

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5264 OF 2017

Manoj Jaikumar Tibadewal

...Petitioner

vs.

Suman Prabhakar Donde and Others

...Respondents

Mr. Aniruddha Garge, for the Petitioner.

CORAM : N. J. JAMADAR, J.

DATE : JUNE 07, 2022

P.C.:

1. Heard the learned counsel for the petitioner.

2. The challenge in this petition is to an order dated 2nd February, 2016 passed by the learned Civil Judge, Nashik on an application (Exhibit 41) in Final Decree No. 6 of 2007, preferred by the petitioner for framing a preliminary issue under Order XIV Rule 2 of Code of Civil Procedure, 1908.

3. The final decree proceeding is instituted by the respondent/plaintiff to execute the decree passed in Regular Civil Suit No. 346 of 1992. The petitioner was not a party to the said suit.

4. The petitioner preferred an application purportedly under Order XIV Rule 2 of the Code asserting, inter alia, that the final

**VISHAL
SUBHASH
PAREKAR**

Digitally signed by
VISHAL SUBHASH
PAREKAR

Date: 2022.06.07
17:06:06 +0530

decree application is legally untenable. It is also barred by law of limitation. It was further contended that the decree in Regular Civil Suit No. 346 of 1992 was not executable against the petitioner.

5. By the impugned order the learned Civil Judge rejected the application holding, inter alia, that there was no propriety in framing the preliminary issue in final decree proceeding. The executing Court can not go behind the decree. The petitioner may work out his remedies by instituting an independent suit.

6. The learned counsel for the petitioner submitted that in consonance with the written statement filed by the petitioner in Final Decree Application No. 6 of 2007, wherein the petitioner has raised contention regarding the legality and executability of the decree passed in RCS No. 346 of 1992, the petitioner had preferred the said application. The learned counsel further submitted that the incorrect nomenclature of the application or reference to an inapplicable provision of law is of no significance and the substance of the matter is required to be looked at. It was submitted that the petitioner, in effect, alleged that the decree passed in RCS No. 346 of 1992 was legally un-executable. Therefore, the said issue ought to have been decided by the executing Court.

7. I find it difficult to accede to the aforesaid submission. From the tenor of the application (Exhibit C to the petition), it becomes evident that the petitioner sought framing of preliminary issue on the ground that final decree application was not legally tenable and it was barred by limitation as well. Additionally, it was contended that the decree was not executable against the petitioner.

8. In the aforesaid background, the learned Civil Judge was justified in observing that, being the executing Court, it could not go behind the decree. The learned Civil Judge further observed that the petitioner has to work out his remedies by instituting an independent suit. The aforesaid approach of the learned Civil Judge seems justifiable.

9. In any event, a final decree proceeding could not have been converted into a suit wherein the petitioner would insist on framing of preliminary issue regarding executability of the decree. Undoubtedly, the executing Court is competent to adjudicate upon the execution, satisfaction and discharge of the decree. However, if a party asserts, on the basis of material, which was not before the court which passed the decree that the decree itself could not have been passed, the remedy ordinarily does not lie before the executing

Court. From this stand point, the learned Civil Judge was well within his rights in observing that the petitioner could work out his remedies in separate proceedings. In this view of the matter, no interference is warranted in exercise of extraordinary writ jurisdiction.

10. Hence, the petition stands dismissed.

The petitioner is however at liberty to avail the remedies as available in law.

(N. J. JAMADAR, J.)