

SA Pathan

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

WRIT PETITION NO.6038 OF 2006

WITH

WRIT PETITION NO.11496 OF 2019

WITH

CONTEMPT PETITION NO.134 OF 2023

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Anjanabai Krishna Kinhale & Anr.

... Petitioners

V/s.

Nivrutti Eknath Kinhale & Ors

... Respondents

Mr. Nitin Gaware Patil a/w Mr. Abhishek D. Nagode,
for the petitioners.

Mr. Sudhir V. Sadavarte, for the respondent No. 1B.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 30, 2023

P.C.:

1. The petitioners are decree holders in Regular Civil Suit No.143 of 1975 filed for partition and separate possession of ancestral property. The Executing Court dismissed their execution holding that decree is not executable as respondent Nos.2 to 5 had not consented for passing the decree. The facts and circumstances relevant for adjudication of issue involved are as under:

i) The petitioners filed Regular Civil Suit No.143 of 1975 seeking partition and possession of ancestral property;

- ii) On 21 January 1983, the Trial Court decreed the suit recording no objection of defendant No.2 ;
- iii) Respondent No.1 filed appeal against the said decree;
- iv) The Appellate Court on 29 July 1986 dismissed the appeal;
- v) On 24 February 1987, second appeal filed by respondent No.1 was also dismissed.

2. In the meantime, the petitioners filed Execution Petition No.9 of 1984. Respondent Nos.2 to 5 raised an objection before the Executing Court contending that they had not consented for granting decree and, therefore, the decree cannot be executed.

3. The Executing Court accepted the contention raised on behalf of judgment debtor No.5 that neither he nor his Advocate was signatory to the pursis filed by defendant No.2 and, therefore, decree passed by the Trial Court was not binding of defendant Nos.3, 4 & 5. The said judgment of Trial Court is challenged by way of present writ petition.

4. Learned Advocate for the petitioners submitted that judgment debtor No.5 did not challenge the decree by way of appeal before the superior Court. With the result, the decree against judgment debtor No.5 has attained finality. He submitted that moreover, defendant No.5 had filed separate suit after passing of decree challenging the said decree which was dismissed for non-prosecution. He further submitted that the decree in execution is not a consent decree and, therefore, can be executed against respondent Nos.2 to 5 also. He invited my attention to the order

dated 5 September 2001 restoring his Suit No.84 of 1987 which was challenging the decree passed in Regular Civil Suit No.143 of 1975. The objection to dismiss the Execution Petition has not maintainable.

5. *Per contra* learned Advocate for judgment debtor No.5 submitted that judgment debtor No.5 had not signed the pursis and, therefore, the Executing Court rightly recorded finding that the decree is inexecutable.

6. I have heard both sides.

7. The judgment dated 21 January 1983, records no objection on behalf of defendant No.2. It appears that the Court while passing the decree took into consideration pursis filed by defendant No.2 only. It, therefore, appears that the decree was passed based on pursis filed by defendant No.2. However, the fact remains that the decree dated 21 January 1983 cannot be termed as consent decree. The ingredients of Order 23, Rule 3 of the Code of Civil Procedure, 1908 requires existence of agreement between the parties in writing and signed by the parties along with the satisfaction of the Court that such agreement is lawful. Such agreement in writing is absent while passing the decree.

8. The parameters for construing decree as consent decree have been laid down by the Apex Court in the case of **Pushpa Devi Bhagat (Deceased) Through Legal Representative Smt. Sadhna Rai Versus Rajinder Singh and Others**, reported in (2006) 5 SCC 566. The Apex Court in paragraph 18 and 19 has held as under:

“18.The said Rule consists of two parts. The

first part provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such satisfaction to be recorded and shall pass a decree in accordance therewith. The Rule also makes it clear that the compromise or agreement may relate to issues or disputes which are not the subject-matter of the suit and that such compromise or agreement may be entered not only among the parties to the suit, but others also, but the decree to be passed shall be confined to the parties to the suit whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit. We are not, however, concerned with this aspect of the Rule in this appeal.

19. What is the difference between the first part and the second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms

of what is agreed between the parties. The agreement/compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise(s) in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so “satisfies” the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any “enforcement” or “execution” of the decree to be passed in terms of it. Let us illustrate with reference to a money suit filed for recovery of say a sum of rupees one lakh. Parties may enter into a lawful agreement or compromise in writing and signed by them, agreeing that the defendant will pay the sum of rupees one lakh within a specified period or specified manner or may agree that only a sum of Rs 75,000 shall be paid by the defendant in full and final settlement of the claim. Such agreement or compromise will fall under the first part and if the defendant does not fulfil the promise, the plaintiff can enforce it by levying execution. On the other hand, the parties may submit to the court that the defendant has already paid a sum of rupees one lakh or Rs 75,000 in full and final satisfaction or that the

suit claim has been fully settled by the defendant out of court (either by mentioning the amount paid or not mentioning it) or that the plaintiff will not press the claim. Here the obligation is already performed by the defendant or the plaintiff agrees that he will not enforce performance and nothing remains to be performed by the defendant. As the order that follows merely records the extinguishment or satisfaction of the claim or non-existence of the claim, it is not capable of being “enforced” by levy of execution, as there is no obligation to be performed by the defendant in pursuance of the decree. Such “satisfaction” need not be expressed by an agreement or compromise in writing and signed by the parties. It can be by a unilateral submission by the plaintiff or his counsel. Such satisfaction will fall under the second part. Of course even when there is such satisfaction of the claim or subject-matter of the suit by the defendant and the matter falls under the second part, nothing prevents the parties from reducing such satisfaction of the claim/subject-matter, into writing and signing the same. The difference between the two parts is this: where the matter falls under the second part, what is reported is a completed action or settlement out of court putting an end to the dispute, and the resultant decree recording the satisfaction, is not capable of being enforced by levying execution. Where the matter falls under the first part, there is a promise or promises agreed to be performed or executed, and that can be enforced by levying execution. While

agreements or compromises falling under the first part can only be by an instrument or other form of writing signed by the parties, there is no such requirement in regard to settlements or satisfaction falling under the second part. Where the matter falls under the second part, it is sufficient if the plaintiff or the plaintiff's counsel appears before the court and informs the court that the subject-matter of the suit has already been settled or satisfied.”

9. On perusal of the record, it appears that defendant No.2 challenged the decree initially by filing appeal and, thereafter, by filing second appeal before this Court. This Court dismissed the second appeal on the ground that he is party to the consent decree; however, this Court clarified that rights of defendant Nos.3 to 5 to challenge Trial Court's decree in accordance with law remains unaffected.

10. The objection raised by the judgment debtor before the Executing Court is limited to the extent of stating that judgment debtor No.5 had not signed the consent pursis and, therefore, the decree dated 21 January 1983 is not binding on judgment debtor No.5.

11. The question, therefore, arises for consideration in this writ petition whether the Executing Court while entertaining objection under Section 47 of the Code of Civil Procedure, 1908 can hold decree to be inexecutable.

12. The parameters for raising objection to executability of decree is limited to following three grounds: (i) the decree being

nullity. The decree can be said to be nullity, if legal representatives having right to sue are not brought on record; (ii) the Court lacks inherent jurisdiction; (iii) the decree being void.

13. It is well settled that decree can be held to be executable only if such decree is nullity or void but not on the ground that the decree is erroneous on the facts or on law. The Apex Court in the case of **Vasudev Dhanjibhai Modi Versus Rajabhai Abdul Rehman & Ors**, reported in 1971 1 SCC 670 has held in essence enunciated that only a decree which is a nullity can be the subject-matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt: (SCC pp. 672-73, paras 6-7)

“6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make it,

objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.”

14. Though this view has been settled by number of similar pronouncements, Supreme Court in **Dhurandhar Prasad Singh v. Jai Prakash University (2001) 6 SCC 534** , while considering the scope of Section 47 of the Code, held that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree unexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same

view.

14. None of the above circumstances as recognized in law for rendering a decree in-executable exist in the facts of the case. Even otherwise it is well settled that when the decree is capable of two interpretations, the interpretation which advances cause of Decree Holder needs to be accepted.

15. Coming back to the facts of the case, once it is held that the decree is not consent decree, the defect of passing decree in absence of consent of judgment debtor No.5 may render such decree as illegal, however such defect would not render such decree either void or nullity.

16. In absence of finding of such decree being void or nullity, the Executing Court in its microscopic jurisdiction could not have recorded a finding that such decree is not binding on judgment debtor No.5, particularly when judgment debtor No.5 was already party to the suit. Therefore, in my opinion, the Executing Court was not justified.

17. It further appears during pendency of present writ petition; the Execution Petition was dismissed for non-prosecution. The petitioner, therefore, challenged the order of dismissal of Execution Petition by filling Writ Petition No.11496 of 2019. Since the Executing Court held decree to be inexecutable and the writ petition against he said order was pending in this Court and this Court had issued Rule, the Executing Court ought not to have dismissed execution for non-prosecution.

18. For above reasons, the executing court could not have

dismissed the Execution Petition on the ground that the decree is not binding on judgment debtor. Hence, following order:

- a) The order dated 26 July 2012 passed in Execution Petition No.9 of 1984 passed by Civil Judge, Jr. Division, Saswad is quashed and set aside.
- b) The Execution Petition No.9 of 1984 is restored to the file of Civil Judge (Jr. Division) Saswad.
- c) Considering pendency of this writ petition and the fact that the decree was passed in the year 1983. The Executing Court is directed to complete the Execution proceedings within three months from today.

19. Both the writ petitions stand disposed of in above terms. No costs.

20. An effect of this order is stayed for period of four weeks from today.

21. In view of disposal of the writ petitions, nothing remains to be considered in the contempt petition. Hence, the contempt petition stands disposed of as infructuous.

(AMIT BORKAR, J.)