

Anand

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

WRIT PETITION NO. 11913 OF 2022

Ramesh Waman Shinde

.Petitioner

Vs.

**ANAND
SUDHAKAR
SUDAME**

Shivaji Shankar Gawde & Ors.

.Respondents

Digitally signed by
ANAND
SUDHAKAR
SUDAME

Date: 2023.08.08
10:56:54 +0530

Mr. Shriram Kulkarni i/b. Mr. Sachin Chavan Advocate, for the
Petitioner

Mr. G. S. Godbole, Senior Advocate i/b. Mr. Jaydeep Deo for the
Respondents

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 24.7.2023

P. C.

. The challenge in the Petition is to the order dated
12.09.2022 rejecting the Petitioner's application for recasting of
the issues.

2. The facts of the case are that Special Civil Suit No.
1345 of 1991 came to be instituted seeking specific performance
of an Agreement for sale dated 28.10.1984 and for possession.
The case of the Plaintiff was that the suit property admeasuring
about 68R land was owned by the Defendant having purchased
the same from one Raju Maruti Shinde. The suit came to be
decreed by the Judgment and Order dated 27.07.2000 and the

Court Commissioner came to be appointed on 22.02.2021 for execution of the sale deed. An application came to be filed below Exh. 60 by the Respondent No. 1 on the ground that there is obstruction to the execution of the decree by way of an encroachment by the persons detailed in the application below Exh. 60. It was contended that as per the decree, the decree holder is entitled to the vacant possession of the land, however, in the interregnum, the persons detailed in the application, have encroached upon the property and it is necessary to remove the encroachment. On 17.08.2021, the Petitioner, herein, who is an obstructionist, filed an application seeking to recall the proceedings instituted under Order 21 Rule 22 of the Code of Civil Procedure, 1908 (for short 'CPC') as well as the Show Cause Notice which was issued by the Court. Subsequently, an application came to be filed below Exh. 139 with a prayer that the application filed below Exh.60 be treated as an application under Order 21 Rule 97 of the CPC. Vide order dated 11.10.2021, the application below Exh. 60 was treated as an application under Order 21 Rule 97 of the CPC. In these proceedings, an application came to be filed on 26.10.2021 by the Petitioner Obstructionist stating that the decree which has been passed in Special Civil Suit No. 1345 of 1991 is null and void and cannot be executed

against the obstructionist. It was contended that the obstructionist and other family members are in possession of the suit property since the time of the purchase of the said property by their late Grandfather - Raju Maruti Shinde in the year 1944. It was contended that the Judgment Debtors were never in possession of the suit property and they were not having any kind of concern with the disputed property. It was further contended that the ownership right assumed by the decree holder as being vested in the Judgment Debtors at the time of execution of the sale deed dated 26.09.1984 and at the time of filing of Special Civil Suit No. 1345 of 1991 is wrong and illegal. It was contended that the decree under execution is bad-in-law and void and inexecutable and that the obstructionist is not bound by the impugned decree. It was contended that the decree of specific performance passed in Special Civil Suit No. 1345 of 1999 is bad in law and void and the same cannot be executed against the present obstructionist. In the said proceedings, issues came to be framed below Exh. 145 which is annexed to page No. 124 of the Petition which read thus :-

“ISSUES

1. Does obstructionist No.1 prove that the suit property had purchased by his grandfather Raju Maruti Shinde in the year 1944?

2. Does he further prove that he and all his family members are in exclusive possession of suit property since 1944 being owner vide sale deed in the year 1944?

3. Does he further prove that the decree passed in Special Civil Suit No.1345/19 is redundant, inexecutable and void, hence not binding upon him?

4. Does he entitle to relief of calling back notice under Order XXI Rule 22 of the Code of Civil Procedure ?

5. What order ?”

3. On 13.12.2021, the Petitioner filed an application for recasting of the issues objecting to the Issue No. 3. It was contended that issue No. 3 has been wrongly framed by placing burden upon the obstructionist and that as per the law, burden is upon the decree holder to prove that the impugned decree is valid and executable against the present obstructionist. The issues which were suggested in the said application read thus :-

“1. Whether the Decree Holder proves that the obstructionist is bound by the Decree passed in Spl. Civil Suit No.1345/1991 impugned in the execution proceedings no.742/2012?

2. Whether the Decree Holder proves that the decree obtained in Spl. Civil Suit No.1345/1991 is legal and valid and executable decree against the present Obstructionist?”

4. The executing Court has rejected the application on the ground that the issues are framed by taking into consideration the contentions of the obstructionist in his reply

and is based on the pleadings of the parties. The executing Court observed that it appears from the record that the decree is capable of being executed and that the obstructionist is claiming independent right to the suit property which is asserted in the obstructionist's reply to the present application and the issues are framed on the basis of the pleadings.

5. Heard Mr. Kulkarni, learned counsel for the Petitioner and Mr. Godbole, learned senior Advocate for the Respondent.

6. Mr. Kulkarni, learned counsel for the Petitioner has taken this Court through the decree which has been passed as well as various applications which were filed during the execution proceedings. He would contend that by the decree put in execution, the Plaintiff sought execution of the sale deed from the Defendant as well as peaceful and vacant possession of the suit property and upon default the Plaintiffs were given liberty to get necessary sale deed executed and get the peaceful and vacant possession of the suit property through appointment of the Court Commissioner. He would submit that the case of the Respondent in the Execution Application is that the Petitioners are the

encroachers upon the property and in that event, unless the decree is obtained for removal of encroachment based on title, the decree could not have been put into execution. He would further contend that the burden lies upon the obstructionist to prove that the decree is redundant, inexecutable and void and it is for the Respondents/ Decree Holders to prove that the decree is valid and executable considering the objection as to decree being void taken. He draws support from the decision of this Court in the case of *Mani Nariman Daruwala since deceased by his heirs Rusi Nariman Daruwala and Ors. Vs. Phiroz N. Bhatena & Ors. 1991 (1) Mh.L.J. 376* and in particular, paragraphs 10, 12 and 13 of the said decision.

7. Per contra, Mr. Godbole, learned senior Advocate appearing for the Respondents submits that the case of the Petitioner is that his grandfather was owner of the property and that possession was never parted with. He would point out that the sale deed of the year 1964 discloses that at the time of execution of the sale deed, possession of the suit property was handed over. He would submit that it is not the case of the Petitioners that they are claiming independent title in the suit property and in fact, they are claiming their rights through their grandfather. He would contend that considering the pleadings in

the objection application, the burden has been rightly cast upon the Petitioner to prove that the decree is redundant, inexecutable and void. He would further submit that the decision which has been relied upon is not applicable to the facts of the present case, inasmuch, as in that case, the decree was construed to be nullity, as the suit in question was filed under Section 41 of the Presidency Small Cause Courts Act, 1882 which was without jurisdiction. He would submit that in the facts of the present case, the Petitioners are claiming through their grandfather and as such, there is no independent right and as such, burden is upon them to prove that the decree is inexecutable and no burden can be cast upon the Respondents.

8. Considered the submissions.

9. Passing of the Judgment & Decree is not in dispute. It is also not in dispute that in the execution application, as per the report of the bailiff, the decree of possession could not be executed, as it was found that the Petitioners and some third party were in possession of the suit property. In the application below Exh. 60, the case of the Respondents is that the Petitioners and others had encroached upon the suit property and as such,

sought removal of the encroachers. In the application which has been filed by the obstructionist, the specific contention which has been taken for objecting to the execution of the decree is that the decree under execution is null and void and cannot be executed against the third party. The contention is that the suit property was in continuous possession of the Petitioners, since their forefathers have purchased it in the year 1944 and as such, no ownership right was transferred to the Defendants at the time of execution of the agreement for sale dated 26.09.1984 or at the time of filing of Special Civil Suit No. 1345 of 1991. From a perusal of the obstructionist's application, it is clear that the obstructionist has raised a contention that the decree in question is not executable against the Petitioner, as the same is void and not binding upon him. It is not disputed that in an application filed under Order 21 Rule 97 of the CPC read with Rule 101 of the CPC, all questions arising between the parties to the proceedings relevant for adjudication of the application shall be determined by the Court in the application and not by a separate suit. It is well settled that while deciding the application, the same takes the form of a suit and necessarily involves framing of issues. If we consider the issues which have been framed, the burden is cast upon the Petitioner to prove that the suit property was

purchased by the grandfather of the Petitioner in the year 1944, that he is in exclusive possession of the suit property since 1944 and that the decree passed is redundant, inexecutable and void and hence, not binding upon him and whether the Petitioner is entitled to relief of calling back notice under Order XXI Rule 22 of the CPC.

10. Framing of issues is contained in Order XIV, Rule 1 of the CPC which provides that the issues arise when a material proposition of fact or law is affirmed by one party and denied by the other and material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. In the present case, objection to the execution application is on the ground that the decree obtained in Special Civil Suit No. 1345 of 1991 is void and inexecutable for the reason that the impugned decree is passed against the Judgment Debtor and cannot be executed against the third party. As there is assertion on the part of the obstructionist that the decree is void, redundant and inexecutable taking into consideration the provisions of Section 101 of the Indian Evidence Act, the burden of proof is on the person, who asserts existence of a fact and as such the burden is

upon the Petitioner to prove that the decree which is passed in Special Civil Suit No. 1345 of 1991 is inexecutable and void. The decision which has been relied upon by the learned counsel appearing for the Petitioner was rendered in the facts of that case, where it was held that the decree was nullity inasmuch as the relationship was of landlord and tenant and the proceedings were filed not before the Court established under the Rent Act. In the facts of that case, the Court held that the obstructionist can always contend that the decree is nullity and inexecutable and therefore, the Courts are refrained from entertaining the application filed by the obstructionist and once the contention is raised, it will be for the decree holder to establish that the decree which is put in execution is a valid decree and that the decree is capable of being executed. In the present case the contention of the petitioner is that the decree is inexecutable for the reason that the possession had never been parted with by the Petitioner. Considering the averments made in the application, the burden is upon the Petitioner to prove that the decree passed in the Special Civil Suit No.1345 of 1991 is inexecutable and void as far as the Petitioners are concerned. The fact remains that the decree in question has been passed directing the possession to be handed over by the Defendant. In the present case, the bailiff's report

makes it clear that the possession is not with the Defendant and that the suit property is in possession of the Petitioner. No doubt, it is stated that the suit property has been encroached upon by the Petitioner, however, the fact remains that the decree holder now claims possession from the Petitioner. In that view of the fact, burden is upon the decree holder to prove that the decree which is put under execution is binding upon the third party/obstructionist.

11. Considering the facts of the case, in my opinion, Issue No. 3 which has been framed by the Executing Court casting the burden upon the Petitioner to prove that the decree passed is inexecutable and void need not be interfered with. In addition thereto, the issue which was suggested by the learned counsel for the Petitioner as to whether the decree holder proves that the decree under execution is binding upon the third party/obstructionist also needs to be framed.

12. Learned counsel appearing for the Respondents submits that the Court may not in exercise of the powers conferred under Article 227 of the Constitution of India interfere with the petition as regards framing of the issues.

13. In my view, in case of miscarriage of justice, the powers under Article 227 of the Constitution of India can be exercised.

14. The importance of framing of issues cannot be undermined. The same is reflected in the decision of the Apex Court in the case of ***Makhan Lal Bangal Vs. Manas Bhunia and Ors. (2001) 2 SCC 652***, wherein in paragraph 19, the Apex Court has highlighted importance of framing of the issues and held that the object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. Considering the decision of the Apex Court, I am not inclined to accept the submission of learned senior counsel that framing of the issues, being a discretion of the executing Court ought not to be interfered with. It is important for the parties to be aware of the case which they are expected to prove and as such, in the absence of proper issues being framed, the result would be miscarriage of justice. In view of the above, Issue No. 3 is not interfered with and additional issue is required to be framed as to whether the decree holder proves that the decree under execution is binding upon the third

party/obstructionist.

15. Considering that the decree is of the year 2000, the Executing Court is requested to decide the same expeditiously and in any event, within a period of six months from today.

16. The Writ Petition is disposed of in the above terms.

(SHARMILA U. DESHMUKH, J.)