

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9051 OF 2018

Ramkrishna Bala 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-164 and Exhibit-178 in Regular Darkhast no. 56 of 1983. For the sake of convenience, the parties
3. The facts of the case are that RCS No. 91 of 1976 was decreed on 31st March 1981 and the defendants-the petitioners herein were directed to deliver the possession of encroached portion of 7R land in Gat no. 1047 to the plaintiff within a period of one month. The appeal preferred against the judgment and decree was dismissed with

cost on 8th February 1983. As the decree remained unsatisfied the plaintiffs filed Regular Darkhast No.56 of 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-112 was submitted on 6th May 2009. The plaintiff filed an application stating that the compromise has not attained finality and the compromise pursis dated 6th May 2009 is not in accordance with law and not acceptable to the plaintiffs and prayed for execution of decree. Application below Exhibit-164 was filed by the plaintiff decree-holder for recovery of the possession of encroached portion as per the decree. To the application for execution below Exhibit-164, reply came to be filed by the judgment-debtor claiming that there was a consent pursis submitted to the executing Court pursuant to which there was measurement, the judgment-debtor is shown to have encroached upon 3-R land of the decree-holder and the respondent decree-holder is shown to have encroached upon the judgment-debtor's land to the extent of 2-R.

4. The second application below Exhibit-178 was filed by the judgment-debtor under section 47 of the CPC, reiterating the same contention which were part of their reply to the application of decree holder below Exhibit-164.

5. The executing Court decided the issue of executability of the decree against the backdrop of consent pursis and observed that the effect of compromise pursis cannot be to extinguish the effect of decree passed in RCS no.91 of 1976. The trial court held that the intention of filing the pursis at Exhibit-112 was for the purpose of ending the dispute, however, the parties had agreed to arrive at consent terms keeping the original decree intact and they had no intention to extinguish the original decree. The trial court on the basis of record observed that the application below Exhibit-131 filed by the judgment debtor praying for recovery of possession of encroached land from the decree holder has been rejected and the subsequent measurement which was carried out was not certified by his predecessor in office. As such the executing court partly allowed the application below Exhibit- 164 and the prayer of the decree holder to measure the land was rejected. However, the executing court allowed the decree holder to execute the decree and disposed of the application at Exhibit-178 accordingly.

6. Learned counsel appearing for the petitioner urged that in view of the compromise pursis which was entered into between the parties there was subsequent measurement which reveals that the decree holder had also encroached upon the portion of his property.

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. He would further submit that pursuant to the decree of the year 1981 there has been a shifting of the boundaries which formed the basis for application at Exhibit- 178. 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]***.

7. *Per contra*, learned counsel appearing for the respondent decree holder points out that the compromise deed 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.

8. Considered the submissions.

9. It is one of those unfortunate cases where in spite of having a decree in his favour in the year 1981 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.

10. It is not in dispute that there is a decree in favour of the respondent-plaintiff in which the direction was to hand over the

possession of encroached portion. In the execution proceedings with the purpose for an amicable settlement, the consent pursis appears to have been entered into between the parties. The provisions of Order 21 Rule 2 of CPC 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 (d) of the consent pursis makes it clear that the consent terms was entered into keeping the original decree intact.

11. As rightly observed by the trial Court, the intention of the parties was not to extinguish the original decree and in fact the same cannot be. As such the measurement which were subsequently carried out cannot be said to have been accepted by the decree holder. The contention of learned counsel for the petitioner as regards the shifting of boundaries does not find place in the application below Exhibit-178 filed by the judgment debtor. Perusal of the said application indicates that what the judgment debtor seeks to put in service is the compromise terms claimed to have been entered into between the parties and as such seeks to object to the execution.

As rightly held by the trial Court, the intention of compromise terms could never have been to extinguish the force of original decree. Moreover, the application filed below Exhibit-131 by the judgment-debtor praying for recovery of the possession of encroachment was rejected by the executing court. It is not demonstrated that the said rejection has been challenged and, as such, the said order has attained finality. In the absence of any right of the judgment-debtor to seek recovery of the encroached portion as per the subsequent report of the court commissioner, the necessary corollary is that decree of the year 1981 is required to be put into execution. The execution proceedings have been stalled enough and, in my opinion, the same is now required to be expedited.

12. 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.

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

14. As the decree which has been sought to be executed is of

the year 1981, 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.]