

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.247 OF 2022

Maurice W. Innis

..Petitioner

Versus

Lily Kazrooni @ Lily Arif Shaikh

..Respondent

Mr. A. V. Anturkar, Senior Advocate i/by Zainab R. Shaikh, for the
Petitioner.

Mr. Saeed Akhtar a/w Hitesh A. Thorat, Rehan Ansari & Saniya
Khan, for the Respondent.

CORAM : NITIN W. SAMBRE, J.

**RESERVED ON : 11th APRIL, 2022
PRONOUNCED ON : 21st APRIL, 2022**

PC.

1. Petitioner based on an agreement of sale dated 17th
April, 2009 initiated suit for specific performance being Special Civil
Suit No.68 of 2012 on the file of Civil Judge, Senior Division,
Satara, with following prayers :-

“13. Hence, the plaintiff prays as follows :

- A) The defendant may kindly be ordered to execute the
registered sale deed in respect of the suit property, as
per agreement dated 17/04/2009.
- B) In case of the failure to comply from the defendant, the
sale-deed may be executed by an appointment of a
court commissioner.

- C) Defendant may kindly be restrained from causing any interference with the lawful and peaceful possession of the plaintiff in the suit property till the execution of the final sale deed.
- D) Interim order may be issued in terms of prayer clause (c) till the decision of the suit.
- E) Plaintiff may be allowed to amend the suit, if any, when necessary.
- F) Other just and necessary orders may be passed from time to time.
- G) Costs of the suit may be awarded from the defendant.”

2. The said suit came to be compromised in Lok Nyalaya and compromise decree is drawn on 8th July, 2017, which reads thus:-

“Pursis on behalf of Plaintiff and Defendant is as under

Plaintiff and Defendant have decided to compromise the matter on the following terms and conditions.

1) Present plaintiff have sanctioned building map 97.12 Ares of C.T.S. No.396A of village Panchgani Tal. Mahabaleshwar sanctioned map is dated 9/4/2010 is part & parcel of this compromise & both parties have agree the same. Disputed property is 0.51 Ares and same is situated to the western of plot No.396.

2) Area to the extent of 10 gunthas is kept to between plaintiff & defendant as common and ownership right is

kept common. Present plaintiff sold away 10 Ares land for the access for same property to purchaser has easementary right to common road. If in future common area left for road is acquired and compensation amount decided by local authority then compensation amount will be distributed in equal share. Area of common road is to be measured & ascertain and after measurement the area determined will be common Road.

3) Area allotted to present plaintiff is as under

a) Area of residential bungalow & area of construction up to plinth level towards the one southern side of bungalow plus the area western side of C.T.S. No.396A including two bungalows shown in sanctioned thus total area 20.5 Ares is given to the present plaintiff.

4. The area situated to the western side bungalow of present plaintiff & plinth level structure upto the boundary of the two bungalows of extreme side. The total area is 20.5 Ares is given to the present defendant. Present defendant should execute sale-deed of the property mentioned in para 3 above. The consideration of Rs.10 Lac is already received by present defendant. The cost of stamp duty & Reg. will be borne by plaintiff.

5. The area given to the present plaintiff & defendant is 20.5 Ares each is to be ascertain by the surveyor by making expenditure one half each and got demarcated same.

6. The value of the two bungalows of which construction of slab level is completed i.e. to western side of plaintiff bungalow. The cost of construction will be decided. And two plinth level bungalows, towards western side of plaintiff bungalow the cost of same also is to be determined by the Govt. valuator & ½ half of the total value of construction is to be paid by the present defendant.

7. The plaintiff and defendant are agreed to draw a decree according to this compromise.

8. The suit filed by present defendant in Mahabaleshwar No.105/12 & Transfer Appln. No.20/17 filed in district court is to be withdrawn by defendant.

9. The plaintiff and defendant should bear their cost of the suit & other proceeding mentioned above.

Decree be drawn as per the terms & conditions and present plaintiff & defendant are authorize to enforce the decree.”

3. Special Darkhast No.21 of 2018 is taken out by the respondent for the purpose of execution of the aforesaid compromise decree.

4. So as to make the decree executable, the report of the District Superintendent of Land Records was called, who has drawn a map at Exh.114 along with report at Exh.57.

5. The judgment debtor and the decree holders both submitted their objections to the aforesaid report of the Court Commissioner vide Exhs.61 and 62. As a consequence, the Court Commissioner was subjected to thorough cross-examination recorded at Exh.109 on 2nd March, 2021.

6. In view of objections of the judgment debtor and decree holder, valuation of constructed structure standing on the suit plot was carried out with the aid of Government Recognized Valuer.

7. After appreciating the rival claims, the Executing Court vide order passed below Exhs.1 and 57 observed that the judgment debtor has no serious objection or dispute about allotment of portion mark 'VA3NOV' admeasuring 0.0766 R out of the suit property. The Executing Court noticed that the dispute is in relation to the allocation of portion mark 'WXYZA1A2H'.

8. In the wake of above, after considering the contents in the compromise decree and having noticed that it is not practicable to allot the portion towards western side to the decree holder which will be causing inconvenience to the decree holder, following directions were issued :-

“1] The D.H. be allotted 20.5 R portion out of the suit plot marked as 'CDEFGHA2STC' and the portion marked as 'VA3NOV' so also the portion out of 'VOPU' to add up to the share to be allotted to him.

2] The J.D. be allotted 20.5 R. portion out of the area 'ABCTUPQRA' and 'HIXYZA1A2H'.

3] The portion 'TSA2A1ZNA3VUT' so also the portion marked as 'JKLMA4J' be kept in common between J.D. and D.H. as per the compromise decree and be used as common path way.

4] The court commissioner shall file the report about modified demarcation and allotment of shares as far as possible within two months of this order.”

9. Both the judgment and decree holder have taken note of

directions issued on 19th July, 2021 referred above. However, at Exh.129, the decree holder took out application for modification of the aforesaid order dated 19th July, 2021 under provisions of Order XLVII Rule 1 r/w Section 114 of the CPC.

10. A prayer for review moved at Exh.129 in relation to order below Exh.57 came to be allowed vide order impugned dated 26th August, 2021. The Executing Court so as to make the decree workable and executable has given following directions :-

“1] The D.H. be allotted 20.5 R portion out of the plot No.396-A marked as ‘EFGHWXYZA1A2SE’ and the portion marked as ‘VA3NOV’.

2] The J.D. be allotted 20.5 R. portion out of the area ‘ABCESTUVOPQRA’ and ‘HIXWH’.

3] The portion ‘TSA2A1ZXIJA4MNA3VUT’ and the portion marked as ‘JKLMA4J’ be kept in common between J.D. and D.H. as per the compromise decree and be used as common path way.

4] The court commissioner shall file the report about modified demarcation and allotment of shares as far as possible within two months of this order.”

11. After the aforesaid order was passed, the decree holder moved an application for execution of the decree by issuing warrant of possession vide Exh.158 which prayer came to be allowed on 11th October, 2021 which order is also challenged in the present petition. While questioning the aforesaid orders viz. order dated 19th July,

2021 passed below Exhs.1 and 57, order dated 26th August, 2021 passed below Exh.129, order dated 11th October, 2021 passed below Exh.158, learned senior counsel Mr. A. V. Anturkar would urge that the Executing Court has travelled beyond the decree which is not permissible in law. According to him, the compromise decree is quite clear and after considering the contents therein, particularly, clause 3.A and 3.B, it can be inferred that the portions which were intended to be allocated to each of the party i.e. decree holder and judgment debtor are specifically spelt out in categorical terms. According to him, vide impugned orders the Executing Court has given go-bye to the aforesaid directions contained in the compromise decree and has modified the decree by passing impugned orders which is without jurisdiction or absence of any legal authority. So as to substantiate his claim, he has invited my attention to the two maps which are produced on record from which he has tried to justify the executability of the decree in terms of the consent decree.

12. While countering the aforesaid submissions, counsel for the respondent/decreed holder would support the impugned orders. According to him, the present writ petition is nothing less than an arm-twisting attempt on the part of the petitioner to somehow prolong the execution of the decree. He would urge that the Court below was justified in passing the orders impugned so as to make decree workable and executable which in any case is permissible in law. According to him, the Executing Court was justified in passing

the orders impugned and as such, has sought dismissal of the petition.

13. I have appreciated the aforesaid contentions.

14. If we consider the terms in the compromise decree, particularly clause 3a and 4, same speaks of the allocation of portions out of the property owned by judgment debtor. Clause 5 of the same reads thus :-

“5. The area given to the present plaintiff & defendant is 20.5 Ares each is to be ascertain by the surveyor by making expenditure one half each and got demarcated same.”

15. The compromise decree was also assailed by the petitioner before various forums and ultimately the attempt on the part of the respondent to take compromise decree to its logical end has reached to a final stage in view of the impugned orders.

16. The Executing Court while making the decree workable and executable has taken aid of the Court Commissioner, so also the Government Recognized Valuer to the extent of the valuation of the structures so as to avoid prejudice to parties to the decree. Parties to the decree viz. decree holder and judgment debtor had enough opportunity to cross-examine the Court Commissioner as reflected from Exh.109 and as such, there is no scope for grievance by either of the parties to the decree of not getting enough opportunity of hearing before the Executing Court.

17. The fact remains that in the compromise decree, though there is reference to sanction map drawn and attached so as to help in identifying location of the portions to be allocated to the share of decree holder, however, clause 5 of consent decree acts as a rider to it. As a consequence of which, the Executing Court so as to make the decree workable has taken aid of the Court Commissioner and the Government Recognized Valuer which in any case cannot be termed to be contrary to the provisions of Section 47 of the CPC.

18. It appears that the petitioner was expecting division of the suit property as per his convenience and while allocation of area pursuant to compromise decree, the Executing Court is required to and rightly so while making the decree executable considered the interest of both i.e. decree holder and judgment debtor.

19. This Court is required to be sensitive to the judgment of the Apex Court in the matter of *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Ors.* reported in *AIR 1956 SC 359* and *Pratibha Singh and Anr. Vs. Shanti Devi Prasad and Anr.* reported in *AIR 2003 SC 643*.

20. The compromise decree makes the sanctioned map dated 9th April, 2010 in relation to the building area of CTS No.396A of village Panchgani to be part and parcel of the decree based on the agreement of judgment debtor and decree holder. The disputed property shown to be 0.51 R situated on the western side

of the plot No.396. Out of the aforesaid area of 0.51 R, 10 guntha land is kept common for judgment debtor and decree holder. The petitioner sold 10 R land for access out of property to third party who has easementary right to common road. The petitioner herein i.e. the judgment debtor is given area of residential bungalow with area of unfinished construction i.e. upto plinth level towards southern side of bungalow and area from western side of CTS No.396A including two bungalows shown in sanctioned map total area admeasuring 20.5 R. Western side bungalow and plinth level structure upto boundary of two bungalows of extreme side having total area of 20.5 R is given to the defendant i.e. respondent/decreed holder. Directions were also issued to execute sale-deed in relation to the property referred to above by the defendant to the suit.

21. As such, what can be ascertained is that each of the party to the decree got 20.5 R land, location to be ascertained by the surveyor as provided in clause 5 of the decree. It further provides for valuation of the unfinished bungalows from the Government valuer.

22. In the aforesaid background, it appears that vide order below Exh.57 the District Superintendent Land Records came to be appointed and has drawn a map at Exh.114. In that view of the matter, what can be noticed is the impugned order dated 19th July, 2021 to the extent of appointing Court Commissioner below Exh.57 and valuing the property from Government Recognized Valuer,

allocation of earmarked portion out of the suit property, appears to be well within the jurisdictional limit of the Executing Court. The Executing Court since was apprised of the transfer of 10 R land by the petitioner to third party i.e. Prince Developers was justified in changing the location of the share to be allocated to each of the party to the decree vide order dated 26th August, 2021. While passing both these orders, the Executing Court has recorded reasons which are germane to the cause considered. The Executing Court was sensitive to the act of the petitioner of creating third party which was one of the consideration for passing the said order.

23. After the aforesaid orders are passed, though the counsel for the petitioner Mr. A. V. Anturkar has tried to demonstrate the variations in the property which is identified from sanction map as referred to in the decree, so also the map prepared by the District Superintendent of Land Records at Exh.114 thereby superimposing, the Court is required to be sensitive to the powers under Section 47 of the CPC. The Section 47 of the CPC empowers the Executing Court to see that the decree holder get the very property that has been agreed to be given under the decree. In case dispute as identity of property cropped up, it is for the Executing Court to determine such question under Section 47 of the CPC.

24. The Apex Court in the matter of *Jai Narain Ram Lundia (cited supra)*, in paragraph 23 has observed thus :-

“(23) The only question that remains is whether the executing Court can consider whether the defendant is in a position to perform his part of the decree. But of course it can. If the executing Court cannot consider this question who can? The executing Court has to see that the defendant gives the plaintiff the very thing that the decree directs and not something else, so if there is any dispute about its identity or substance nobody but the Court executing the decree can determine it.

It is a matter distinctly relating to the execution, discharge and satisfaction of the decree and so, under S. 47, Civil P. C., it can only be determined by the Court executing the decree. And as for the first Court’s conclusion that it could not decide these matters because it was not the Court that passed the decree, it is enough to say, as the High Court did, that S. 42 of the Code expressly gives the Court executing a decree sent to it the same powers in executing such decree as if it had been passed by itself.”

25. Apart from above, this Court is also required to be sensitive to the position of law that, in case, if the map is shown to be part of the decree which is tentative, from the contents of the compromise decree the property cannot be ascertained, under Section 152 of the CPC, the Executing Court can supply omissions. Such omissions can be supplied based on the reading of the decree, the pleadings and the documents which are relied on. By exercising powers under Section 47 of the CPC to make the decree executable so as to avoid the frustration of the decree by supplying omissions can be ordered so as to avoid the frustration of the execution of the decree. In support of the aforesaid proposition, reliance can be placed in the matter of *Pratibha Singh (cited supra)*.

26. As such, what can be inferred from the orders impugned is the Executing Court was within its powers under Section 47 of the CPC so as to make the decree executable without substantially varying the conditions of the decree. It appears that the decree contains clauses viz. clause Nos.3a, 4 and 5 which has made to believe to the Court below that each of the party is entitled for 20.5 R land that is after excluding 10 R land which was to be used for the common purpose. In the decree, there is reciprocal duty on each party to it to share the land from which they are having common ownership. From perusal of the map drawn by the District Superintendent of Land Records at Exh.114, it has to be noticed that the Executing Court has taken steps under Section 47 to make the decree workable and executable.

27. The Apex Court has observed that the Executing Court can't mechanically dismiss the execution proceedings thereby observing that the decree lacks details, as to its executability thereby leaving the party to go for another round of litigation.

28. Rightly so, upon perusal of the documents, judgment and decree and execution proceedings, the Executing Court was justified in identifying the property. The support to the aforesaid observations can be drawn in the matter of ***Bhavan Vaja Vs. Solanki Hanuji Khodaji Mansand*** reported in ***AIR 1972 SC 1731***. The Apex Court while dealing with the similar situation in paragraph 19 has observed thus :-

“4. The counsel relied on Bhavan Vaja and Ors. v. Solanki Hanuji Khodaji Mansang **AIR 1972 SC 1371**. Laying down the principle on the point, at paragraph 19, the Apex Court stated thus:

19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. In order to find out the meaning of the words employed in a decree the Court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. Evidently the execution court in this case thought that its jurisdiction began and ended with merely looking at the decree as it was finally drafted. Despite the fact that the pleadings as well as the earlier judgments rendered by the Board as well as by the appellate Court had been placed before it, the execution Court does not appear to have considered those documents. If one reads the order of that Court, it is clear that it failed to construe the decree though it purported to have construed the decree. In its order there is no reference to the documents to which we have made reference earlier. It appears to have been unduly influenced by the words of the decree under execution. The appellate Court fell into the same error. When the matter was taken up in revision to the High Court, the High Court declined to go into the question of the construction of the decree on the ground that a wrong construction of a decree merely raises a question of law and it involves no question of jurisdiction to bring the case within Section 115, Civil Procedure Code. As seen earlier in this case the executing Court and the appellate Court had not construed the decree at all. They had not even referred to the relevant documents. They had merely gone by the words used in the decree under

execution. It is clear that they had failed to construe the decree. Their omission to construe the decree is really an omission to exercise the jurisdiction vested in them."

29. As such, what can be noticed from the orders impugned is the Executing Court was within its lawful duty and powers under Section 47 of the CPC, thereby ordering the execution of decree to make it workable.

30. The third impugned order dated 11th October, 2021, thereby directing the issuance of possession warrant to deliver possession of the portion of the decree holder, as a consequence of the aforesaid two orders which are already held to be legal.

31. In that view of the matter, I hardly see any reason which warrants interference in the extraordinary jurisdiction so as to form an opinion that the Execution Court has travelled beyond the decree. That being so, the petition fails, dismissed.

32. Ad-interim relief is continued for a period of one week, though there is strong objection from the decree holder.

[NTIN W. SAMBRE, J.]