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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6433 OF 2019

Mr. Rajendra Vitthal Bahirat & Ors. .. Petitioners
V/s.

Prakash Ramchandra Girme ..Respondent

Mr. Tejesh Dande a/w Bharav Gadhavi a/w Vishal Navale a/w
Vaibhav Kulkarni i/b Tejesh Dande & Asso. for the petitioners.
Mr. Sanjeev Sawant a/w Abhishek Matkar, for the Respondent.

CORAM : C.V. BHADANG, J.

RESERVED ON : 21st DECEMBER, 2020
PRONOUNCED ON : 08th JANUARY, 2021

:JUDGMENT:

1. Rule made returnable forthwith. The learned counsel for the respondent waives service. Heard finally by consent of parties.
2. This is a classic case of the common experience that it is easy to obtain a decree, than to get it executed.
3. The challenge in this petition is to the order dated 25.04.2019 (below Exhibit 180) passed by the learned Civil Judge, Senior Division, Pune in Special Execution Case No. 122 of 2010. By the impugned order, application Exhibit 180 filed by the Petitioners/Judgment Debtors, purportedly under Section 47 of the Code of

Civil Procedure, 1908 (“CPC” for short), for deciding the location and boundaries of the suit property, before issuance of the possession warrant, has been dismissed.

4. The facts necessary for the disposal of the petition may be stated thus:

That the respondent/deed holder had filed Special Civil Suit No. 2152 of 2007 against the petitioners for possession of the suit property, under Section 6 of the Specific Relief Act.

The property which is subject matter of dispute was described as property bearing Survey No. 2A/8/1 (old survey No. 2A/7/1/1) of village Bopodi, Taluka – Haveli, District – Pune admeasuring 3740 sq. ft. i.e. 347.58 sq. meters.

The suit came to be decreed on 03.03.2010, in the following terms:

“ORDER

The suit is decreed with costs.

The defendants are hereby directed to deliver vacant and peaceful possession of suit property bearing S. No. 2A/8/1 i.e. old S. No. 2A/7/1/1, area admeasuring 3740 sq. ft. i.e. 347.58 sq. mtrs situated at Bopodi, Tal. Haveli, Dist. Pune to the plaintiff within one month from the date of decree.

The defendants are hereby restrained perpetually from changing the nature of suit property and from creating third party interest in the suit property.

Decree be drawn accordingly.”

5. The petitioners challenged the same before this Court in Civil Revision Application No. 571 of 2010. On behalf of the petitioners, it was contended before this Court that the respondent (original plaintiff) has not been able to place any material before the Court, to show that land Survey No. 2A/8/1, corresponds to old survey No. 2A/7/1/1. A specific submission was made on behalf of the petitioners that the petitioners have no objection, if, the respondent tries to execute the decree, with regard to survey No. 2A/8/1.

6. This Court on perusal of the impugned judgment found that the Trial Court had not recorded a positive finding that survey No. 2A/8/1, corresponds to old survey No. 2A/7/1/1. In that view of the matter, this Court found that it was necessary to modify the decree. Thus, this Court by a judgment and order dated 20.09.2011, disposed of the Revision Application, in the following terms:

“ORDER

(i) In the judgment and Decree dated 3rd March 2010 the words appearing in the operative part of the judgment “i.e. old S.No. 2A/7/1/1” stand deleted and rest of the decree can be executed by the respondent in accordance with the provisions of law.

(ii) Civil Revision Application stands disposed of accordingly.

(iii) There shall be no order as to costs.

(iv) It is clarified that the aforesaid hearing was conducted in the presence of the respondent and the order is also passed in his presence.”

7. The respondent is trying to execute the decree aforesaid as modified, since, the year 2010. The principal contention on behalf of the petitioners, in resisting the execution of the decree, is that the property has not been properly identified. The petitioners have filed various civil applications, in this regard as under:-

(i) Applications Exhibit 28, 29 and 38, which were rejected by executing Court vide common order dated 15.01.2013, observing that the petitioners have not challenged the boundaries of survey No. 2A/8/1, either in the main suit or in the execution application.

(ii) By an application Exhibit 55, the petitioners sought appointment of Taluka Inspection of Land Records (“TILR”) to verify from the original revenue record and submit the boundaries of Survey No. 2A/8/1 and directing him to make the necessary record

available before the Court as regard the decree passed in Regular Civil Suit No. 760 of 1983.

(iii) The Executing Court by an order dated 27.02.2013 allowed application Exhibit 55 appointing the TILR to verify the boundaries of Survey No. 2A/8/1. In pursuance of the said Order, the TILR submitted his report on 31.10.2013. It appears that the TILR was examined before the Executing Court on behalf of the petitioners and was cross-examined on behalf of the respondent.

(iv) The petitioners filed application Exhibit 155 for recalling the said witness for re-examination, which was rejected by the Executing Court by order dated 31.03.2017 on finding that the application was made with an intention to nullify the material brought in the cross-examination by the decree holder.

(v) By application Exhibit 171, the Petitioners sought fresh survey of the land, which was rejected by the Executing Court by order dated 14.08.2018. The executing court found that the surveyor had carried out the survey on the basis of the available record in his office and submitted his survey map-cum-report in which the suit property was specifically shown. In that view of the matter, the Executing Court found that it was not just and proper to appoint a fresh commissioner.

(vi) By application Exhibit 173, the petitioner sought recalling of the Court Commissioner, purportedly in order to resolve the controversy regarding location and boundaries of the suit property, which application was rejected by the Executing Court on 01.02.2019 on finding that application was only an attempt to prolong the execution proceeding.

(vii) The petitioners challenged the said order before this Court in Writ Petition No. 3165 of 2019, which was rejected by this Court on 13.03.2019, observing thus:

“4. In this case, the execution proceeding are pending since last eight years as observed by the learned executing Court in the impugned order. Further, the Court Commissioner was duly examined as also cross examined. In the application seeking recall of this witness there is absolutely no explanation as to why the questions, which the petitioner now seeks to pose to the Court Commissioner were not posed. It is obvious that this Application was taken out to only delay the execution proceeding which have been pending since last 8 years. There does not appear to be ambiguity as such in the deposition of the Court Commissioner. In any case, there does not seem to be any confusion in the mind of executing Court in regard to the description and identification of the property. In such circumstance, it is really not for the judgment debtor to insist upon the

Court exercising its powers under the Order 18 Rule 17 of Code of Civil Procedure.”

This court directed the Executing Court to dispose of the execution proceedings within a period of three months.

viii) After this, the Petitioners filed application Exhibit 180 with the following prayers:

*“a. This Hon’ble Court may kindly be pleased to issue directions / decision regarding location and boundaries of suit property before allowing possession warrant to the DH.
b. Any other order/directions in the interest of justice may kindly be given.”*

ix) The said application has been rejected by the Executing Court by the impugned order dated 25.04.2019. Hence, this petition.

8. I have heard Mr. Dande, the learned counsel for the petitioners and Mr. Sawant, the learned counsel for the respondent. The parties have also filed synopsis of their arguments on record. With the assistance of the learned counsel for the parties, I have gone through the record.

9. It is submitted by the learned counsel for the petitioners that in view of the observations of this Court in the judgment and order dated 20.09.2011 in Civil Revision Application No. 571 of 2010, the Executing Court was required to record a finding about the exact identification of the land Survey No. 2A/8/1, alongwith its exact boundaries and location.

10. It is submitted that the Commissioner's Report dated 31.10.2013 shows that the TILR, who visited the site was not having gut book and partition map (falani nakasha). It is submitted that there is variance in City Survey record and the report shows that boundaries of survey No. 2A/8/1 are not shown in the measurement map/plan available in the office of the city survey, which is also evident from the evidence of Somnath Korke and Pramod Ghatge. It is submitted that the description of the suit property in the plaint mentions that the suit property is adjacent to a river, which is on the western side of the suit property. However, perusal of the plan submitted by the Court Commissioner shows that the river is not adjacent or abutting the suit property, but it is far away from the property on the western side.

11. In the submission of the learned Counsel, this shows that the suit property i.e. Survey No. 2A/8/1 is not located where it is claimed by the respondent/decreed holder. It is thus, submitted that the suit property is not identified or demarcated by any identifiable, fixed boundaries. Therefore, according to the learned counsel it was necessary for the Executing Court to have gone into the said question under Section 47 of the CPC. It is submitted that the powers of the Executing Court under Section 47 are wide and infact are a substitute for an independent suit which powers the Executing Court has failed to exercise.

12. Lastly, it is submitted that the Judgment and Decree dated 03.03.2010 passed by the learned Trial Court is on the basis of the orders passed by the City Survey Officer on 30.08.2008. However, the said order has been modified in Appeal No. 2255 of 2012, vide order dated 06.02.2020. He, therefore, submitted that impugned order be set aside and the Executing Court be directed to decide the objection under Section 47 and decide the location and boundaries of the suit property.

13. The learned counsel for the respondent has submitted that more than once, the Executing Court has decided the issue about the

location/boundaries of the suit property, which would be evident from various applications filed by the Petitioners. It is submitted that the Executing Court had appointed TILR, who has given his report and who has been examined on behalf of the petitioners. It is submitted that principles of res-judicata applies, at different stages of the same proceedings, as held by the Supreme Court in ***Ishawar Dutt v/s. Land Acquisition Collector***¹. It is submitted that the petitioners are trying to make successive applications seeking same relief with regard to the location/boundaries/ demarcation of the suit property which is hit by principles of res-judicata.

14. The learned counsel has placed reliance on the decision of the Supreme Court in ***Ravinder Kaur v/s. Ashok Kumar & Anr.***² in order to submit that such an attempt by the judgment debtor to resist the execution of the decree cannot be accepted.

15. In short, according to the learned counsel for the respondent, the issue with regard to location and boundaries of the suit property stands concluded, multiple times, right up to this Court by virtue of orders passed below Exhibit 155 and Exhibit 171. It is pointed out that these orders were never challenged by the petitioners and

1 (2005)7SCC 190

2 (2003)8 SCC 289

consequently, they have attained finality. On behalf of the respondent further reliance is placed on the decision of the Supreme Court in *Swami Atmananda & Ors. v/s. Ramakrishna Tapovanam & Ors.*¹ and *K. K. Modi v/s. K. N. Modi & Ors.*² in order to submit that the respondent/decree-holder, cannot be kept out of usufruct of the decree, which has attained finality.

16. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

17. It cannot be accepted that this Court in Judgment and Order dated 20.09.2011 in Civil Revision Application No 571 of 2010 has required the Executing Court to record a finding about the identification of land survey No. 2A/8/1 alongwith its boundaries and locations. Quite to the contrary, in paragraph 4 of the Judgment, this Court had found that the respondent/decree holder has come out with a case that the latest survey number of the land in-question is 2A/8/1 and there is no need to to into the question as to which is the old survey number. This Court further observed in paragraph 5 as under:

1 (2005)3 SCC 734

2 (1998)3 SCC 573

“5. In the facts and circumstances of the case, I am inclined to observe that if at all in future if the application is made for execution of the Judgment and Decree dated 3rd March 2010 impugned in this petition, the said Court shall permit execution as regards land bearing Survey No. 2A/8/1 and enable the respondents to take possession of the said land admeasuring 3740 sq. ft. i.e. 347.58 sq. meters situate at Bopodi, Tal. Haveli, Dist. Pune. To that extent, the decree will have to be modified by deleting words in the decree “i.e. old S. No. 2A/7/1.”

Thus, the first contention on behalf of the petitioner that this Court had required the Executing Court to record a finding, is not correct.

18. There cannot be any manner of dispute with the proposition that under Section 47 of CPC all questions arising between the parties, relating to the execution, discharge or satisfaction of the decree, are required to be determined by the Court executing the decree and not by a separate suit. It is necessary to note that the petitioner has raised the ground about the identity of the property, while resisting the execution and at the instance of the petitioner an inquiry has been conducted by the Executing Court and the finding recorded. In this regard, it is necessary to note that the petitioner

got a TILR appointed, who was examined on behalf of the petitioner and has been cross-examined on behalf of the respondent. Before the Executing Court, the Court Commissioner Somnath Korke along with TILR Pramod Ghatge have been examined. Thus, the petitioner has also availed of the necessary inquiry which is the Executing Court has conducted and therefore, it is not now open for the petitioner to again require the Executing Court to record the finding in this regard. If we peruse the prayer clause in the application (Exh.180) as reproduced above, it is as vague as vagueness could be. In my considered view, the respondent is right in contending that the petitioner is trying to agitate the same issue, although the same stands concluded more than once on the basis of the inquiry conducted by the Executing Court. It is significant to note that the Executing Court has passed atleast two orders, one each below Exhibit 155 and Exhibit 171, which have not been challenged by the petitioner any further and have thus, attained finality.

19. The contention raised on behalf of the petitioner, taking exception to the commissioner's report dated 31.10.2013 is also misplaced. I have carefully gone through the evidence of both the witnesses i.e. Somnath Korke and Pramod Ghatge as well as the report dated 31.10.2013. The report specifically mentions that the

gut book for survey No. 2A/7 and 2A/8 were available in the office. All that the report says is about non-availability of partition map (Falani Nakasha) of survey No. 2A/8/1. Thus, this aspect about non-availability of the *falani nakasha* is only pertaining to further sub-division of survey No. 2A/8 as 2A/8/1. This has nothing to do with survey No. 2A/7 of which a further sub-division namely 2A/7/1 is claimed by the petitioner. It further, appears from the record that when the 'city survey' was carried out, both the properties was assigned city survey No.8. However, that will not having any bearing on the location of the erstwhile survey numbers. In my considered view, a perusal of the measurement map dated 06.08.2013 shows that there are distinct portions shown as survey No. 2A/7 and 2A/8. Survey No. 2A/7 is shown to be, on the Northern side of survey No. 2A/8. The petitioner is claiming to be in possession of a further sub-division of survey No. 2A/7 namely 2A/7/1/1, while the decree is in respect of 2A/8/1. The Executing Court to my mind has found and rightly so that the issue already stands concluded.

20. Now coming to the order dated 06.02.2020 in Appeal No. 2255 of 2012. That was an appeal filed by the petitioner seeking re-

inquiry which infact has been rejected. Thus the reliance placed on the said order is misplaced.

21. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity so as to require interference.

22. The petition is without any merit and is accordingly dismissed. Rule is discharged with no order as to costs.

The amount of Rs.1 lakh deposited before this court in pursuance of the order dated 14.10.2019 along with interest, if any, shall be paid to the respondent after a period of four weeks.

C.V. BHADANG, J.