

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9049 OF 2018

Bapu Maruti Jarande

Since deceased through legal heirs

...Petitioners.

Versus

Shivganga nathu Jarande & Ors.

..Respondents.

*Mr. Pawan S. Patil and Mr. Nitin Jagtap for the petitioner.
Mr. S.C. Shrigiri for respondent No.3.*

Coram : Sharmila U. Deshmukh, J.

Date : July 21, 2023.

P. C. :

1. Not on board. Upon mentioning, taken on production board.
2. The challenge in the petition is to the order dated 23rd January 2018 passed below Exhibit-122 and Exhibit-132 in Regular Darkhast No.55 of 1983. For the sake of convenience, the parties are referred to by their status before the trial Court.
3. The facts of the case are that RCS No.37 of 1980 was decreed on 3rd March 1983 and the defendant no.1-the petitioner herein were directed to deliver the possession of encroached portion of 14-R land in Gat no. 1016 to the plaintiff within a period of one

month. As the decree remained unsatisfied, the plaintiffs filed Regular Darkhast No.55 of 1983 on 20th December 1983 for execution of the decree. It is claimed that in the execution proceedings the parties arrived at consent terms and pursis to that effect at Exhibit-74 was submitted on 6th May 2009. The plaintiff filed an application below Exhibit-122 stating that the compromise was not in accordance with law and had not attained finality and the compromise pursis dated 6th May 2009 not acceptable to the plaintiffs and prayed for recovery of the possession of encroached portion as per the decree. On 12th September 2017, an application under section 47 of the CPC came to be filed below Exhibit-132 by the judgment-debtor stating that pursuant to the compromise pursis, prior to the measurement of land, there was a correction in the maps of original survey number and the measurements are required to be carried out as per the said maps. It was further contended that as the defendant's Gat No.1042 is divided into two parts by reason of a road, while carrying out measurement it was requested that the entire gat number should be measured, which had been permitted by the executing Court. It was contended that the entire Gat number has not been measured as directed and as such the measurement is incomplete.

4. The executing Court decided both these applications

together and observed that the executing Court cannot go behind the decree. The executing Court held that the judgment debtors were directed to hand over vacant possession of 14-R land out of Gat No.1016 and as per the compromise pursis both parties agreed to measure Gat Nos.1016 and 1042 to end their dispute. The executing Court observed that on perusal of the compromise pursis both parties had decided to remeasure the land as per the corrected map and measurement was done on 9th September 2011. As such the executing court partly allowed the application below Exhibit-122 and the prayer of the decree holder to measure the land was rejected. The executing court allowed the decree-holder to execute the decree, however, the prayer of decree-holder to measure the land by appellate land record office was rejected, and disposed of the application at Exhibit-132 accordingly.

5. Learned counsel appearing for the petitioner urged that in view of the compromise pursis which was entered into between the parties as per the measurement carried out on 9th September 2011 the entire Gat has not been measured and as such the measurement is incomplete. He sought to press into service the compromise pursis and would contend that in view of the compromise, the original decree is extinguished and as such could not be put into execution.

In support of his contention, he seeks to rely upon the decision of this court in the case of ***Kolhapuri v. Yallappa [2011(3) Mh.L.J. 348]***.

6. *Per contra*, learned counsel appearing for the respondent decree holder points out that the compromise pursis was not according to law and as such was not acted upon. He would further contend that that being so the original decree is required to be put into execution.

7. Considered the submissions.

8. It is one of those unfortunate cases where in spite of having a decree in his favour in the year 1983 the decree-holder is unable to reap the benefits of his decree. Even in the year 2023 applications are filed raising objection to the execution of said decree.

9. The trial Court rightly observed that the intention of the parties was not to extinguish the original decree and in fact the same cannot be. The trial Court rightly took into consideration the provisions of Order-21 Rule-2 of CPC which provides that where the decree of any kind is otherwise adjusted in whole or in part to the satisfaction of decree-holder, the decree-holder shall certify such adjustment to the Court whose duty it is to execute and the Court shall record the same. In the present case, the decree-holder has not

certified such adjustment. The claim cannot be said to be adjusted in whole or in part. Clause (g) of the consent terms provide that after measurement by Court commissioner and fixing of boundaries, and, after complying with the terms, the executing Court will be informed and execution proceedings will be withdrawn. The adjustment to be completed within six months, upon failure to get the decree or compromise terms executed through Court. Clause (g) of the consent pursis makes it clear that the consent terms was entered into keeping the original decree intact.

10. The objection of judgment debtor appears to be that the entire land has not been measured as per the directions of executing Court. However, it needs to be noted that, as per clause (g) of the compromise pursis in event of non compliance of compromise term of fixing of the boundaries within six months, the original decree was required to be put into execution and as such no fault can be found with the order of trial Court.

11. As regards the decision which has been relied upon by the learned counsel appearing for the petitioner, the same pertains to the appointment of court commissioner under Order 26 Rule 9 of CPC. The facts of that case are clearly distinguishable and, as such, the same is not applicable to the facts of the present case.

12. In that view of the matter, the petition fails and is hereby dismissed.

13. As the decree which has been sought to be executed is of the year 1983, the executing court is directed to decide the execution application within a period of 6 months from the date of production of a copy of this order before the executing Court.

[Sharmila U. Deshmukh, J.]