

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6174 OF 2021

Khabulal Vaziruddin (Died) LRs and Others

PETITIONERS

VERSUS

Malanbai Dattatray Amrapurkar (Died) & Others RESPONDENTS

.....

Mr. Kamlakar J. Suryawanshi, Advocate for the petitioners

Mr. G. K.Naik-Thigale, Advocate for respondents No.1AI to 1AIV

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 6th JULY, 2022

ORDER :

1. This petition, filed under Article 226 and 227 of the Constitution of India, impugns the order dated 24th March, 2021 passed by the learned Second Joint Civil Judge, Junior Division, Beed below Exhibit-166 in Regular Darkhast No. 81 of 1982.

2. The respondent is the decree holder and the petitioners are the judgment debtors. Regular Civil Suit No. 120 of 1975 was filed by the predecessor of the respondents against the petitioners for declaration of ownership and perpetual injunction in respect of the suit property. Said suit was decreed on 15th January, 1979, thereby declaring that the plaintiff is the owner of the suit land and the defendants are restrained from interfering

with the possession of the suit land. Regular Civil Appeal No. 20 of 1979 filed by the petitioners challenging the Trial Court's judgment and decree was dismissed on 2nd February, 1982. Respondent No.1, thereafter, filed RD No. 81 of 1982 before the learned Civil Judge, Junior Division, Beed for execution of the judgment and decree passed in Regular Civil Suit No. 120 of 1975.

3. The petitioners resisted the execution proceedings, by filing say, contending that the Executing Court had no jurisdiction to pass any order of possession, as there is no decree passed in favour of the decree holder / respondent. Possession warrant issued by the Executing Court on 22nd June, 1983 was set aside by this Court in Civil Revision Application No. 344 of 1983 by order dated 1st September, 1986.

4. Thereafter, the parties led evidence in the execution petition and again the Executing Court issued warrant of possession under Order XXI, Rule 32 (5) of the Code of Civil Procedure, by order dated 12th May, 1988. The said order was subject matter of challenge in Civil Revision Application No. 260 of 1988 before this Court. The CRA was allowed on 14th December, 1988 and the possession warrant was set aside and the Executing Court was directed to stay the proceedings of the

Darkhast and to frame issue regarding tenancy and refer the same to the competent tenancy authority for decision.

5. Accordingly, the matter was referred to the tenancy authority. The Tenancy authority held that the judgment debtors / petitioners are not tenants of the suit lands. Said decision is confirmed up to the Hon'ble Apex Court.

6. Thereafter, respondent No.1 – decree holder, filed application Exhibit-108 for issuance of possession warrant under Order XXI, Rule 35 of the Code of Civil Procedure. The said application was resisted by the petitioners / judgment debtors, by filing say.

7. The petitioners – judgment debtors also filed application Exhibit-166 under section 47 of CPC contending that the suit land has been in possession of the judgment debtors, being tenants. The suit land has been cultivated by them with the consent of the husband of deceased decree holder and initially in the year 1963, there was an oral *batai* agreement and written *batai* agreement between deceased decree holder and judgment debtors took place on 16th June, 1976 and from the year 1963, the judgment debtors are in actual physical possession of the suit land till today. They are in possession of the suit land for

more than 12 years continuously and without any obstruction, as *bataidars*. As per the law, the judgment debtors became owners of the suit land. During pendency of the execution, the decree holder Sushila sold 5 Acre of land from the suit land to Mubin Shaikh, Ramrao Sirsat, Shankar Sirsat and Lakhan Sirsat by registered sale deed dated 14th May, 1992. Accordingly, their names are mutated in the revenue record. The Judgment debtors, with their more than 100 family members are residing in the suit land and they have raised RCC construction and seven tin sheds there. The Decree Holder, Sushila has two sons, Uday and Satish and she has given the suit land to them and they are necessary parties in execution. They, therefore, prayed that their application be allowed and necessary inquiry may be made to find out truth of the case, before hearing and passing order below Exhibit-108. After hearing the parties, this application Exhibit-166 is rejected. Hence, present writ petition.

8. Heard learned advocates for the petitioners and learned advocate for the respondents.

9. Admittedly, the decree is passed on 15th January, 1979, whereby the decree holder is declared to be the owner of the suit land and the judgment debtors are restrained from interfering with the possession of the suit land. The execution

proceedings i.e. RD No. 81 of 1982 is filed on 12th November, 1981 for execution of the said decree.

10. True it is that earlier the warrant of possession issued by the Executing Court was set aside by this Court in CRA No. 344 of 1983 holding that there is no order of delivery of possession of the suit lands to the decree holder and, therefore, no warrant for possession can be issued, however, thereafter, the parties led evidence in the year 1988 in the execution proceedings and the Executing Court again issued warrant of possession under Order 21 Rule 32 (5) of the Code of Civil Procedure, by order dated 12th May, 1988.

11. This order of issuance of possession warrant was challenged in CRA No. 260 of 1988, which was allowed and the Execution Proceeding was stayed and the issue regarding tenancy was referred to the competent authority for decision.

While allowing the CRA, this Court has observed :

“Though the ratio of that decision seems to support the contention raised by Shri Borde to avoid the multiplicity of litigation which may require to obtain possession by filing a fresh suit but in the facts of the present case where the interest of tenant is involved and the procedure is prescribed by separate statute to obtain possession from a tenant, the ratio has no application. However, in view of the protracted litigation between the parties, I feel that the civil court

should be allowed to proceed with Darkhast after the decision of tenancy authorities.”

12. It is, thus, clear that the civil court was allowed to proceed with the Darkhast, after the decision of the tenancy authority.

13. The tenancy authority, by its decision dated 31st March, 1997, held that the judgment debtors are not the tenants over the suit lands. Said decision of the tenancy authority is confirmed up to the Apex Court.

14. The decree holder, thereafter, filed application Exhibit-108 under Order XXI, Rule 32 of CPC seeking warrant of possession of the suit land. The same is resisted by the judgment debtors, by filing say. This application is pending for consideration of the Executing Court.

15. In this background, the application Exhibit-166 filed by the judgment debtors seeking inquiry under section 47 of CPC is rejected by the Executing Court holding that already inquiry has been held by the court in respect of mode of execution of decree, by issuing possession warrant. The objection is taken to execute the decree by way of possession warrant.

16. Though the suit is decreed in the year 1979, till date the judgment debtors are successful in avoiding execution of the

decree. Though more than four decades have passed, the decree holders are yet to enjoy the fruits of the decree passed in their favour.

17. In this background, the application filed by the judgment debtors under section 47 of the CPC is another attempt to prolong the execution of the decree.

18. In **"Brakwell Automotive Components (India) Pvt. Ltd. 2017 (6) Mh.L.J. 47**, the Apex Court held -

"19. It is no longer res integra that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties thereunder. It is only in the limited cases where the decree is by a Court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus inexecutable. An erroneous decree cannot be equaled with one which is a nullity. There are no intervening developments as well as to render the decree inexecutable.

20. As it is, section 47 of the Code mandates determination by an executing Court, question arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of Court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity of the executability thereof."

19. Applying above ratio to the facts of the present case, it is clear the provisions of section 47 of the CPC can be invoked only

on the grounds mentioned therein. The judgment debtors have not made out any ground in the present application that the court which passed the decree lacked inherent jurisdiction or decree is nullity and it is rendered *non est* or inexecutable. Though the judgment debtors have contended that the decree is inexecutable, no material to substantiate the said ground is placed on record. The prayer made in the application that inquiry may be made to find out the truth of the case is also vague and it contemplates a fishy inquiry, only with a view to prolong the execution of the decree. Since none of the grounds mentioned in section 47 of the CPC are made out in the application, the Executing Court was justified in rejecting the application Exhibit-166, by a reasoned order.

20. Sub Rule (5) of Rule 32 of Order XXI of CPC provides :

"Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of judgment debtor".

In view of this provision, the decree holder is entitled to claim possession of the suit land in the execution proceedings.

21. Learned advocate for the petitioner relied on following citations -

i. **"Vasudev Dhanjibhai Modi V/s Rahabhai Abdul Rehman and Others" AIR 1970 SC 1475**, wherein it is held that question relating to execution and objection to the validity of decree may be raised in an execution proceeding, if the objection appears on the face of the record.

There is no dispute about said proposition, however, in the facts of the present case, objection raised by the judgment debtors under section 47 of the CPC is found to be devoid of merit.

ii. In **"Glorio Rosario Furtado V/s Cathedral Chapter of the Archdiocese of Goa and Daman" 2016 (2) Mh.L.J. 854**, Co-ordinate Bench of this Court has held that as the dispute was raised by the respondents with regard to the executability of the decree, sought to be executed by the petitioners, learned judge ought to have held inquiry in terms of section 47 of the CPC before examining the objections raised by the respondents.

The objection raised by the judgment debtors under

section 47 of CPC by application Exhibit-166 is found to be devoid of merit. Hence, this ratio will not be of any help to the petitioners.

22. In "*Rahul S. Shah V/s Jinendra Kumar Gandhi and Others*" **AIR 2021 SC 2161** the Apex Court has issued guidelines to Executing Courts and Guideline No. 14 states that the Executing Court, must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay. The execution proceeding in the case is hand, is filed in the year 1982 and is pending for more than four decades. In that view of the matter also, this Court is not inclined to interfere in the order impugned in the present writ petition.

23. The Executing Court has, by a well reasoned order, rejected the objection raised by the judgment debtors in application Exhibit-166.

24. For the aforestated reasons, this Court is of the opinion that there is no illegality or perversity in the order passed by the Executing Court, which is impugned in the present writ petition. The Executing Court has properly appreciated the facts and the record and has passed a reasoned order, which need not be

interfered with in exercise of extraordinary writ jurisdiction of this court.

25. The writ petition, being devoid of merit, is dismissed. No costs.

[NITIN B. SURYAWANSHI]
JUDGE

drp/wp6174-21