

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.716 OF 2019**

Kayji Real Estate Pvt Ltd. ... Petitioner

Vs

Vishwanath Raghuvir Caroikar & Ors. ... Respondents

Mr. R. G. Ramani, Senior Advocate with Mr. P. Kakodkar, Advocate for the Petitioner.

Mr. Prasheen Lotlikar, Advocate for Respondent No.1.

Coram: M. S. SONAK, J

Date: 14th July 2021

Oral Order

Heard Mr. R. G. Ramani, learned Senior Advocate who appears along with Mr. P. Kakodkar for the Petitioner – Judgment Debtor No.1 and Mr. P. Lotlikar, learned counsel for Respondent No.1- Decree Holder.

2 This petition challenges the order dated 19.07.2019 made by the executing Court dismissing the Petitioner's application resisting the execution of judgment and decree dated 30.11.2012 made by the Civil Judge Junior Division at Margao.

3 The record indicates that by this judgment and decree the Petitioners, the original defendants were permanently restrained from interfering with the suit property which was described in the plan at

Exhibit 63. Further, the learned Trial Judge directed the Inspector of Settlement and Land Records to depute a surveyor (Commissioner) to demarcate the suit plot at loco and identify the encroachments made therein and submit a report.

4 The Petitioner appealed to the First Appellate Court vide Regular Civil Appeal No. 10/2013/I. This appeal was dismissed by the First Appellate Court but the First Appellate Court made the following significant observations in paragraph 62 while setting aside the direction for the appointment of Commissioner to identify the encroachment:

"62. The learned trial Judge has also vide the impugned judgment and decree ordered the appointment of a Commissioner to demarcate the suit plot at loco and identify the encroachment made therein. In fact Shri Laad has on 10.12.2003 at exhibit 72 colly drawn a plan showing the encroachment made. Since these encroachments are already identified in the plan annexed to the report, the question of appointing a commissioner again does not arise. Plaintiff has not made any such prayer. The question of granting such a relief does not arise. Demarcating the encroachment at loco and removing it will be the question of executing of the decree. Construction done if any, inspite of the order of injunction will have to be removed. To the extent of appointing a Commissioner to demarcate the suit plot at loco, the impugned judgment cannot be sustained."

5 The Petitioner instituted a Second Appeal No.117 of 2015 before this Court but even the same was dismissed by order dated 07.07.2016.

6 Mr. Ramani, learned Senior Advocate for the Petitioner submits that in this matter no decree of mandatory injunction to remove the encroachments was granted and therefore, the executing Court, cannot travel beyond the decree and make any orders for removal of the encroachments. He relies on *Rameshwar Dass Gupta vs State Of U.P & Anr*¹ and *V. Ramaswami Ayyangar And Others vs T.N.V. Kailasa Thevar*² to submit that the executing Court cannot travel beyond the decree even under the guise of seeking to interpret the decree. He, therefore, submits that the impugned order which directs the removal of the encroachment is in excess of jurisdiction which is vested in the executing Court, and therefore, must be interfered with.

7 Mr. Lotlikar defends the impugned order based on the reasoning reflected therein. He submits that the decrees made by the Courts have to be holistically construed. He submits that such holistic construction makes it clear that the Judgment Debtor had to remove the encroachment, particularly because there are concurrent findings that these encroachments were made in the teeth of injunction orders made during the pendency of the proceedings. He submits that the fruits of the decree cannot be denied to the Decree Holder based upon such objections as have now been raised to the execution of the decree. He submits that this is not at all the case of executing Court traveling beyond the decree but rather this is a case where the executing Court is

1 1996(6) Supreme 640

2 AIR 1951 SC 189

giving full effect to the decrees as have been made. He relies on ***B. Gangadhar Vs B.G. Rajalingam***³ in support of his submissions. He also relies on ***Delhi Development Authority Vs Skipper Construction Co.(P) Ltd., and another***⁴ to submit that no party should be allowed to enjoy or retain the fruits of his own contempt of lawful orders. He submits that this is a case where the Judgment Debtor is obstructing and delaying the execution unduly and therefore, this petition may be dismissed.

8 The rival contentions now fall for my determination.

9 The conjoint reading of the judgments and decrees made by the Trial Court and the Appellate Court makes it clear that in this case the encroachments made by the Judgment Debtor were required to be removed. Merely because the expression “*mandatory injunction*” may not have been so expressly employed, on the conjoint reading of both the judgments and decrees, it is quite clear that such encroachments were not to be tolerated.

10 The only reason perhaps why the expression “*mandatory injunction*” does not find specific reference in the decree made by the learned Trial Judge is because the learned Trial Judge was not too sure about the precise dimension of the encroachment at loco and deemed it

3 AIR 1996 SC 780

4 (1996) 4 SCC 622

appropriate to appoint a Commissioner to determine the same. In appeal, however, the First Appellate Court set aside this direction by observing that the report furnished by Mr. Laad dated 10.12.2003 at Exhibit 72 Colly had indicated the nature and dimension of the encroachment and therefore, there was no further necessity of appointing Commissioner. The First Appellate Court, as noted earlier in paragraph 62, very clearly directed that the construction done despite the order of the injunction will have to be removed.

11 Mr. Lotlikar is also quite right in his submission that there are concurrent findings that in this case that despite injunction orders the encroachments were made. Such encroachments cannot now be saved based on how the Judgment Debtor seeks to interpret the decrees. Even if it is assumed that there is some ambiguity in the decrees the Judgment Debtor cannot seek to protect the encroachments carried out in the teeth of injunction orders during the pendency of the suit. This is what is the effect of observations in *Skipper Construction* (supra) relied upon by Mr. Lotlikar.

12 Even the observations in paragraph 4 of *B. Gangadhar* (supra) are relevant and to a certain extent support the contention of Mr. Lotlikar. They are transcribed below for convenience:

“Rule 35(3) of Order 21 CPC itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the

court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any constructions on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the code expressly prohibits such multiplicity of proceedings.”

13 The decisions relied upon by Mr. Ramani, no doubt, lay down the well-accepted proposition that the executing Court cannot travel beyond the decree. Those were cases where it was established that the executing Court was indeed traveling beyond the decrees which were clear and specific. In one of the cases no interest was awarded in the decree but the executing court had proceeded to award the same. In the present case, as noted above, the decrees did contemplate the removal of encroachments particularly since such encroachments were made in the teeth of the injunction orders. There was material on record to indicate the nature and extent of such encroachments. The Judgment Debtor

cannot frustrate the execution of decrees, merely because the wordings of the decrees may not be quite artistic or merely because there is no express reference to the expression "*mandatory injunction*". From the context as well as from the conjoint reading of the judgments and decrees made by both the Trial Court and the First Appellate Court, it is very clear that the encroachments had to be removed.

14 In *Satyawati Vs Rajinder Singh and another*⁵, the Hon'ble Supreme Court held that once the decree was passed in favor of a party, the executing Court should not look into other reports which had been submitted to it afterward. Therefore, the learned executing Court was quite right in referring to Exhibit 72 Colly i.e. report furnished by Mr. Laad on 10.12.2003, which had clearly indicated the nature of dimension of the encroachment.

15. In *Satyawati* (supra), the Hon'ble Supreme Court expressed agony that the Decree Holder was unable to enjoy the fruits of her success even in the year 2013 when the decree was made in January 1996. The Hon'ble Supreme Court referred to the observations of the Privy Council made in 1872 that the difficulties of a litigant in India begin once he has obtained a Decree. The Hon'ble Supreme Court also referred to another decision of the Privy Council made in the year 1925 to the same effect. Finally, the Hon'ble Supreme Court observed that despite observations in 1925, once again in 1982, in *Babu Lal vs. M/s.*

5 (2013) 9 SCC 491

Hazari Lal Kishori Lal & Ors⁶, the Hon'ble Supreme Court was constrained to observe that the procedure was 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. Finally, the Hon'ble Supreme Court emphasized that there should not be an 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.

16. Recently, in ***Rahul S. Shah Vs Jinendra Kumar Gandhi and others***⁷, the Hon'ble Supreme Court in the context of delay in execution of decrees has made the following observations which are quite apposite in the present case.

“23. This court has repeatedly observed that remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees. This was discussed even in the year 1872 by the Privy Counsel in The General Manager of the Raja Durbhunga v. Maharaja Coomar Ramaput Sing which observed that the actual difficulties of a litigant in India begin when he has obtained a decree. This Court made a similar observation in Shub Karan Bubna @ Shub Karan Prasad Bubna v Sita Saran Bubna, wherein it recommended that the Law Commission and the

6 (1982) 1 SCC 525

7 2021 SCC OnLine SC 341

Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or the Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be handmaid of justice and sub-serve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.

24. In respect of execution of a decree, Section 47 of CPC contemplates adjudication of limited nature of issues relating to execution i.e., discharge or satisfaction of the decree and is aligned with the consequential provisions of Order XXI. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind. Firstly, the question must be the one arising between the parties and secondly, the dispute relates to the execution, discharge or satisfaction of the decree. Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, Executing Court must not go beyond the decree. However, there is steady rise of proceedings akin to a re-trial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the Executing Court and the decree holder is deprived of the fruits of the litigation and the judgment

debtor, in abuse of process of law, is allowed to benefit from the subject matter which he is otherwise not entitled to.”

17. There is no jurisdictional error in the impugned order made by the executing Court. For all the aforesaid reasons, this petition is liable to be dismissed and is hereby dismissed. There shall however be no order as to costs.

18 The learned executing Court is directed to dispose of the execution proceedings expeditiously having regard to the observations made by the Hon'ble Supreme Court in the above-referred cases.

M. S. SONAK, J.

at*

TARI AMRUT NAGESH Digitally signed by TARI AMRUT
NAGESH
Date: 2021.07.16 11:46:25 +05'30'