

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 920 OF 2022

Mr. Rajendra Vitthal Bahirat

Through his POA holder

Shri Ravindra N. Sakla and Anr.

....Petitioners.

V/s

Shri Prakash R. Girme

.....Respondent

Mr. Anil Anturkar, Senior Advocate a/w Mr. Tejesh Dande, Mr. Bharat Gadhavi, Mr. Vishal Navale, Mr. Aniket Aghade i/b Tejesh Dande & Associates for the Petitioners.

Mr. Sanjiv A. Sawant i/b Mr. Abhishek S. Matkar for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 31, 2022

P.C.:-

1] This Petition is by the judgment debtor who has suffered a decree of handing over vacant and peaceful possession of suit property, delivered in Special Civil Suit No.2152 of 2007 on 03/03/2010 passed by 3rd Additional Judge, Small Causes Court & Joint Civil Judge, Senior Division, Pune.

2] Petitioner has questioned the order dated 11/01/2022 passed

below Exhibit-218 and the order dated 14/10/2021 passed below Exhibit-214 by the Executing Court i.e. Judge, Small Causes Court, Pune in Special Darkhast No.122 of 2010 arising out of execution of the aforesaid decree.

3] Application-Exhibit-214 is preferred by the Respondent/decreed holder whereby the Executing Court has directed issuance of warrant of possession in respect of suit property in accordance with the Report of T.I.L.R. dated 31/10/2013 whereas Application-Exhibit-218 is moved by the decree holder for removal of obstruction, which is granted vide impugned order dated 11/01/2022.

4] Heard Mr. Anil Anturkar, learned Senior Counsel appearing for the Petitioners/judgment debtors and Mr. Sanjiv Sawant, learned Counsel appearing for the Respondent/decreed holder.

5] Learned Senior Counsel for the Petitioner would invite attention of this Court to the judgment of this Court in Civil Revision Application No.571 of 2010 delivered on 20/09/2011 and would claim that the decree in question is executable only to the extent of land Survey

No.2A/8/1 and it cannot be executed against old Survey No.2A/7/1/1, as the decree to that extent is already modified. He would further invite attention of this Court to the fact that the Executing Court is trying to execute the decree by virtue of impugned orders in relation to such property which is not the subject matter of the decree. He would draw support from the judgment of this Court referred to above so as to substantiate his contention. He would then invite attention of this Court to the Report of the Court Commissioner dated 31/10/2013. According to him, the said Report in categorical terms mention that the land record in relation to land Survey No.2A/8/1 is not available and as such, the Executing Court without identifying the property ought not to have ordered execution of the decree. He would claim that what has been ordered vide impugned order dated 14/10/2021 passed below Exhibit-214 is, issuance of warrant of possession in respect of the suit property in accordance with the Report of T.I.L.R. dated 31/10/2013 is ordered. As the very property itself is not identified, he would claim that impugned orders are not sustainable.

His further contention is, Application-Exhibit-218 moved by the

Respondent/Plaintiff was objected by the Petitioners vide Exhibit-220 and such objections are not at all dealt with by the impugned order dated 11/01/2022. As such, according to him, the order impugned passed below Exhibit-218 is also not sustainable, as objections of the Petitioners are not considered. He would claim that in execution of the decree, demolition of wall in some different property is ordered. However, such wall is not the subject matter of the execution proceedings. Relying on the observations of the Executing Court in an order passed below Exhibit-202 on 16/06/2021, he would claim that execution was required to be deferred in view of prayer of Respondent/Plaintiff for demolition of alleged wall. He would, as such, claim that Court below has committed an error apparent on the face of record in passing the impugned order which warrants interference.

6] While countering the submissions, learned Counsel for the Respondent/decreed holder would invite attention of this court to the decree passed by the Trial Court, modification of the same by the Revisional Court in Civil Revision Application No.571 of 2010 and observations therein. He has also relied on the orders of this Court

passed in Writ Petition No.3165 of 2019, whereby prayer of the Petitioners was rejected on earlier occasion in the matter of summoning of witness under Order XVIII Rule 17 read with Section 151 of the Civil Procedure Code. In addition, his contentions are, this Court vide detailed judgment delivered on 08/01/2021 in Writ Petition No.6433 of 2019 has considered all the aforesaid facets of the matter and has dismissed the same, which is already upheld by the Hon'ble Apex Court. He would, as such, claim that Petition is nothing but an attempt on the part of the judgment debtors for delaying execution. He would pray that Petition be dismissed with exemplary costs.

7] I have considered rival submissions.

8] No doubt, the decree passed in Special Civil Suit No.2152 of 20076 came to be modified to the extent of schedule of the property and this Court in an operative part of the order dated 20/09/2011 passed in Civil Revision Application No.571 of 2010 observed as under:-

“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.”

As such, the decree was executable in relation to the property bearing Survey No.2A/8/1.

9] Subsequent thereto, in execution proceedings of the said decree i.e. Darkhast No.122 of 2010, the Executing Court appointed T.I.L.R. to verify the boundary of Survey No.2A/8/1, as such allowed

Application-Exhibit-55 with directions to the T.I.L.R. to verify the boundaries of Survey No.2A/8/1 i.e. the suit property. Petitioners were directed to bear expenses. As a consequence of above, on 31st October, 2013 Commissioner gave his report with map annexed thereto.

10] Commissioner was subjected to cross-examination and again an attempt on the part of the Petitioner to re-summon the Court Commissioner under Order XVIII Rule 17 was turned down by this Court in Writ Petition No.3165 of 2019. The Court having noticed the conduct of the Petitioner has dismissed the said Petition with costs of Rs 5000/-

11] Petitioner at that point has not stopped his attempt of beating around the bush so as to frustrate the execution of the decree and accordingly by order passed below Exhibit-180 by the Executing Court, an objection preferred by the Petitioners/judgment debtors under Section 47 of the Civil Procedure Code for deciding location and boundaries of the suit property came to be dismissed. This Court vide detailed judgment has observed as to how the Petitioners have

adopted delaying tactics in execution proceedings and dismissed the Petition with costs of Rs 1 lakh, which I am informed is already deposited by the Petitioners. Petitioners carried the said judgment dated 08/01/2021 passed in Writ Petition No.6433 of 2019 before the Apex Court in SLP (C) No.3115 of 2021, which was dismissed by the Apex Court.

12] If we appreciate all the aforesaid three judgments of this Court, in Civil Revision Application No.571 of 2010 this Court has specifically recorded contentions of the Petitioners in para 3 of the said judgment which reads thus:

“3..... He further submitted that if the respondent is trying to execute a decree in regard to Survey No.2A/8/1 of land situate at Bopodi, Tal. Haveli, Dist. Pune, applicants have no objection in execution of the said decree.”

13] Thereafter, even before the Additional Judge, Small Causes Court, the Petitioner while dealing with Exhibit-55 has made following statement in categorical terms, which reads as under:-

“4.....The Judgment Debtor herein have categorically stated that they are no concern with

the suit land i.e. CTS No.2A/8/1. In fact, the decree passed by the trial court as appears is not challenged by the Judgment Debtor.....”

14] Thereafter, even in Writ Petition No.3165 of 2019, which was decided on 13/3/2019, this Court has made the following observations in regard to conduct of the Petitioners in para 4 which read 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 in 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.”

15] In Writ Petition No.6433 of 2019, this Court has noted that it is a common experience that it is easy to obtain decree but difficult to get it executed. This court accordingly proceeded to record submissions of the present Petitioners in para 7 in regard to identification of the property and observed in paras 17, 18 and 19 as under:-

“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/decreed 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 go into the question as to which is the old survey number. This Court further observed in paragraph 5 as under:

“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 at least 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.”

16] In the aforesaid backdrop, what can be noticed is, Petitioners are trying to reopen the issue which is already decided upto the Apex Court against them. The orders of the Executing Court which are impugned in the present Petition are nothing but the steps taken by the Executing Court to achieve the goal of final execution of the decree. Executing Court in entirety has followed beyond reasonable doubt procedure contemplated under Order XXI in the matter of execution of decree for possession. Contention of the Petitioners that Executing Court has travelled beyond decree, thereby overlooking judgment of this Court in Civil Revision Application, thereby misidentifying the property cannot be accepted. The said issue is already decided by this Court in Writ Petition No.6433 of 2019 which is upheld by the Apex Court. The Petitioners’ consistent stand is, they

have no objection for execution of decree in relation to the property which is mentioned in the order passed in Civil Revision Application and the decree holder since last more than 11 years is struggling to execute the decree. Petitioners one way or other are trying to stall the execution. This Court has also formed an opinion in earlier round of litigation that Petitioners are trying to stall the execution of decree on unreasonable grounds and as such, saddled costs of Rs 1 lakh. Petitioners have not mend their ways in spite of the said order and have chosen to come out with objections on flimsy grounds, thereby trying to stall execution proceedings. The orders impugned, in my opinion, are in tune with the judgment of the Apex Court in the matter of *Rahul S. Shah vs. Jinendra Kumar Gandhi and Ors* reported **AIR 2021 SC 2161** and in *B. Gangadhar vs. B.G. Rajalingam* reported in **1995(26) ALR 358**. The contention of Mr. Anturkar that execution of decree is ordered by way of demolition of such property which is not the part of a decree is also liable to be rejected as, in the matter of execution of decree for possession of immovable property, delivery of the property can be ordered by the Executing Court by passing incidental or necessary orders for effective enforcement of the decree. Power to remove any obstruction or superstructure made

during pendency of execution of decree is incidental, ancillary and inherent and can be exercised in the matter of possession of the property in execution of decree. Para 4 of the judgment in the matter of *B. Gangadhar* cited supra, reads thus:

“4. Rule 35(3) of Order 21 C.P.C. 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 superstructure 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.”

The Executing Court was required to pass orders impugned based on the report dated 1/12/2021 submitted by the Court Bailiff which speaks of temporary obstruction. With the assistance of respective learned Counsels, I have perused the said Bailiff Report dated 1/12/2021, the statement of the Respondent/decreed holder and also the panchanama drawn on the spot by the Bailiff. The said report in categorical terms speaks of the visit of the Bailiff alongwith Plaintiff and panchas for execution of the order passed below Exhibit-217 in Regular Darkhast No.122 of 2010. It is specifically mentioned that on the way which leads to the entry in suit property, temporary structure of wall is created and the said road is the only way of getting entry in the suit property as the alternative roads which were tried to be traced were not noticed or available. Not only that, present judgment debtor has encroached on the property of decree holder by constructing a temporary shed. As such, the Bailiff has reported that unless the obstruction planted by the Petitioners/judgments debtors is removed, decree cannot be executed by handing over possession of the suit property to the decree holder.

As such, the Executing Court was justified in passing the order of removal of obstruction which is in tune with the aforesaid judgment of the Apex Court in the matter of *B. Gangadhar*.

17] As far as the contention of learned Senior Counsel Mr. Anturkar in regard to the Court Commissioner's Report dated 31st October, 2013 is concerned, judgment of this Court in Writ Petition No.6433 of 2019, particularly in paragraph 19 specific observations to that effect on the said issue are recorded. Apart from above, the contention that objection to Exhibit-218 vide Exhibit-220 is not considered is concerned, all the contentions are duly dealt with in detail by the aforesaid judgment delivered in Writ Petition No.6433 of 2019 which is already affirmed by the Apex Court. The present Petition is nothing but a determined and dishonest litigant interminably dragging on litigation to frustrate execution of decree which is passed almost 11 years back. The history narrated hereinabove demonstrates cussedness and lack of bona fides on the part of the present Petitioners in preferring the present Petition. It can be noticed from the tenacity and determination of the Petitioners that they intend to prevent the

present Respondent/decreed holder from enjoying fruits of the decree. Time and again, same type of arguments are canvassed at every stage of the proceedings before the Executing Court so also this Court. This Court in *Ravinder Kaur vs Ashok Kumar* reported in (2003) 8 SCC page 289 has dealt with conduct of the parties like the present petitioner and observed in para 15 thus :-

“Courts of law should be careful enough to see through such diabolical plans of the judgment-debtors to deny the decree-holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing law’s delay and bringing bad name to the judicial system.”

18] It is worth to observe here that in earlier order of this Court passed in Writ Petition No.6433 of 2019, the conduct of the Petitioners was observed to be of delaying tactics in execution of decree. This Court even in the present Petition in view of conduct of the Petitioners/judgment debtors is left with no other option but to make similar observations. As such, present Petition is also dismissed with costs of Rs 2 lakhs which the Petitioners are directed to deposit

before this Court which is permitted to be released in favour of the decree holder. The costs be deposited within a period of two weeks from today.

19] At this stage, learned Senior Counsel sought stay of the execution of the warrant of possession. In the backdrop of findings recorded hereinabove, I hardly see any reason which warrants grant of relief claimed by the Petitioners. That being so, same stands rejected.

(NITIN W. SAMBRE, J.)