

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.349 OF 2018
WITH
CIVIL APPLICATION NO.248 OF 2018

Somnath Pandurang Balwade	...Appellants/ Applicants
<u>Versus</u>	
Ganesh S/O Subhdrabai Badale And Others	...Respondents

SECOND APPEAL NO.617 OF 2022
WITH
CIVIL APPLICATION NO.247 OF 2018
WITH
INTERIM APPLICATION NO.17948 OF 2022
IN
SECOND APPEAL NO.617 OF 2022

Somnath Pandurang Balwade	...Appellants/ Applicants
<u>Versus</u>	
Ganesh S/O Subhdrabai Badale And Others	...Respondents

Adv. Abhijeet Kulkarni i/b D. D. Abhijit Asso for the
Appellant/Applicant

Adv. Harshad Inamdar for Respondent No. 1.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : FEBRUARY 27, 2024

P. C. :

1. The instant case is one more example of proverbial obstruction caused in execution of Court Decree preventing the decree holder from enjoying the fruits of the Decree for prolonged period, in this case a period of about 26 years. The Consent Decree which was put in execution was passed in the year 1997.

2. Second Appeal No. 349 of 2018 has been preferred by the Obstructionist being dissatisfied by the judgment dated 6th January, 2018 passed by the Appellate Court in Regular Civil Appeal No. 317 of 2014 (old RCA No. 215 of 2013) dismissing the appeal thereby confirming the judgment dated 30th May, 2013 passed by the Executing Court rejecting the objection Petitions below Exhibit 20 and 25 filed under Order 21 Rule 97 of the Code of Civil Procedure (CPC).

3. Second Appeal No. 617 of 2022 was preferred taking exception to the judgment of the Appellate Court dated 6th January, 2018 passed in Regular Civil Appeal No. 323 of 2014 dismissing the Appeal upholding the dismissal of RCS No. 386 of 1997 by the trial Court.

4. Learned Counsel for parties submitted that the issues involved in both the Appeals are common and hence both the Appeals may be taken up for hearing together as common submissions would be advanced.

5. After the order in the Appeals was transcribed, it was brought to the notice of this Court, that the Second Appeal No. 617 of 2022 was filed in the year 2018 but being numbered in the year 2022 was not the subject assignment of this Court. Learned Counsel for the parties requested for time to obtain appropriate orders on administrative side. Subsequent to obtaining of the administrative order, the present order has been uploaded on the official website.

BACKGROUND FACTS:

6. RCS No. 169 of 1997 was filed by the Respondent-decree holder against the tenant- deceased Pandurang Balwade seeking recovery of possession of the suit property on the ground of bonafide requirement. The dispute was settled between the parties by way of compromise terms under which the deceased Pandurang Balwade agreed to hand over the possession of the suit property i.e. Gat No. 3802 within a period of six months failing which the decree holder to obtain the possession through the Court. A decree in terms of compromise terms was passed by the Trial Court. The Consent Decree records that the southern wall of the suit property No. 3802 was demolished by the deceased Pandurang and joined with adjacent property Gat No. 3803 and before handing over the possession of the suit property, the deceased Pandurang will get the southern wall constructed and if the same is not done, the decree holder

would have the wall constructed at his own expense and recover the cost from the deceased Pandurang. The Consent decree further notes that the access to the Gat No. 3803 would be through Gat No 3803.

7. After the death of Pandurang Balwade, the decree holder filed execution proceedings against the present Appellant being legal representative of Pandurang Balwade for execution of the Consent Decree dated 13th June, 1997. The present Appellant Somnath Pandurang Balwade filed Objection Petition at Exhibit 20 contending that the execution proceedings were not maintainable. It was contended that from 16th September, 1993, the obstructionist was the tenant in respect of the suit property and the suit property was in his possession in respect of which, the monthly rent was regularly paid. It was contended that the property tax etc. was paid by the obstructionist and in the suit property, the obstructionist is running hotel by the name "Ganesh Hotel". It was pleaded that on the date of the filing of the RCS No. 169 of 1997 i.e. on 5th April, 1997, the deceased Pandurang was not the tenant of the property and the consent decree was illegal and void ab initio and as such, could not be executed and was not binding upon the obstructionist as he was not a party to RCS No. 169 of 1997. It was further contended that at the time of execution of the consent decree, the deceased Pandurang Balwade was suffering from various ailments. It was contended that the

deceased Pandurang was the biological father of Respondent No. 1 decree holder and had close relations with Subhadrabai Badale to whom the Respondent No. 1 was given in adoption. It was pleaded that CTS No. 3802 was purchased by the deceased Pandurang Balwade out of the income of the joint family property and was subsequently transferred in the name of Subhadrabai Badale. It was pleaded that the obstructionist has separated from the deceased Pandurang and is running his own business in CTS No. 3802. It was pleaded that the CTS No. 3802 and 3803 are adjacent to each other and the predecessor in title had demolished the wall which separated the said CTS numbers and the access to both the Gat numbers was through the door on the eastern wall from the last 20 years. Another objection Petition below Exhibit 25 was filed by the wife of deceased Pandurang Balwade raising the same objections as raised by the present Appellant.

8. The decree holder resisted the Application contending that the consent decree was rightly passed and no appeal has been filed against consent decree. It was pleaded that the obstructionist has no right to obstruct and had no cause in the subject matter and the decree had reached finality.

9. The Executing Court framed the following issues for consideration.

Sr. No.	ISSUES	FINDINGS
1.	Does objection petitioners prove that judgment debtor Somnath was the tenant in possession over the suit premises since from 1993 on wards as alleged ?	In the negative
2.	Do they further prove that they were the necessary parties to RCS No. 169/1997 ?	In the negative
3.	Whether the decree in RCS No. 169/1997 binding upon objection petitioners ?	In the affirmative
4.	What order ?	As per final order

10. The Executing Court on consideration of evidence held that there is no document establishing surrender of tenancy by Pandurang in favour of the Obstructionist, there is no receipt of rent payment on record, the obstructionist is unaware as to whether his name is recorded in the Khand Register of the Municipal Council, Barshi. The Executing Court held mere license is not sufficient to establish tenancy as nothing is on record to show that the landlord had consented to the issuance of license. The Executing Court held that the possession of the obstructionist cannot be held legal. On the aspect of fraud, it was held that there is no evidence to demonstrate that deceased Pandurang was suffering from illness and was unable to understand. It was held that as the obstructionist was claiming independent right of tenancy, he was not a necessary party to the RCS No.

169 of 1997 filed by the decree holder against deceased Pandurang.

11. As regards the issue of the suit property and CTS No. 3803 being joint together having one structure, the Executing Court noted that the permission of construction was sought prior to the possession of the obstructionist over the suit property and the fate of the construction would depend upon the compromise decree and merely because construction is raised by tenant recovery of possession cannot be refused. The Objection Petition below Exhibit 20 and 25 came to be rejected.

12. As against this, Appeal came to be filed before the Appellate Court. The Appellate Court re-appreciated the evidence on record. On the objection raised as to the amalgamation of the properties in 1988, the Appellate Court held that the permission for construction was sought in the year 1988 prior to the possession of the obstructionist and the construction was made with the consent of the deceased Pandurang and the deceased landlord and the obstructionist cannot challenge the same merely because the said construction is made by the original tenant. As regards the claim of the obstructionist of being in possession of the properties since the year 1993 as tenant, the Appellate Court noted that there is no documentary evidence to show that the original tenant-Respondent No. 2 had surrendered the tenancy right to Appellant. The Appellate Court further held that mere issuance of Shop Act license in the

name of the obstructionist is not sufficient to infer that he is a tenant of the suit property. The Appellate Court noted that the decree in RCS No. 169 of 1997 was passed on 30th June, 1997 and except one medical record of 1983, all the other medical records were in respect of the period from December, 1998 to April, 2001. The Appellate Court held that the obstructionist has not established his independent right as tenant and therefore he is not a necessary party and dismissed the Appeal.

13. RCS No. 386 of 1997 was filed by the Appellant herein seeking a declaration that the Compromise decree dated 13th June, 1997 passed in RCS No. 169 of 1997 is obtained by fraud and misrepresentation and for injunction. The suit was dismissed by the Trial Court vide judgment dated 30th May, 2013 as against which Regular Civil Appeal No. 323 of 2014 was filed which came to be dismissed.

SUBMISSIONS:

14. Heard Mr. Kulkarni, learned counsel for the Appellant and Mr. Inamdar, learned counsel for the Respondent.

15. Mr. Kulkarni, learned counsel for the Appellant submits that the substantial questions of law in both the Appeals are common and as such advanced common submissions in both the Appeals. He submits that the consent decree is not a Decree which could be put in execution for the

following reasons:

- a) Consent Decree is not a Decree as defined in Sub-Section (2) of Section 2 of CPC read with Section 33 of CPC.
- b) Without taking recourse to Section 21 of the Legal Services Authority Act, the compromise terms would not attain the status of the decree as there is no deeming provision in CPC to give status of decree to the compromise as found in Section 21 of the Legal Services Authority Act, 1987.
- c) Section 33 of CPC provides that evidence has to be recorded followed by pronouncement of judgment and thereafter a decree can follow.
- d) Compromise terms entered into by the parties is merely a contract between the parties with the super added seal of the Court and there is no adjudication to confer status of Decree on the compromise terms.

16. He would submit that the compromise is in fact a contingent contract as before handing over the possession the judgment debtor was required to construct the southern wall. He submits that considering the provisions of Section 189 of the Maharashtra Municipal Council and Nagarpanchayat and Industrial Township Act, 1965, unless building permission is sought for construction of the wall, the contingency was not satisfied. He would further submit that CTS No. 3802 was amalgamated with CTS No. 3803 and as such, both the properties lost their

independent status and the compromise is therefore void under Section 20 and 21 of the Contract Act which cannot be put into execution being a void compromise. He points out the building permission granted by the planning authority marked as Exhibit 98 which was signed by the owners of CTS Nos. 3802 and 3803. According to him pursuant to the amalgamation there is single construction standing on the properties with consent of the parties. In support of his submissions he relies upon the following decisions :

- *Baldevdas Shivilal vs. Filmistan Distributors (India) (P) Ltd.* [(1969) 2 SCC 201]
- *S. Satnam Singh vs. Surender Kaur*, [(2009) 2 SCC 562]
- *State of Karnataka vs. State of T. N.*, [(2017) 3 SCC 362]

REASONS AND ANALYSIS:

17. In RCS No. 169 of 1997, the Respondent and the original tenant i.e. the father of the Appellant entered into consent terms and Decree was passed in terms of the consent terms, which consent decree is sought to be put in execution by the Respondent. The contention of Mr. Kulkarni is that the consent decree is not a Decree within the meaning of Sub-Section (2) of Section 2 of CPC read with Section 33 of CPC since it is not

preceded by hearing and judgment. Decree and Judgment has been defined in sub section (2) and sub section (9), of Section 2 which reads thus:

2(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include –

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal of default.

2(9) Judgment means the statement given by the Judge on the grounds of a decree or order.

18. Section 33 of CPC provides that after the case has been heard, the Court shall pronounce judgment, and on such judgment a decree shall follow. It will also be necessary in this context, to consider Rule 3 of Order XXIII of CPC which reads as under:

3. Compromise of suit :- 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], or where the defendant satisfies the plaintiff in respect of

the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates 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]:

[provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question: but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

19. Decree is a formal expression of an adjudication whereas judgment is the statement given by the Judge on the grounds of a decree or order. In cases where *lis* is contested, the decree is to be supported with statement on grounds of decree as without the statement of reasons, the formal expression of an adjudication cannot be sustained. However where the parties mutually decide the terms on which decree is sought from the Court, the consent terms constitutes the statement of reasons. A decree passed with consent of the parties is no different from decree passed after adjudication. A Consent Decree presupposes an agreement which has been arrived at between the parties and in terms of the agreement, the parties desires the disposal of the proceedings by passing of Decree.

20. Mr. Kulkarni would contend that the Rules of First schedule of CPC are mere rules and cannot control the provisions of the Code. The answer can be found in Section 2(1) which defines “Code” to include Rules and Section 121 of CPC which provides that the Rules in First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of Part X.

21. Order XXIII governs the withdrawal and adjustment of suits. Rule 3 of Order XXIII deals with compromise of suit and consists of two parts. The first part relates to the adjustment of the suit wholly or in part by any lawful agreement or compromise in writing and signed by the parties and the second part relates to the satisfaction by the Defendant in respect of whole or any part of the subject matter of suit. In such cases, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith. The Agreement is translated into a Decree and therefore all attributes of decree would be applicable to the Consent Decree.

22. The issue is well settled as can be found from the observations of the Apex Court in *Pushpa Devi Bhagat vs Rajinder Singh* [AIR 2006 *Supreme Court* 2628]. The Apex Court held in paragraph 14 reads thus:

“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. 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.....”

23. The submission of the learned Counsel for the Appellant proceeds upon misreading of the provisions of Rule 3 of Order XXIII of CPC. While recording a compromise, the Court records a satisfaction about the lawfulness of the agreement or compromise by judicial application of mind and the same constitutes a judicial act and not ministerial act. Although by passing a decree under Order XXIII Rule 3 of CPC, the Court records the agreement or compromise which is a contract between the parties, upon receiving the imprimatur of the Court, the compromise terms attains the status of Decree within the meaning of sub section (2) of Section 2 of CPC as it partakes character of formal expression of adjudication conclusively determining the rights of the parties. The Consent Decree passed is in compliance with Section 33 of CPC as the consent terms are the statement of reasons. To accept the submissions of Mr. Kulkarni would be to render the imprimatur of the Court to the compromise as a mere ministerial act conferring no further power to compel the performance of the terms of the compromise. The provisions of Order XXI of CPC which governs the execution of Decrees and Orders does not distinguish between Decree passed by Consent of the parties and Decree passed by the Court upon adjudication in a contested *lis*. The

executing court can compel the fulfillment of the obligations to the extent to which either party is enjoined under the terms of compromise to do but has failed to discharge of the same. For the said purpose, the executing decree may issue necessary process, appoint commissioner etc. and thus execute the decree.

24. It will also be relevant to refer to the decision of Apex Court in case of *Rama Narang vs Ramesh Narrang* [AIR 2006 Supreme Court 1883] where the Apex Court in context of maintainability of contempt petition in case of consent decree has held thus:

“A compromise decree is as much a decree as a decree passed on adjudication. It is not as has been wrongly held by the Calcutta High Court in Nisha Kanto Roy Chowdhury (supra) merely an agreement between the parties. In passing the decree by consent, the Court adds its mandate to the consent. A consent decree is composed of both a command and a contract. The Bombay High Court's view in Bajaranglal Gangadhar Khema (supra) correctly represents the law that a consent decree is a contract with the imprimatur of the Court. 'Imprimatur' means 'authorized' or 'approved'. In other words by passing a decree in terms of a consent order the Court authorizes and approves the course of action consented to. Moreover, the provisions of Order 23 Rule 3 of the code of Civil procedure requires the Court to pass a decree in accordance with the consent terms only when it is proved to the satisfaction of the court that a suit has been adjusted wholly or in

part by any lawful agreement All decrees and orders are executable under the Code of Civil Procedure. Consent decrees or orders are of course also executable.”

25. To bolster his submission that the consent terms with imprimatur of Court is not a Decree, Mr. Kulkarni would submit that the provisions of Section 21 of Legal Services Authorities Act gives a deeming effect of the decree to the award of the Lok-Adalat and unless the compromise constitutes Award of Lok Adalat, the compromise cannot attain the status of decree. The submission is premised on a mis-reading of Section 21 of Legal Services Authorities Act, which Section gives deeming effect of Decree to the Award of Lok Adalat so as to facilitate the execution of Award of Lok Adalat as Decree of the Court. Under the provisions of CPC, the compromise decree is a Decree capable of being put in execution. Accepting Mr. Kulkarni’s submission would render the provisions of Order XXIII Rule 3 of CPC otiose. In my view, the submission lacks merit and the position in law being well settled does not raise any substantial question of law.

26. The next submission is that the decree was not executable as the same was a contingent contract dependent on construction of southern wall by the Judgment Debtor or Decree Holder upon obtaining permission under Section 189 of Maharashtra Municipal Council and

Nagar Panchayat and Industrial Township Act, 1965. To appreciate the submission it will be necessary to refer to the terms of the compromise which can be summarized thus:

- a) Gat No. 3802 is owned by the Plaintiff therein and the Defendant was a tenant.
- b) The adjacent Gat No. 3803 is owned by the Defendants son i.e. present Appellant in which the Defendant is carrying on a Hotel Business.
- c) That the Plaintiff requires the suit promises bonafide for his requirements and the Defendant shall handover the possession of the suit premises within a period of six months.
- d) The Defendant had demolished the southern wall of Gat No. 3803 and had joined Gat No. 3802 and 3803.
- e) Before handing over possession, the Defendant shall erect the wall on the southern side and if the same is not done, the Plaintiff shall erect the same out of his own funds to be recovered from the Defendant.
- f) The access to Gat No. 3803 will be through the said Gat No. 3803 only.

27. Upon careful reading of the Consent Terms, it is clear that the Decree became executable upon default in handing over of the possession within the period of six months. The terms do not signify that the construction of southern wall is a condition precedent to handing over of

the possession of the suit premises as the terms entitle the Decree Holder to get the same constructed at the cost of the Judgment Debtor, which construction could not be carried out by the Decree Holder without being put in possession of the suit premises. For the Decree to be considered as contingent or conditional Decree, the terms should make the enforceability of the Decree subject to the fulfillment of the contingency or condition as a condition precedent. In the instant case, the Consent Decree did not postpone the enforceability of the Decree till the construction of the southern wall.

28. Executing court in execution of the decree can compel the fulfillment of the obligation by issuing necessary directions in that respect. Merely because the compromise decree obliged the Defendant to do a certain act, it cannot be said that unless and until the act is performed and the obligation discharged by the Defendant, the same remains a contingent contract incapable to be put in execution. It cannot be lost sight of that by imprimatur of this court, the compromise deed has attained the status of the decree and once that is done for the purpose of execution of the said compromise decree, the executing Court can act under the provisions of Order XXI which provides for execution of the decrees of the Court and compel the performance of the obligations by the Defendant by issuing necessary process etc. The decree cannot be said

to be a conditional one in the sense that some extraneous event was to happen on fulfillment of which alone it could be executed. The submission on question of enforceability of Consent Decree does not raise any substantial question of law as the compromise terms are clear and unambiguous and seeks no other interpretation.

29. In so far as the submission that the decree is unexecutable as there was amalgamation of the property is concerned, Exhibit 98 is a proposed plan showing proposed increase in the height of roof, change of the CJI sheet, wooden partition and change of styles in existing building on CTS Nos. 3802 and 3803. From the plan it cannot be conclusively established that there was an amalgamation of CTS Nos. 3802 and 3803 resulting in the forming of a larger plot or that the original status of CTS Nos. 3802 and 3803 was lost. The case of the Appellant is that he became a tenant of the property in the year 1993 and as such, the proposed map is prior to the possession of the obstructionist on the suit property. The Courts have rightly held that the record of construction on Gat No. 3802 and 3803 shows that the permission of construction was sought in the year 1988 prior to the possession of the Appellant and in view of the compromise have held that the appellant without claiming right through the original tenant cannot raise objection and the recovery of possession cannot be refused.

30. Before the Executing Court, the objections raised by the Appellant obstructionist can be summarised as under.

a) From 16th September, 1993 the Appellant by virtue of the tenant is in possession of CTS No. 3802 and for the said purpose the rent was being paid as well as the property tax.

b) On the said suit property, the obstructionist is running business of Hotel named “Hotel Ganesh.”

c) That the consent decree is illegal ab-initio and as such, the decree is not binding on the Appellant and cannot be executed.

b) CTS Nos. 3802 and 3803 are adjacent to each other and for the purpose of carrying on business, the predecessors had demolished the wall between the two properties and for the last 20 years, the access is through the door on the eastern wall.

31. Considering the pleadings, the Trial court and the Appellate Court had framed the necessary issue as regards the tenancy of the Appellant and on the basis of the evidence has rightly negated the said issue. There is no submission advanced on the findings and rightly so, as there is no perversity of findings.

32. As regards the decisions which have been relied upon by learned counsel for the Appellant in the case of *Baldevdas Shivilal & Anr.* (*supra*),

the issue before the Apex court was whether a consent decree operates as res judicata as the consent decree is merely record of contract between the parties to a suit to which a super added seal of the Court. The said decision does not assist to the Appellant as the said decision cannot be said to be laid down a proposition of law that consent decree is not a decree capable of being put into execution. It is well settled that for the purpose of a decree to operate as res judicata, the matter is required to be heard and finally decided by the Court. In other words there has to be adjudication by the Court.

33. The next decision is in the case of *S. Satnam Sing & Anr. (supra)* where the question was whether the property can be added in the list of properties after a preliminary decree is passed in a partition suit. In that context the Apex Court considered the definition of the decree and held that for an order passed by the Court to be construed as a decree it must satisfy the test of an adjudication being given in the suit which determines the rights of the parties which determination must be conclusive in nature and there must a formal adjudication. The issue before the said Court was in the context of preliminary decree being passed. In that case, the Court was not considering as to whether a decree passed upon a compromise entered into between the parties under Rule 3 of Order XXIII is a decree within the meaning of Section 2 Sub Section (2) of the CPC or not.

34. As regards the decision in the case of *State of Karnataka (supra)*, the Apex Court had interpreted the term adjudication which was held to define the legal process of resolving the dispute and the formal pronouncement of a judgment and decree in a Court proceedings. Even in that case, there was no issue as to whether a consent decree would be a decree capable of being put in execution.

35. Having regard to the discussion above, no substantial question of law arises. Appeals stand dismissed.

36. At this stage request is made by Learned Counsel for the Appellant for extending the ad interim relief operating in his favour since 2018 for further period of four weeks. The request is opposed by learned counsel for Respondent. As the ad interim relief is operating since 2018. I am inclined to continue it for further period of four weeks from the date of uploading of the order on the official website.

(SHARMILA U. DESHMUKH, J.)