

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11521 OF 2021
WITH WP/11529/2021

RAJENDRA LAXMINARAYAN JAISWAL AND OTHERS
VERSUS
NANDRANIBAI HARINARAYAN JAISWAL AND OTHERS

...
Advocate for Petitioners : Mr. M.R. Sonawane
Advocate for Respondent No. 2 and 4: Mr. S.S. Bora h/f. Mr. R.M.
Deshmukh

.....
[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 27th JULY, 2022

ORDER :

1. Both these petitions since raise similar question of law and fact, they were heard together and being disposed of by this common order.

2. In both these petitions application filed by the petitioners for framing of issues in the execution petition has been turned down by the Trial Court.

3. Execution Petition No. 54/2017 is filed by respondents herein, seeking execution of the decree passed in Regular Civil Suit No. 2015/2012. It is necessary to mention here that said suit was between landlord and tenant for recovery of possession and execution of decree passed against the tenant.

4. In the said execution petition, petitioners filed objection petition under Order 21 Rule 97, 100 and 101 read with 151 of Code of Civil Procedure. The objection petition is pending for adjudication.

5. In the said objection petition, petitioners moved application for framing of issues contending that in the objection petition the petitioners have specifically averred that decreetal properties are joint family property and in family arrangement, some portion was given to deceased Laxminarayan and some portion to Shivnarayan Jaiswal. The names of these persons were recorded in city survey record as well as in municipal corporation record. The objection is at preliminary stage and these controversies are required to be tried and decided by Executing Court by framing appropriate issues. Special Civil Suit No. 86/2007 for partition in respect of several properties including decreetal property is filed and same is pending. They also claimed that they have obstructed to the execution of decree and they are in possession of the said property and therefore, issue in respect of possession and nature of property be framed.

6. Respondents resisted said application and the Executing Court has rejected the application for framing of issues. Hence, present petitions.

7. Heard the learned advocate for the petitioners and learned advocate for respondents. Perused the documents filed on record by the respective parties.

8. The learned advocate for the petitioners strenuously urged that taking into consideration the fact that the petitioners are in possession of the suit property it is necessary to frame issues. For supporting the claim of the petitioners that they are in possession, he relied on obstruction panchnama, which according to him indicates that the petitioners are in possession of the property. By relying on para 345 of the civil manual he submits that, the Executing court ought to have allowed the application and the issues should have been framed. In support of his submissions he relied on Udyavara R. Acharya Vs. Jugal Kishor Jagannath Sharda (2020 (5) Mh.L.J., 227), Subhash Chander and Anr. Vs. Smt. Phoolwati and Others [(2009) 3 ILR (Punjab) 700], Noorduddin Vs. Dr. K.L. Anand (1994 AIR SCW 5093), Ram Chandra Verma Vs. Shri. Jagat Singh Singhi and

others (AIR 1996 SC 1809), Shreenath and another Vs. Rajesh and others (AIR 1998 SC 1827), Parasanbai Dhanraj Jain & Ors. Vs. Sunanda Madhukar Jadhav (2017 (6) ALL MR 877) and Kasam Hiral Beniwale Vs. Chotu Lodu Manjare (Writ Petition No. 2192/2019).

9. Per contra, the learned advocate for respondents supported the impugned order. He submits that the petitioners are trying to prolong the execution of decree by filing various proceedings. Sale deed in 1979 in favour of Harinarayan is not challenged so far and therefore issue of ownership of said property would not arise in the present proceeding. By pointing out obstruction panchnama he submits that it cannot be said that the petitioners were in possession of the shop. He further submits that the decree is passed against the tenant and therefore the petitioners have no right to claim that issues proposed by them should be framed in the matter. He further submits that suit property is deleted from partition suit. He therefore by relying on Rahul S. Shah Vs. Jinednra Kumar Gandhi and Others (2021 6 SCC 418) submits that there is no substance in the petition and the petition may be dismissed.

10. It is a matter of record that the petitioners have failed to get themselves impleaded in the suit, appeal and prayer of the petitioners for impleadment in the proceedings has been rejected by this Court in Writ Petition No 7301/2019 with Writ Petition No. 7302/2019. Said order has become final.

11. The substantive objection raised by the petitioners is pending which will be adjudicated on its own merit by the Executing Court.

12. In *Rahul Shah* (supra), the Hon'ble Apex Court has held:

"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 14 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 Bubna¹⁵, wherein it recommended that the Law Commission and the 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 (1871-72) 14 Moore's I.A. 605 (2009) 9 SCC 689 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."

13. In *Subhash Chander* (supra), the learned Single Judge of Punjab and Haryana High Court held "*Thus, whether there is a fraud or collusion between Decree Holder or Judgment Debtor who did not contest the suit, is a question of fact which could be proved if on the basis of pleading of the parties, appropriate issues are framed and opportunity is granted to the appellants to lead their evidence because the objections filed under Order 21 Rule 97 of the CPC have to be decided as a suit.*"

14. In *Udyavara Acharya* (supra), co-ordinate bench of this Court has held that 'the Executing Court in a proceeding under Order 21 Rule 97 ought to have conducted full fledged inquiry into the issues raised by obstructor including letting parties to lead evidence'.

In para 33 of this judgment, the decision of Hon'ble

Supreme Court in N.S.S. Narayan Sarma Vs. Goldstone Exports (2002) 1 SCC 662 is observed that '*it is not obligatory for the executing Court to frame issues because the proceedings under Rule 97 of Order 21 are miscellaneous*'.

This Court proceeded to hold that '*it is however, always regarded advisable for the Court to frame issues or to draw up points for determination so as to enable the parties to have knowledge about the controversy, particularly, after the Amendment Act, 1976. As the Supreme Court has held that the said proceedings are in the nature of suit, all the question relating to right, title and interest in the property arising between the parties are to be determined by the executing Court*'.

15. Note 345 in Chapter XXI of Civil Manual makes a provision that when dispute arise in the course of execution proceedings, the provisions as to suits, unless in applicable, should be followed. In such cases, issues must be framed, evidence taken and judgment written according to the law applicable to the suits.

16. The decision relied upon by the learned advocate for the respondents in *Rahul Shah* (supra), was the matter arising from state of Karnataka. It is not clear whether there is analogous provisions to note 345 in Karnataka civil manual.

17. Taking into consideration the provisions of note 345 in civil manual and ratio in *Udyavara Acharya* (supra) that, it is regarded advisable for the Court to frame issues or to draw up points for determination, in the facts of the present case, this Court is of the opinion that the issues may be framed or at least points for determination be drawn for adjudicating the objection raised by the petitioners under Order 21 Rule 97.

18. In the result, writ petitions are allowed in following terms:

ORDER

(I) The Executing Court is directed to frame issues/points for determination within a period of two weeks from the date of receipt of this order and decide the objection raised by the petitioners within a period of four weeks thereafter.

- (II) The parties are at liberty to lead evidence within a stipulated period.
- (III) With these directions, writ petitions are disposed of.

[NITIN B. SURYAWANSHI, J.]