



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2275 OF 2020

Mangesh Anant Gole.

...Petitioner.

Versus

Laxmibai Pralhad Gawade (Deleted).

and Another.

..Respondents.

Mr. Sandip Parikh i/b Mr. Prabhakar M. Jadhav for the petitioner.
Mr. Rohan V. Karkande for respondent No.2.

Coram : Sharmila U. Deshmukh, J.

Date : August 9, 2023.

P. C. :

1. By this petition the challenge is to the order dated 27th August 2019 passed in Regular Darkhast no.529 of 1972 rejecting the petitioner's application to be substituted in place of the decree-holder. The challenge is also to the subsequent order of 9th September 2019 dismissing the execution proceedings for non prosecution.

2. The facts of the case as discernible from the list of dates and events tendered by the counsel for the parties are that one Bhau Maruti Gawade had filed RCS no.970 of 1962 against respondent no.2- society for removal of encroachment and possession. The suit

[As per speaking to minutes order dtd 8th Dec. 2023, this is the corrected order.]

property was land bearing survey new survey no.236 + 120(part) + 129(part) from village Yerwada, Pune. The suit came to be decreed vide judgment and decree dated 14th June 1963. The execution proceedings bearing Regular Darkhast no.919 of 1964 was filed by Bhau Gawade. During the pendency of execution proceedings, part of the suit property was sold and conveyed to one Peter Joseph Bhosale and Paul Alvares by virtue of agreement of sale dated 19th January 1969 and conveyance dated 19th March 1969. By the said conveyance, Bhau Gawade assigned and transferred all the rights acquired by him in favour of the petitioners and clause 6 of the conveyance authorised the purchasers to continue the execution application in the name of plaintiff or to prosecute the same in their own names. Pursuant to the conveyance, the mutation entries were effected in favour of the subsequent purchasers. As regards the execution proceedings which were instituted by Bhau Gawade, the same were withdrawn on 13th March 1970 despite an application being filed by the subsequent purchasers for deleting the name of original decree-holder and substituting their name.

3. On 21st December 1971 Bhau Gawade expired and the legal heirs of Bhau Gawade filed Regular Darkhast no.529 of 1972 seeking the execution of decree dated 14th June 1963. While this execution

proceedings were pending by two conveyance-deeds dated 23rd February 1989 and 6th July 1989, Paul Alvares conveyed his 1/2 share in favour of Joseph Thomas Rego and Gloria Maria Rego who on 11th March 2010 conveyed their share to the present petitioner and on 31st March 2010 legal heirs of Peter Bhosale conveyed their share to present petitioner. In the execution proceedings instituted by the legal heirs of Bhau Gawade, respondent no.2 raised an objection regarding the maintainability on the ground that as the suit property was transferred, and the purchasers by conveyance of 31st March 2010 had purchased the suit property, the legal heirs have no *locus*, came to be rejected as against which Writ Petition no.7353 of 2009 was preferred and this Court vide order dated 24th February 2010 rejected the said petition filed by respondent no.2 society.

4. Subsequently, on 3rd May 2010 an application came to be filed by the petitioners in Regular Darkhast no.529 of 1972 seeking to be substituted in place of the legal heirs of Bhau Gawade and for possession of the suit property from the judgment-debtor which came to be opposed by the legal heirs of Bhau Gawade. By order dated 24th October, 2010 the petitioner was permitted to be substituted in place of the legal heirs of deceased decree-holder. By an application dated

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3rd December 2018, respondent no. 2-society judgment-debtor sought to set aside the order dated 24th October 2018 on the ground that the said application was decided without any notice to respondent no.2 judgment-debtor and without hearing them in the matter. The said application came to be allowed and the order dated 24th October 2018 was set aside, to permit an opportunity of hearing to the judgment-debtor to file their objections to the substitution of the petitioner in place of the legal heirs of original decree-holder. Vide reply dated 28th January 2019, respondent no.2 objected to the substitution on the ground that the same is not justified by the provisions of Order XXI Rule 16 of the Code of Civil Procedure, 1908 and denied the conveyance which had been executed in respect of the subject property. It was further contended that the applicants had no *locus standi* to step into the shoes of legal heirs of deceased Bhau Gawade (the original decree-holder). By the impugned order dated 27th August 2019, the application of petitioners came to be rejected giving rise to the present proceedings.

5. Heard learned counsel appearing for the respective parties.

6. Mr. Parikh, learned counsel appearing for the petitioner has invited the attention of this court to the decision of this court in Writ

Petition no.7353 of 2009 and would contend that the objections to the execution proceedings filed by the legal heirs of deceased decree-holder was resisted by respondent no.2-society on the ground that there was an assignment of decree in favour of the subsequent purchasers. He would further contend that the executing Court in the impugned order has erroneously held that there is there is ambiguous position as regards the possession which third party intervener is not able to clarify. He would urge that the only question which is required to be considered is whether by virtue of the subsequent conveyance, the decree is assigned in favour of the third party intervener who seeks to step into the shoes of original decree-holder. He submits that the suit itself being for recovery of possession, there is no ambiguity as regards the possession which was the subject matter of decree itself. In support of his submissions Mr. Parikh relies upon the decision of this court in ***Govindrao v. Ganpatrao Raghobaji [AIR (34) 1947 Nagpur 116]***.

7. *Per contra*, learned counsel appearing for respondent no.2 submits that the property was transferred during the pendency of first execution petition at the time when the application by the then transferee was pending, and as at that time the execution petition itself was withdrawn, the predecessors-in-title were not impleaded

and then the further transferee has no right to get themselves impleaded as a decree-holder. He would further contend that prior to the conveyances which are executed in favour of the present petitioner, by an order of Collector, the property has been transferred in favour of respondent no.2-society. He would further submit that in view of the provisions contained in Order XXI Rule 16 CPC, the transferee ought to have led evidence which has been refused by the petitioners in the present case.

8. Considered the rival submissions.

9. As indicated in the order dated 1st August 2023, it is unfortunate situation in which decree of the year 1963 is not yet executed although darkhast has been filed in the year 1972. The issue which is required to be considered in the present petition is as to whether the petitioners are entitled to be substituted in place of the legal heirs of original decree-holder. From the material which is brought on record, there does not appear to be any dispute as regards the subsequent transfers of the suit property which has taken place and the conveyance in favour of present petitioner is not in dispute.

10. The provisions of Order XXI Rule 16 of CPC provides for an

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application for execution by transfer of decree and states that where the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. The Bombay High Court Amendment to Rule 16 of Order XXI has been amended to include second proviso, which provides that where the transferee Court holds the assignment proved, it shall forthwith communicate its decision in that behalf to the Court which passed the decree, and the latter Court shall make an entry in the Register of Suits indicating that the assignment has been held to be proved.

11. The contention of learned counsel appearing for respondent no. 2 is that the assignment is not to the present petitioner. In that the respect, if we consider the application below Exhibit-145 filed by the petitioner, there is a reference to clause 6 of the conveyance which was executed by the original decree-holder in favour of Mr. Bhosale and Alvares which authorises the purchasers to continue the execution application in the name of original plaintiff. By subsequent conveyances, the property has been transferred in favour of the present petitioner and as such the present petitioner is assignee of

the decree.

12. What is required to be noted is that in writ petition no.7353 of 2009, the submission of respondent no.2 was that by virtue of sale, the decree was assigned by the original plaintiff to the subsequent transferee and that once there is an assignment of decree, the decree-holder has no *locus*. In that decision, this court considered the provisions of Order XXI Rule 16 of CPC and has held that prohibition which prevents a decree-holder from executing the decree after making an assignment, will apply when transferee makes an application for execution and when the procedure contemplated by the first proviso to Rule 16 of Order XXI is followed. Considering the stand which has been taken by respondent no.2 in the earlier round of litigation, it is now not open to respondent no. 2 to take a diametrically opposite stand and oppose the substitution of the assignee. The only question which was required to be considered is whether there has been an assignment of decree and as such whether the assignee has stepped into the shoes of decree-holder.

13. The trial Court considered the order of collector dated 2nd December 1996 showing that the subject property had been assigned to judgment-debtor. The trial Court considered that the conveyance

deed executed in favour of the original decree-holder showed the possession was with vendor and at that time a further document of 31st March 2010 showed the knowledge of parties related to possession over the subject matter with respondent no.2-society. The executing court appears to have swayed by the fact that there is no reference about the absence of part possession in the previous document and there appears to be ambiguity on that count. The trial Court held that if the part of subject matter is already been assigned to third party intervener by handing over possession and as regards the other document the possession aspect which was previously absent has been shown in the later transfer, there is ambiguity.

14. In my view, the ambiguity, if any, as regards the possession is not an aspect which is required to be dealt with at the time of considering the applicability of provisions of Order XXI Rule 16 of CPC. The executing court has to only determine whether there has been assignment of decree and, as such, whether the assignee has stepped into the shoes of decree-holder. In the present case, there has been an assignment of decree which is evident from the material which is produced on record and the same stand had been admitted by respondent no.2-society in the earlier round of litigation and which is part of record of writ petition no.7353 of 2009.

15. In ***Govindrao (supra)***, a somewhat similar situation was considered by this Court and the Court held that as regards the enquiry as to the subject matter of conveyance in the proceedings of that case, the Court had held that it foreign to an inquiry in the matter of substitution and reserved leave to the judgment-debtors to raise the question after the assignees were substituted in the record. In my opinion, in the present case the same procedure would be the correct procedure to be followed.

16. In the light of discussion above, the impugned order dated 27th. August 2019 is hereby quashed and set aside. By reason of the impugned order being quashed, the application below Exhibit-145 seeking substitution in place of the legal heirs of original decree-holder stands allowed.

17. Needless to clarify that all objections as regards the execution of decree and all rights and contentions of both parties are expressly kept open. The discussion above is only for the purpose of considering whether the petitioners are entitled to be substituted in place of original decree-holder and the executing court to decide the execution proceedings on its own merits and in accordance with law.

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18. As the execution proceedings have been dismissed by order dated 9th September 2019 for non prosecution the same is restored to file as by the impugned order dated 27th August 2019 the application of the petitioner for being substituted was rejected, there was nobody to continue with the execution proceedings, which has resulted in the same being dismissed for non prosecution. Regular Darkhast no. 529 of 1972 is restored to the file.

19. Writ petition stands allowed in above terms.

[Sharmila U. Deshmukh, J.]