

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.4034/2021

The Janta Sahakari Bank Ltd. through its General Manager/Chairman, Gondia
...Versus...
Ravindra s/o Jivrajbhai Seth & ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri Sunil Manohar, Sr. Advocate assisted by Shri H.R. Gadhia, Advocate for petitioner
Shri V.A. Sheth, Advocate with Shri Pramod Bapat, Advocate for respondent no.1
Shri I.J. Damle, AGP for respondent nos.2 and 3

CORAM : AVINASH G. GHAROTE, J.
DATE : 15/11/2022

1. The respondent no.4 is reported to be dead, as per the information by Advocate Shri Vijay Sheth appearing for the respondent no.1. Shri Sunil Manohar, learned senior counsel for the petitioner submits that he has instructions for deletion of the respondent no.4 from the array of respondents.

2. Statement is accepted. The respondent no.4 be deleted from the array of respondents at the risk and consequences of the petitioner. Amendment be carried out forthwith.

3. On 16/12/2021 when the matter was heard for the purpose of admission, the following submissions were recorded.

“Heard Mr. Manohar, learned Senior Advocate along with Mr. Gadhia, learned counsel for the petitioner.

2. The contention is that the respondent No.1 being a borrower had defaulted in payment, as a result of which, proceedings were instituted before the Co-operative Court, which resulted in an award being passed against the respondent No.1, which subsequently came to be confirmed by the Appellate Court. The son of the respondent No.1, thereafter, filed a Special Civil Suit No. 87 of 1989 claiming the mortgaged property to be a joint property, in which, he had a right. The suit came to be decreed, appeal against which, came to be allowed. In Second Appeal a specific finding has been rendered that the mortgaged property was not a joint family property and also that the son was put up by his father (page 92) and the Second Appeal was dismissed. The son had thereafter, filed a Writ Petition claiming that the decree in Second Appeal was obtained by practicing fraud upon the Court, which came to be summarily rejected. Thereafter, the respondent No.1 has filed an application under Section 144 of CPC, in which, application Exh.70 filed, to decide the maintainability of the proceedings, came to be rejected, holding that the same would be decided after recording of evidence.

3. Mr. Manohar, learned Senior Advocate contends that Section 144 of CPC is not attracted as there is no reversal as contemplated by Section 144 of CPC, and therefore, there was no question of recording any evidence in that regard and the application for maintainability ought to have been decided at the first instance.

4. *Issue notice to the respondents, returnable on 10.01.2022. Ms. Khan, learned AGP waives service for respondent Nos.2 and 3.*

5. *In the meantime there shall be stay in terms of pray clause (3)."*

4. Advocate Shri Sheth appears for the respondent no.1 along with Advocate Shri Bapat, Shri I.J. Damle the learned Assistant Government Pleader represents the respondent nos.2 and 3. The respondent no.4 has been deleted. The matter is finally heard.

5. In addition to the submissions advanced on 16/12/2021, Shri Manohar, learned senior counsel submits that the provisions of Section 144 of the Code of Civil Procedure (for short, "CPC" hereinafter) are clearly not attracted in the matter at all, either on facts or in law, considering which, the impugned order below Exhs.23 and 26 dated 26/04/2021 (pg.140) which directs recording of evidence by keeping those two exhibits in abeyance and the subsequent order dated 12/03/2018 (pg.152) rejecting the application for deciding Exh.23 before recording the evidence cannot be sustained and are liable to be quashed and set aside.

6. Shri Sheth, learned counsel for the respondent no.1 submits that there has been a reversal of the decree

passed by the Co-operative Court in ABN Case No.52/A/76 dated 07/06/1976 (pg.16) by the Civil Court in a suit filed by the son of the respondent no.1, namely, Special Civil Suit No.87/1989, decided on 24/12/2004 (pg.43) and though the appeals against the same have been allowed, namely, Regular Civil Appeal Nos.6/2005 and 41/2005 by the learned Appellate Court by the judgment and decree dated 11/02/2010 whereby the suit, namely, Special Civil Suit No.87/1989 has been dismissed and so also the second appeal therefrom, namely, Second Appeal Nos.473/2010 and 495/2010 have been dismissed by this Court by the order dated 17/02/2011 (pg.83), a review whereof has also been dismissed by the order dated 28/06/2011 (pg.94), the respondent no.1 is entitled for restitution for determining which evidence has to be led and therefore supports the impugned orders. In support of his contention, he places reliance upon ***Mahijibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and others, AIR 1965 SC 1477; Krishna Awaji Ghadge Vs. Bapu Kalu Ghadge and others, AIR 1959 Bombay 490 ; Kandan (died) and others Vs. K. Periaswamy, AIR 2004 Madras 425 and Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd., AIR 1995 SC 441*** out of the compilation placed by him on record. He, therefore, submits that since the award by the Co-operative Court amounts to a decree under Section 156 (1) r/w Section 156 (2) of the Maharashtra Co-operative Societies Act, 1960 (for short “the

MCS Act” hereinafter) and Rule 2 (d) of the Rules framed thereunder, the provisions of Section 144 of CPC are attracted and therefore there is a need to record evidence as the respondent no.1 is entitled to restitution.

7. The provisions of Section 144 of the Code of Civil Procedure being material are quoted as under :-

“144. Application for restitution. - (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

[Explanation.- For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,-

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which

passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

8. A perusal of the language of Section 144 of CPC demonstrates that restitution is available in case any decree or order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose.

9. Though technically speaking in case there is a reversal of an award by the Civil Court even of the award passed under Section 91 of the MCS Act, the principles of restitution would become applicable. However in the facts of the present case, the same are clearly not attracted.

10. The admitted position in this matter needs to be therefore stated :

The petitioner had advanced a loan to the Partnership Firm M/s Ravindra and Co. and in default had

instituted proceedings under Section 91 of the MCS Act for recovery vide ABN Case No.52/A/76, in which the present respondent was the opponent no.2 in-person. The property in question was mortgaged to secure the aforesaid loan. In the written statement filed on behalf of the Firm as well as present respondent no.1 the claim of the Bank was admitted and a plea for granting of installments was raised, as a result of which, the award came to be passed on 07/06/1976 (pg.17). In pursuance to this award as the amount was not forthcoming, execution proceedings were levied, as a result of which, the property of the respondent no.1 was attached on 19/07/1978 and was sold in auction to the auction purchaser (respondent no.4 since deleted) on 06/03/1980 and the auction purchaser was also placed in possession in 1981.

11. Thereafter, on 26/06/1986 the son of the respondent no.1 namely Miresb Ravindra Sheth, minor through his guardian mother Smt. Meera w/o Ravindra Seth filed Special Civil Suit No.87/1989 (Old No.82/1986) challenging the auction sale dated 28/08/1978 as not binding upon him on the ground that the property in question was the property of the plaintiff (Miresb Ravindra Sheth). Several other grounds were also raised contending that the auction sale done was illegal. The learned Civil Judge Senior Division, Gondia by the judgment and decree dated 24/12/2004 (pg.43) decreed the suit in the following terms :

“ ORDER

The suit is partly decreed as follows :

It is declared that the plaintiff is the owner of suit property and alleged auction sale dt.28-8-78 is not binding on him.

It is hereby declared that the recovery proceeding and the proclamation are illegal and hereby set aside.

Defendants No.1 to 4 shall restore the possession of suit mortgaged property to the plaintiff within the period of two months from the date of order.

Defendants shall pay the cost of plaintiff and do bear their respective own costs.

Decree be drawn up accordingly.”

12. This judgment and decree dated 24/12/2004, was challenged by the Bank as well as by the State by way of two appeals, namely, Regular Civil Appeal Nos.6/2005 and 41/2006. The learned Appellate Court by the judgment dated 11/02/2010 allowed both the appeals and set aside the judgment and decree as passed by the learned Trial Court and dismissed the suit (pg.81). The original plaintiff - Miresb Ravindra Sheth being aggrieved thereto filed two second appeals, namely, Second Appeal Nos.473/2010 and 495/2010

and both came to dismissed by this Court by the judgment dated 17/02/2011 (pg.93). A review thereof filed vide Misc Civil Application Nos.538/2011 and 539/2011 also came to be dismissed on 28/06/2011 (pg.94). Thereafter, by raising a plea of fraud Miresb Ravindra Sheth had filed Writ Petition No.6265/2011, challenging the auction which was dismissed by the learned Division Bench of this Court by the order dated 10/02/2012 (pg.96).

13. Thereafter, an application under Section 144 (1) of CPC has been filed by the present respondent no.1 contending that since the auction sale dated 28/08/1978 in pursuance to the award dated 07/06/1976 under Section 91 of the MCS Act was set aside in Special Civil Suit No.87/1989, the respondent no.1 was entitled to restitution.

14. There cannot be any quarrel with the propositions as laid down in ***Mahijibhai Mohanbhai Barot; Krishna Awaji Ghadge; Kandan*** and ***Mrs. Kavita Trehan*** (supra) relied by learned counsel for the respondent no.1, which enunciate the principles of restitution, however, on the facts of the present case they are clearly not attracted. This is so for the reason that there is no challenge to the award dated 07/06/1976 passed under Section 91 of the MCS Act and therefore in sum and substance there is no reversal of the award passed under Section 91 of the MCS Act at all. What has been challenged is

the subsequent auction sale dated 28/08/1978 in execution of the award as it disclosed from the judgment and decree dated 24/12/2004 in Special Civil Suit No.87/1989, in view of which, the legality and validity of the award dated 07/06/1976 remains in-violate. As such though the award may be termed as a decree, there is no reversal of the same by the judgment dated 24/12/2004 in Special Civil Suit No.87/1989.

15. That apart, it is an admitted position that the judgment dated 24/12/2004 in Special Civil Suit No.87/1989 has been set aside by the learned Appellate Court by the judgment dated 11/02/2010 (pg.82) by dismissing the suit itself, which dismissal has been confirmed by this Court in second appeal by its judgment dated 17/02/2011 and the review thereof has been rejected. Thus, it is clearly apparent that there is no reversal of any judgment or decree or for that matter of the award under Section 91 of the MCS Act by the Civil Court.

16. The contention that the learned Trial Court in Special Civil Suit No.87/1989 had held the auction sale dated 28/08/1978 to be illegal, does not go to the legality and validity of the award dated 07/06/1976, which stands as it is apart from which the judgment itself has been set aside in appeal.

17. The contention that the learned Appellate Court in para 5 of its judgment has confirmed that the auction sale was illegal (pg.86) is clearly misconceived for the reason that that is a submission/contention which has been recorded by the Court. The reasonings for dismissing the appeal, are ascertainable from para 10 onwards.

18. It is thus apparent that when Section 144 of CPC requires the reversal or modification or variance of a decree, in sum and substance, there is no reversal, variance or modification of any decree much less the award dated 07/06/1976 under Section 91 of the MCS Act at all, considering which, the proceedings under Section 144 of CPC itself were not tenable, much less was it permissible for the Court below to have passed the impugned orders.

19. Hence, the impugned order dated 26/04/2014 directing leading of evidence (pg.141) is hereby quashed and set aside. So also the order dated 12/03/2018 (pg.153) is also quashed and set aside and the application below Exh.70 is hereby allowed by directing the learned Court below to decide the application below Exhs.23 and 26, in light of what has been stated in this order, after hearing the respective counsels for the parties within a period of two months from today.

20. The writ petition is allowed in the aforesaid terms and disposed of. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar