

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

CIVIL REVISION APPLICATION NO.7 OF 2021

1. Shardedevi w/o Devidin Gupta,
Since deceased through Legal Representatives;

i) Govind s/o Devidin Gupta,
Aged about 55 years, Occ: Business,

ii) Madhusudan s/o Devidin Gupta,
Aged about 51 years, Occ: Business,

R/o Both 1 and 2, R/o Plot No.83,
Surendrangar Central Railway
Cooperative Housing Society, Nagpur.**APPLICANTS**

...V E R S U S...

Jayshree w/o Avinash Banait,
Aged about Adult, Occ: Business,
R/o Opposite Dhanwate National College,
Congress Nagar, Nagpur.**NON APPLICANT**

Shri D.N. Mehta, Advocate for applicants.
Dr. R.S. Sundaram, Advocate for respondent.

CORAM:- V. M. DESHPANDE, J.
DATED :- APRIL 5, 2021.

ORAL JUDGMENT

1. Hearing was conducted through video conferencing and the learned counsel agreed that the audio and visual quality was proper.

2. Rule. Rule is made returnable forthwith. Heard finally by consent of learned counsel for parties.

3. This revision is a classic example of attempt, which is made by judgment debtors to deny the decree holder from enjoying the fruits of the decree granted by the Court of law.

4. Heard Mr. Mehta, learned counsel for the applicants in extenso and Dr. Sundaram, learned counsel for non applicant. Both the learned counsel took me through the compilation of this civil revision application, which includes judgment and order passed by this Court (Coram: A. S. Chandurkar,J.) in Second Appeal No.418/2017 dated 12.09.2017, by which second appeal filed on behalf of the present applicants was dismissed and also judgment of this Court (Coram: Manish Pitale, J.) in Writ Petition No.5680/2018 and Writ Petition No.162/2019 whereby this Court, while allowing Writ Petition No.5680/2018 filed by the present respondent, dismissed the writ petition filed on behalf of the present petitioners.

5. In this Civil Revision Application, the applicants have impugned the order passed by learned executing Court dated 17.06.2020 in Regular Darkhast No. 183/2016 below Exh.-126, whereby the learned executing Court has rejected the application filed on behalf of the applicants/judgment debtors for dismissal of the execution proceedings.

6. The contention of Mr. Mehta, learned counsel for the applicants/judgment debtors is that the executing Court ought to have dismissed the execution proceedings inasmuch as according to him, the prayer made in the execution parcha for issuance of warrant of possession of the suit plot was not maintainable because it is his submission that learned appellate Court has granted only the decree of mandatory injunction and not the decree of possession. He, therefore, submitted that the approach on behalf of learned executing Court in rejecting the application cannot stand to the scrutiny of law. He relied on judgment of this Court in *Om Prakash Navani and anr Vs. Herbert Joseph Pereira and Ors;* reported in *2003 (3) Mh. L. J. 989* to submit that the Court below has committed error in invoking the jurisdiction under Order XXI Rule 35 of the Code of Civil Procedure. He, therefore, submits that the order be quashed and set aside. It is his submission that since the applicants/judgment debtors have already deposited the decreetal amount of Rs.7440/- as claimed in the execution parcha, nothing remains. He, therefore, prayed that this revision be allowed.

7. Per contra, Dr. Sundaram, invited my attention to the prayer clauses made in the plaint which are reproduced in affidavit-in-reply filed on behalf of the non applicant and also invited my attention

to the operative portion of the decree passed by the appellate Court and submitted that there was a specific prayer of non applicant for possession in the suit and the said was granted by the appellate Court vide judgment and decree dated 01.04.2016. He also submitted that while granting decree of possession, mandatory injunction was granted in favour of non applicant as claimed in the plaint itself, seeking direction to hand over vacant possession by removing the construction made by the judgment debtors as prayed in the suit. He also submitted that present applicants approached before the Hon'ble Apex Court on two occasions. Firstly, challenging the judgment delivered by this Court in Second Appeal No.418/2017 confirming the judgment and decree passed by first appellate Court and subsequently by challenging the judgment and order passed by this Court in Writ Petition No.5680/2018 along with Writ Petition No.162/2019 arising out of earlier order passed by learned executing Court and on both occasions, Hon'ble Apex Court has dismissed the Special Leave Petitions filed on behalf of the present applicants. He submitted that the decree of possession has attained finality and therefore there is no error on the part of the learned executing Court for fixing the matter for issuance of warrant of possession. He, therefore, submits that the present civil revision application be dismissed.

8. The present applicants are legal representatives of original judgment debtor-Smt. Shardedevi w/o Devidin Gupta. She died during the pendency of Regular Civil Appeal No.83/2011 before the learned lower appellate Court. The applicants were substituted in her place.

The non applicant herein along with one Kumudini filed a suit with following prayers.

“i. Pass a decree for Rs.28,600/- against the defendant ordering and directing her to pay the decretal amount to the plaintiff alongwith the cost of the present suit.

ii. Pass a decree for possession ordering and directing the defendant to put the plaintiff in vacant possession of the suit plot.

iii. Pass a decree for mandatory injunction ordering and directing to remove the structure standing thereon the suit plot within a stipulated period failing which the same may be removed at the cost of the defendant.

iv. Order an enquiry under Order 20 Rule 12 of The Code of Civil Procedure, 1908, for means-profit for illegal use and occupation of the suit plot from the date of filing of suit till actual delivery and possession to the plaintiff.

v. Any other relief as deem fit under the circumstance of the case be granted to the plaintiff.”

The said suit was registered as Regular Civil Suit No.1305/1993 (Old) and Regular civil Suit No.366/2003 (new). The suit was contested by original defendant. Vide judgment and decree

dated 03.01.2011, the learned Judge of the trial Court, dismissed the suit in its entirety. Felt aggrieved by the dismissal of the suit, the original plaintiffs preferred appeal before the appellate Court, which was allotted on the file of learned Ad hoc District Judge-7, Nagpur as Regular Civil Appeal No. 83/2011. During the pendency of the said appeal, the original defendant passed away. Similarly, original plaintiff no.1-Kumudini also passed away. Since, legal representative of Kumudini was already on record as plaintiff no.2, she was permitted to proceed with Regular Civil Appeal. The present applicants, being legal representatives of original defendant Shardadevi were substituted by order of the learned appellate Court and they were brought on record and they contested the appeal.

9. Learned Ad hoc Additional District Judge-7, Nagpur vide judgment and decree dated 01.04.2016 was pleased to allow the appeal. It would be useful to reproduce the operative portion of the appellate Court's judgment and decree, which is filed on record before this Court by the applicant himself.

"1. Appeal is allowed with cost.

2. The impugned judgment and decree dt. 03.01.2011 in (Old No.) RCS No.1305/93 (New No.) SCS No.366/2003 is hereby set aside.

3. Plaintiff's suit is decreed.

4. The defendants/respondents by way of mandatory

injunction directed to handover the vacant possession of the suit plot by removing the structure standing there on within three months from the date of decree.

5. An enquiry under Order 20 Rule 12 of Civil Procedure Code for mesne profit be made.

6. Decree be drawn accordingly.”

10. After the appeal was allowed, applicants herein approached to this Court by filing Second Appeal No. 418/2017. This Court, vide judgment dated 12.09.2017 was pleased to dismiss the second appeal. Against the dismissal of second appeal, Special Leave Petition was filed before the Hon'ble Apex Court. The said Special Leave Petition was dismissed by Hon'ble Apex Court on 16.12.2011.

11. Perusal of the judgment delivered by this Court in Second Appeal, which is available on record, shows that the applicants herein failed to prove that they have perfected their title by adverse possession. In addition to that, this Court observed in its judgment that original judgment debtor, in reply to Exh.-69, has admitted the erstwhile vendor's title from whom non applicant/plaintiff purchased the property. In Second Appeal, the contention that was raised was that the suit filed by the plaintiff was barred by limitation. The said was also negated by the Court while dismissing the second appeal.

12. In the second appeal, it was never contention of present applicants that at no point of time, the present non applicant/plaintiff

has not prayed for possession. The decree of possession was not at all challenged. What was challenged was that as the judgment debtors have perfected their title by adverse possession and the suit is barred by the limitation. Both these were turned down by the judgment dated 12.09.2017 and the Special Leave Petition challenging the said is also dismissed. Therefore, judgment and decree given by the learned appellate Court about possession and mandatory injunction and for placing the plaintiff in vacant possession by removing the structure standing on the encroached land, has attained finality.

13. In the aforesaid factual background, contention on behalf applicants that there was no decree of possession in favour of the non applicant and there was a decree of only mandatory injunction is not only misconceived but an absurd one.

In the given set of facts of this case, in my opinion, judgment in *Om Prakash Navani and anr.* supra, is of no assistance to the applicants.

14. One of the contentions that was raised before this Court by the learned counsel for the applicants is that the execution is barred by limitation. He submitted that as per Article 165 of the Limitation Act, the limitation to execute decree of mandatory injunction is three years. In my view, contention of the learned counsel for applicants about

limitation is also misconceived inasmuch as the decree in favour of the plaintiff was granted first time on 01.04.2016 and the execution was filed on 23.08.2016 so the execution was filed well within limitation.

15. I have already observed that the learned counsel for the applicants is not correct in submitting that there was no decree for possession inasmuch as from the operative portion of the decree at clause (iii), the appellate Court has specifically decreed the suit, meaning thereby decree of possession was granted. Mandatory injunction was given in the said to the plaintiff to secure vacant possession of the suit property by removing the construction made by the judgment debtors.

16. There is no case made out in the present civil revision application. Hence, it is dismissed with costs.

Needless to mention that the executing Court shall take further steps to satisfy the decree.

Rule is discharged.

JUDGE

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