The challenge in this Writ Petition is to the order passed by Civil Judge, Junior Division, Pathri on 5/11/2012, below application Exh.48 in Regular Darkhast No.16/2012 (Old Special Darkhast No.1/2003). By the impugned order, the objection raised by the petitioners to the execution of the decree passed in the Special Civil Suit, No.7/2001, came to be turned down. The petitioners are, therefore, before this Court.

2. Facts relevant for deciding this Writ Petition are as follows :

Respondent No.1 filed the suit (Special Civil Suit No.7/2001) against respondent No.2 (defendant in the suit) for specific performance of agreement for sale dated 9/3/1997. The suit came to be decreed on 10/1/2002, directing the respondent No.1 (plaintiff) to deposit Rs.27,000/- in the Court within one month from the date of the decree. The respondent No.2 (defendant) was directed to execute the sale deed of the suit land in favour of the respondent No.1 after deposit of the amount of Rs.27,000/-. In case the respondent No.2 failed to execute the sale deed, the sale deed was to be executed by a Court Commissioner. The respondent No.2 was permanently restrained from obstructing the respondent No.1's possession over the suit land, Gut No.371, admeasuring 2 Hectors 90 R.

3. The respondent No.1 (Decree Holder) put the decree for execution. It is execution proceeding, being Regular Darkhast No.16/2012 (Old Special Darkhast No.1/2003). In the very proceeding, the respondent No.1 made the present petitioners parties as Judgment Debtors

No.2 and 3 respectively with the prayers for directing the petitioners to execute the sale deed in favour of respondent No.1 and hand him over the possession of the suit land.

4. The petitioners moved application Exh.48, raising objections to the executability of the decree against them. The said application was titled as an application for passing a final decree. A copy of the said application has been on record. None of the parties has, however, adverted to the contents of the said application. On hearing the parties to the said application, the Executing Court turned down the said application vide order impugned in this Writ Petition. The Executing Court observed that the said application could not be treated as one under Section 47 of the Code of Civil Procedure (C.P.C.). It also held the said application to have been filed after long span of nearly eight years after having got the knowledge of the decree and, therefore, held the application to have been barred by limitation. The Executing Court further observed that, the decree is binding on the petitioners herein unless and until the same is set aside by a competent Court.

5. Heard learned counsel for the parties. Shri Joslyn Menzes, learned counsel holding for Shri P.S. Paranjape,

learned counsel appearing for the petitioners herein would submit that the petitioners had purchased the suit land long before the respondent No.1 (Decree Holder) filed the Suit, Special Civil Suit No.7/2001 for specific performance of agreement for sale. The petitioners had moved the revenue authorities for recording their names in the revenue record of the suit land. The respondent No.1 had raised an objection for mutating the names of the petitioners in the revenue record. The respondent No.1 has been unsuccessful therein. He did not challenge the certification of the mutation entry. The respondent No.1 thereafter filed the suit against the respondent No.2 alone for specific performance. The petitioners were not impleaded as parties to the said suit in spite of knowledge of the sale deed having been executed in their favour by the respondent No.2 on 23/4/1998. The suit was proceeded ex parte. The same indicates that it was a collusive suit between the respondents No.1 and 2. The decree passed in such suit is thus not binding on the petitioners and the proceeding for execution of a decree passed in the said suit is not competent against the petitioners. The learned counsel, therefore, urged for setting aside the impugned order.

6. Shri A.N. Patil, learned counsel appearing for the

respondent No.1 would, on the other hand, submit that the petitioners claim through the respondent No.2. The agreement for sale precedes the execution of sale deed in favour of the petitioner. On execution of the agreement for sale, the respondent No.2 did not have authority to execute the sale deed in petitioners' favour. The rights of the respondent No.1 under the agreement for sale do not get defeated by subsequent transaction. The petitioners are thus bound by the decree passed in Special Civil Suit No.7/2001. According to learned counsel, the Executing Court has thus rightly rejected the application Exh.48. He would, therefore, urge for dismissal of the Writ Petition.

7. The petitioners and the respondents are relatives of each other. One Bhausahab was a common ancestor. He was survived by three sons – Manikrao (deceased), Madan and Balasahab. The respondent No.2 herein is the elder son of Manikrao. The petitioners are the sons of Balasahab. As such, the respondent No.1 Madan is uncle of petitioners and the respondent No.2.

8. Admittedly, the respondent No.2 sold the suit land to the petitioners under a registered sale deed dated 23/4/1998. A copy of the sale deed is on record. Recitals of

the sale deed indicate the petitioners to have purchased the land for consideration of Rs.1,97,000/-. Possession of the land appears to have been delivered to them under the sale deed. The petitioners then moved the application dated 26/5/1999 to the Village Talathi for recording of their names in the revenue record of the land Gut No.371. It appears that, the respondent No.1 raised an objection for recording the names of the petitioners in the revenue record of the land on the ground of having agreed to purchase the land under the agreement for sale executed in his favour by the respondent No.2 on 9/3/1997. The Tahsildar, vide his order dated 15/3/2000, directed to record the names of the petitioners in the revenue record of the land Gut No.371. The respondent No.1 did not challenge the said order before the appellate authority under the Maharashtra Land Revenue Code, 1966 (MLRC).

9. It is only on 27/4/2001 the respondent No.1 filed the suit (Special Civil Suit No.7/2001) against the respondent No.2 alone for specific performance of agreement for sale dated 9/3/1997. The said suit was decided exparte. The petitioners have, therefore, every reason to contend that it was a collusive suit between the respondents No.1 and 2.

10. Section 19 of the Specific Relief Act, 1963 reads :-

“19) Relief against parties and persons claiming under them by subsequent title :- Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against ---

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c)
.....”

11. True, the agreement for sale precedes the sale deed executed by the respondent No.2 in favour of the petitioners. As such, the petitioners may be said to be the persons claiming under the respondent No.2 (defendant in the suit) by title arising subsequent to the contract. There is, however, exception in the nature of a transferee for value who has paid his money in good faith and without notice of the original contract. The respondent No.1 had every knowledge about the title of the suit land having been transferred by the respondent No.2 in favour of the petitioners since he himself had raised an objection before the revenue authorities for recording the names of the petitioners in the revenue record

pursuant to the sale deed. In this factual backdrop, the respondent No.1 should have impleaded the petitioners as party defendants to the suit for the specific performance of agreement for sale. Since the same has not been done, the decree passed in the said suit is not binding on the petitioners. The learned Executing Court was not correct in observing that subsequent to the execution of the agreement for sale, the respondent No.2 did not have authority to sale the land in favour of the petitioners.

12. True, the Executing Court was right in observing that the objection raised by the petitioners could not be considered to be one under Section 47 of the C.P.C. since their claim does not pertain to a transaction post institution of the suit. The petitioners were neither parties to the suit nor claim to be representatives of any of the parties to the suit. The respondent No.1 in the execution proceedings itself made the petitioners parties thereto and asked for relief of possession. It is not known as to when the respondent No.1 did lose possession of the suit land, if any, when he claims to have been put in possession of the land under the agreement for sale. Be that as it may, the decree passed in Special Civil Suit No.7/2001 is not binding on the petitioners as they were not parties to the suit in spite of the plaintiff having been aware the respondent No.2 to have sold the suit land to the

petitioners long before the suit was filed. This Court is, therefore, not in agreement with the reasons given by the Executing Court for turning down the application Exh.48 moved by the petitioners. Interference is, therefore, called for with the impugned order.

13. The Writ Petition, thus, succeeds. The order dated 5/11/2012, passed by Civil Judge, Junior Division, Pathri below Exh.48 in Regular Darkhast No.16/2012 (Old Special Darkhast No.1/2003) is hereby set aside. It has been seven years since the impugned order has been passed, it would not be desirable to observe that the application moved by the petitioners was in the nature of an obstruction to the execution of the decree and order passed below the said application, being a deemed decree and is liable to be assailed in appeal before the District Court. The respondent No.1 is at liberty to take appropriate recourse to a legal remedy, as may be advised, for enforcement of his rights under the alleged agreement for sale dated 9/3/1997.

**(R. G. AVACHAT)
JUDGE**

fmp/-