



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FIRST APPEAL NO. 304/2023

(Anil Hariprasad Jejani Vs. Ramesh s/o. Bhagirath Rander & ors.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. C. Dharmadhikari, Advocate for appellant.
Mr. H. D. Dangre, Advocate for respondent Nos. 1 to 3.

CORAM: VINAY JOSHI AND
ABHAY J. MANTRI, JJ.
DATED : 23/10/2024.

Heard.

2. This appeal is of objector in execution of proceeding Special Dharkhast No. 63/2020, in which appellant's objection in terms Order 21 Rule 97 & 98 read with Section 47 and 151 of the Code of Civil Procedure has been turned down by impugned common order dated 11.04.2023. The litigation has checkered history. Initially, the owner of subject property i.e. respondent No. 2 Anil Kheta had executed an agreement to sell dated 06.10.1995 in favour of appellant Anil Jejani. Later on supplementary agreement was executed on 22.11.1995, by which possession of majority of portion of subject land was delivered. Some portion of subject property was in possession of one Pratap, for which it was agreed that Pratap will vacate the said property. In the wake of such possession, on 01.08.2011 owner Anil Kheta has executed another agreement to sale in favour of respondent No.1

Ramesh. On the basis of said agreement, purchaser Ramesh has filed a suit for specific performance which was settled in the Lok Adalat, resulting into passing decree of specific performance. The agreement in between owner and respondent No.1 Ramesh do bear reference of prior agreement of owner with appellant Anil Jejani dated 06.10.1995. After decision of suit for specific performance, purchaser has filed execution petition, in which the appellant Anil raised objection by claiming that he is in possession of the property towards part performance of contract. During pendency of execution proceeding, sale-deed was executed in favour of purchaser Ramesh through Court. The subject property is part of the concerned sale-deed.

3. The appellant i.e. objector has mainly canvassed that his objection ought to have decided by executing Court like a separate suit. According to the appellant, the said statutory requirement was not followed. It was also brought to the notice that the appellant urged to the Executing Court to register his objection as miscellaneous judicial inquiry and decide the same in the nature of suit. The Executing Court has decided the objection without framing issue or recording evidence by the parties, hence prayer of remand.

4. The contesting respondent No.1 objected to remand the matter by submitting that virtually the rights have been canvassed before Executing Court which were

adjudicated and thus, there is no necessity to remand. It is his contention that material placed before the Executing Court was sufficient to decide the rights of the party.

5. *Prima facie*, it is evident that prior agreement to sell was in favour of appellant which was also reflected in the subsequent agreement executed by owner in favour of purchaser Ramesh. Moreover, supplementary agreement also specifies that possession was delivered of the disputed property (15000 square ft.) in the year 1999. In the wake of such position, the Executing Court ought to have framed the necessary issues like whether the appellant/objector has independent right at its own to protect the possession by availing benefit the doctrine of part performance or he is bound by the decree. Obviously, the Executing Court can frame any other issues based on pleadings if required so. The parties must be offered an opportunity to lead evidence, on which the factual issue could be threshed out. In the circumstances, we hold that the Executing Court erred in not allowing the parties to record the evidence which exercise is required.

6. In view of above, by resorting powers of Order 21 Rule 23-A of the Code of Criminal Procedure, the matter needs to be remanded to the Executing Court for deciding the objection afresh by framing the necessary issue and allowing the parties to lead evidence. We hereby make it clear that all objections and contentions raised in this appeal are kept open for consideration. The above observation are

made on *prima facie* basis which has no impact on the merits of the rival claim. The Executing Court shall not sway by any of the above observation and shall decide it in accordance with law.

7. It is informed that the appellant has filed suit for specific performance against the original owner, in which respondent No.1 Ramesh has sought for rejection of plaint on account of Order 7 Rule 11(d) of the Code of Civil Procedure. Obviously, this proceeding has no impact on the merits of said litigation which is independent one. The interplay between both proceeding is kept open.

8. In view of above, we hereby quash and set aside the impugned common order dated 11.04.2023 passed in Executing Petition i.e. Special Dharkhast No. 63/2020. The Executing Court may register the objection as MJC and by framing issues and by giving opportunity to both sides, decide the issue involved. We direct the Executing Court to complete the said exercise within 6 months from the receipt of this order.

9. Both parties are at liberty to amend their objection and reply, if any, before the Executing Court.

10. The appellant's possession shall be protected till disposal of execution proceeding.

(ABHAY J. MANTRI, J.)

(VINAY JOSHI, J.)