

(2014) 02 BOM CK 0033

In the Bombay High Court

Case No : Civil Revision Application No. 17 of 2014

Amol Vishwanath Bade

APPELLANT

Vs

Dattatraya Dinkar Ghule, Dr. Dilip Shankar Bade, Umrao
Pandurang Bangar and Jayashri

RESPONDENT

Date of Decision : 20-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12A, Order 20 Rule 14(1), Order 20 Rule 18(2), Order 20 Rule 20 144
Specific Relief Act, 1963 — Section 28 35(c)

Citation : (2014) 3 ALLMR 644 : (2015) 1 BomCR 749 : (2014) 4 MhLj 253

Hon'ble Judges : A.I.S. Cheema, J

Bench : Single Bench

Advocate : S.K. Shinde, for the Appellant; V.D. Salunke, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—Heard learned counsel for the petitioner and learned counsel for respondent No. 1 on caveat. The revision is being disposed of after hearing these parties finally. This revision petition has been filed by the petitioner claiming to be Opponent No. 4 in Regular Darkhast No. 25/2009 pending before Civil Judge, Junior Division, Pathardi. According to the petitioner, he objected to the execution of the Darkhast on the ground that the decree passed under the Specific Relief Act, 1963 was preliminary decree and so, the same was not executable unless final decree proceedings are drawn up before the trial Court. The executing Court heard the petitioner referring to him as "alleged Judgment Debtor No. 4" and after hearing the decree holder also, has rejected the application of the present petitioner.

2. I have heard counsel for petitioner and counsel for respondent No. 1. According to learned counsel for petitioner, respondent No. 1 Dattatraya had brought suit for specific performance against respondent No. 2 Dr. Dilip and

respondent No. 3 Umrao (arrayed as defendant Nos. 1 and 2 in the suit-Regular Civil Suit No. 170/1996) before Civil Judge, Junior Division, Pathardi). The suit came to be decreed on 8.3.2002 and the decree has been maintained even till Second Appeal to High Court. Counsel for petitioner submitted that, there was another dispute between respondent No. 3 (Judgment Debtor No. 2) and his wife Jayshree, the present respondent No. 4 (but who was not party to the Civil Suit No. 170/1996) in Family Court at Bandra having No. 634/2000 and compromise took place between them. In the said compromise, the respondent No. 3, by way of permanent alimony, handed over suit land admeasuring 85 R to respondent No. 4, and respondent No. 3 executed sale deed dated 27.4.2001 in favour of respondent No. 4. Respondent No. 4 in turn sold the suit land to petitioner on 29.12.2008. The Second Appeal in the matter was disposed on 3.2.2012 and it is not disputed that the sale deed executed in favour of petitioner on 29.12.2008 was lis pendens in Regular Civil Suit No. 170/1996. According to the learned counsel for petitioner, in execution, this petitioner was arrayed as opponent No. 4 and thus, he filed the application objecting to the execution.

3. Learned counsel for petitioner submitted that, in the matter of Chanda (dead) through LRs. Vs. Rattni and Another, , decree under Specific Performance Act has been held to be preliminary and so, according to the learned counsel, it is necessary to draw up a final decree before it can be put to execution. Learned counsel submitted that, u/s 2(10) of CPC (hereinafter referred to as CPC for short), petitioner cannot be said to be Judgment Debtor but still claimed that the petitioner had raised the objections u/s 47 of CPC as he had been arrayed in Darkhast as Opponent No. 4. It was also argued that, the petitioner has purchased 85 R land whereas suit property under the concerned decree is 35 R and so also it would require division.

4. Learned counsel for respondent No. 1 has submitted that the petitioner was purchaser during pendency of the dispute. According to him, although respondent No. 3 created third party interest by first transferring the property to his wife and then she transferring the same to petitioner, still the original defendant kept litigating in the appeals. The learned counsel submitted that the decree cannot be said to be preliminary because the decree directed the plaintiff-decree holder to deposit the money within three months and the amount was accordingly deposited and so, it is final decree and the same is executable. According to the learned counsel, the judgment in the matter of "Chanda" (supra) will not help the petitioner as the object is only to protract the litigation so as to deprive the decree holder of fruits of the decree. He placed reliance on Section 2(2) of the CPC to submit that the decree can be partly preliminary and partly final and the portion which is final, is executable. According to him, the petitioner is third party purchaser lis pendens and cannot be heard in execution. He submitted that, the petitioner was arrayed as opponent only because his name has got entered in 7/12 extract. Petitioner has filed another suit also in which his application to stay execution has been rejected.

5. There is no dispute regarding the fact that, the petitioner is third party purchaser during the pendency of litigation. Section 2(10) of CPC defines Judgment Debtor as under:

10. "Judgment debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

6. It is clear that the petitioner is not judgment debtor as the decree passed was not against him. The decree holder wrongly arrayed the present petitioner in the execution application as one of the opponents.

7. Section 47 of the CPC reads as under:

47. Questions to be determined by the Court executing decree:-(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

[2] * * * *

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I. For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II. (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

8. It is apparent that the questions raised in the execution proceedings by the petitioner are not questions arising between the parties to the suit or representatives of the parties or purchaser of property in execution of decree. Thus, questions being raised by the petitioner need not really be decided by the Executing Court. Learned counsel for the petitioner admitted that the petitioner was not even a purchaser from the original defendants-judgment debtors to the suit. Not that the same would make any difference as far as Section 47 of CPC is concerned. Thus, the application filed by the judgment debtor objecting to the execution of the decree should have been rejected on this count. Keeping in view Section 47 of CPC, petitioner could not have been arrayed as party to the execution.

9. Even on merits of the contention raised by the petitioner, the rejection of his application does not call for interference. The petitioner has heavily relied on the case of "Chanda". In that matter, the suit was decreed *ex parte*. In the decree, one of the direction was that the defendants are to execute the proposed sale deed on payment of the balance price and get it registered within a period of two months. The money was not deposited in two months and when plaintiff moved for execution and permission to deposit the balance sale price in Court, the same was objected to. Judgment debtors moved application u/s 28 of the Specific Relief Act, 1963 to rescind the agreement of sale. Trial Court rescinded the contract. It was held that the plaintiff had failed to deposit the balance sale consideration within the time allowed by the Court and the execution application of plaintiff-appellant was dismissed. The High Court dismissed the revision petition. In this context, provisions of Section 28 were examined by the Hon''ble the Supreme Court and in para 8, observations were as under:

8. The present section corresponds to Section 35(c) of the Specific Relief Act, 1877 (hereinafter referred to as the "repealed Act") under which it was open to the Vendor or lessor in the circumstances mentioned in that Section to bring a separate suit for rescission; but this Section goes further and gives to the Vendor or lessor the right to seek rescission in the same suit, when after the suit for specific performance is decreed the plaintiff fails to pay the purchase money within the period fixed.

The present section, therefore, seeks to provide complete relief to both the parties in terms of a decree for specific performance in the same suit without requiring one of the parties to initiate separate proceedings. The object is to avoid multiplicity of suits. Likewise under the present provision where the purchaser or lessee has paid the money, he is entitled in the suit for specific performance to the reliefs as indicated in subsection (3) like, partition, possession etc. A suit for specific performance does not come to an end on passing of a decree and the Court which has passed the decree for specific performance retains the control over the decree even after the decree has been passed.

10. For such reasons, the Hon''ble Supreme Court held that the Court passing decree of specific performance retains control over the decree even after the decree had been passed and in that context, the observations of the Supreme Court were that the decree of specific performance has been described as a preliminary decree.

11. Order XX of the CPC provides for passing of preliminary decree in administration suits (Rule 13) and suits for dissolution of partnership (Rule 15). In suit for partition under Rule 18(1), final decree can be passed as regards estate assessed to the payment of revenue while under Rule 18(2) preliminary decree is required to be passed as regards other immovable or movable property. Even in matters for which Order XX provides for drawing of preliminary decree (like say house property) Court can, where it is convenient without further

inquiry, pass even final decree directly. This can be gathered from wordings of Order XX Rule 18(2) CPC itself. Order XX Rule 14(1) in pre-emption suit provides that where Court decrees a claim to pre-emption and purchase money has not been paid, the decree shall specify a day, on or before which the purchase money shall be so paid and for direction to deliver possession on payment of purchase money with costs, if any, in specified time. Clause (b) even provides for contingent decree of dismissal if purchase money and costs (if any) are not paid. Order XX Rule 12A in decree for specific performance of contract requires Court decree to specify period within which payment shall be made by purchaser. It does not specify that necessarily preliminary decree should be passed. What is material is to see what exactly is the decree passed.

12. In the present matter, while passing the judgment, directions regarding decree were as under:

ORDER

(1) The suit stands decreed.

(2) The defendant Nos. 1 and 2 do execute the sale deed in favour of plaintiff within three months from the date of decree, on getting the amount deposited by the plaintiff in the Court of Rs. 4000/-. In the case, the defendant Nos. 1 and 2 did not comply the sale deed, the plaintiff is at liberty to get it executed through the Court and in that case the cost of the completion of the sale deed shall be saddled on the defendant No. 1 and 2.

(3) Defendant No. 1 and 2 are hereby permanently restrained from alienating or transferring the suit property admeasuring 35 R portion of the land Gat No. 73 as described in para 1 of suit plaint situated at village Mali Baboolgaon Taluka Pathardi.

(4) In the circumstances of the suit, parties are left to bear their own costs.

(5) Decree be drawn up accordingly.

13. There is no dispute regarding the fact that, after above judgment and decree dated 8.3.2002, within period of three months the decree holder did deposit the amount specified. Learned counsel for petitioner is insisting that even if the amount was deposited, still formal proceedings for final decree were necessary.

14. Section 2(2) of CPC reads as under:

(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 for default.

Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final.

15. It is clear that a decree can be preliminary when further proceedings have to be taken before the suit can be completely disposed of. The decree is final when the adjudication completely disposes of the suit. The same decree can be partly preliminary and partly final. In the decree mentioned above, it is partly preliminary as to the portion where there are directions to make payment within particular time. To that extent the decree is preliminary as Section 28 of the Specific Relief Act, 1963 retains control with the Court passing decree to extend the time or rescind the agreement. Once the amount has been paid within time, nothing remains to be done by the Court passing the decree and part of decree which was final i.e. directions to defendant Nos. 1 and 2 to execute the sale deed, become enforceable. There is thus no substance in the revision petition brought by the petitioner. The same is rejected with costs.