

(2008) 07 BOM CK 0073
In the Bombay High Court
Case No : Writ Petition No. 403 of 2008

Ankush R. Naik

APPELLANT

Vs

Sujata Sanzgiry and Mr. Shaikh Akbar Ali

RESPONDENT

Date of Decision : 17-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, 11
Constitution of India, 1950 — Article 227

Citation : (2008) 5 ALLMR 198 : (2008) 110 BOMLR 2154 : (2008) 5 MhLj 876

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : A.F. Diniz, for the Appellant; M.S. Usgaonkar and I. Agha and S. Vahidulla, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Rule. By consent, heard forthwith.

2. Challenge in this petition, filed under Article 227 of the Constitution, is to the order dated 25/06/2008, by which fresh warrant of possession has been issued against the petitioner.

3. The petitioner is a judgment debtor in execution proceedings No. 53/94/A and, shall be hereinafter referred to as such. An award between the D.H and J.D was made rule of the Court by decree dated 3/06/1994 which reads as follows:

The defendant is hereby directed and within a period of 15 days from this date to convey the suit flat in favour of the plaintiff together with the proportionate undivided right in the land where the suit plot stands by a duly registered Deed of Sale in her favour along with the delivery of possession thereof to the plaintiff on payment of the balance amount of Rs. 1.7 lacs, by the plaintiff to the defendants.

4. The Decree holder filed the execution application on 28/08/1994, inter alia, praying for a warrant of possession, police protection, costs, execution of sale

deed, etc.

5. The judgment debtor filed his objections to the execution on 17/2/1995 and the said objections came to be dismissed by the order dated 20/11/1995 and, as a result, a warrant of delivery of possession came to be issued on 28/11/1995. The judgment debtor did not assail this order, but it appears that the said order was stayed on 29/11/1995 at the behest of one Shaikh Akbar Ali who had made an application under Order 21, Rule 97, CPC and whose application was granted by the trial Court by order dated 9/10/1997 and the said order was subsequently upset by this Court on 18/08/2005 in First appeal No. 5/1998.

6. Thereafter, the decree holder filed another application on 10/02/2006, inter alia, praying that on the failure on the part of the judgment debtor to comply with the warrant of possession dated 28/11/1995, the decree holder be put in possession of flat bearing No. 201, situated on the second floor and having an area of 80 sq. mts. at St. Inez, Panaji, Goa through the Bailiff of the Court who may be also authorized to remove any person bound by the decree who may refuse to vacate the same. Reply to this application was filed on 29/09/2007.

7. This application, as can be seen from the proceedings of the executing Court of 19/03/2008, was fixed on 25/06/2008 and on the same day that is on 25/06/2008 fresh warrant of possession came to be ordered to be issued against the judgment debtor which in fact was issued on 1/07/2008. That was after an objection to jurisdiction of the Executing Court was taken by the said Sheik Akbar ali (proposed intervener) and supported by the J.D. and decided on the same day.

8. At the hearing of the petition, Shri Diniz on behalf of the J.D. has submitted that the petitioner/judgment debtor had filed objections to the execution on 29/09/2007 and, therefore, the learned executing Court without disposing the said objections could not have issued the warrant of delivery of possession. Learned Counsel further submits that the decree under execution was a composite decree which required a registered deed to be executed, possession to be delivered and balance amount of Rs. 1.7 lacs paid by the decree holder to the judgment debtor and, therefore, it could not be executed piecemeal by ordering only delivery of possession. In this context, Shri Diniz has placed reliance on the case of Jai Narain Ram Lundia v. Kedar Nath Khetan and Ors. 1956 S.C. 359 wherein the Apex court has stated that:

When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree : a thing that an executing Court cannot do.

9. Learned Counsel further submits that the executing Court also could not have ordered the execution by issuing the warrant of possession in the light of the judgment of this Court dated 27/02/1991 in Appeal From Order No. 14/1991.

Here, it may be noted that after the said judgment of this Court dated 27/02/1991, the decree holder was made a party to the Civil Suit, from which the said appeal had arisen and it is not the case of the decree holder that they were not aware of the said judgment. Both the parties herein were fully aware of the said Judgment. The said judgment was rendered in a property dispute between Sumati J. Kamat and others as Plaintiffs and the J.D. as Defendant No. 1. The D.H. is one of the prospective purchaser mentioned therein. The said judgment in para 14 stated as follows:

Hence no fresh construction anywhere in the suit land. To the extent indicated this appeal is partly allowed and subject to the observations made. I, However, make it clear that there will be no bar for the prospective buyers to take up their occupancy in the building subject to the condition mentioned earlier, their rights are subject to the final order in the suit. The first respondent is also equally restrained from executing and registering Sale Deeds in favour of prospective purchasers or in favour of purchasers who are already covered by agreement of sale, if not done earlier.

10. On the other hand, Shri Usgaonkar, the learned Counsel on behalf of the decree holder, submits that it was not open to the judgment debtors to raise fresh objections, after their objections were rejected by the executing Court on 20/11/1995. Learned Senior Counsel further submits that the decree holder sought a warrant of possession, because of the restraint placed upon the J.D. in executing the sale deed by the judgment of this Court dated 27/02/1991. Learned Senior Counsel further submits that the warrant of delivery of possession was already issued on 28/11/1995 and the decree holder by the said application dated 10/02/2006 had sought that the same be issued afresh. In support of his submission that the judgment debtor is precluded from raising fresh objections, learned Senior Counsel has placed reliance on the judgment of the Apex Court in the case of Prem Lata Agarwal Vs. Lakshman Prasad Gupta and Others, wherein the Apex Court, inter alia, observed that the principle of res judicata applies to execution proceedings. The Apex Court had further observed in the said case that the judgment debtor had not raised any objection as to limitation in regard to execution of the decree before the Civil Judge at Allahabad. On the contrary, the judgment asked for setting aside the same on the basis of revival of execution proceedings. The revival of execution was not challenged and the judgment debtors therefore were barred by the principle of res-judicata from questioning directly or indirectly the order dated 13/05/1950 reviving the execution proceedings. Learned Senior Counsel has also placed reliance on the case of Ushadevi Balwant Mantri Vs. Devidas Shridhar Joshi, , wherein this Court observed that:

The principle of finality at least in this country should have greater weight in execution proceedings than even in a trial of a suit. It is notorious how long and wearily execution proceedings are dragged on, and if the Court refuses to give effect to the principle of res judicata, it would be open to a judgment debtor to

raise the issue of jurisdiction at any stage of execution proceedings realising that the other objections that he has taken have failed.

11. Learned Senior Counsel has also placed reliance on the decision of Rajasthan High Court in the case of Smt. Pushpa Vs. Ganpatsingh and Others, . In this case, after considering various decisions the learned Single Judge has stated that:

The judgment-debtor if he so desires must raise all objections to the executability of the decree which are available to him at one and the same time at appropriate stage and if he does not do so he is precluded from raising fresh objection in a piecemeal manner at a subsequent stage even in the same execution proceedings.

12. Shri Diniz, on the other hand, has also relied upon several decisions in support of the proposition that neither the principle of res judicata or constructive res judicata could be invoked in the facts and circumstances of this case. In the first decision, in the case of Hakim Enayat Ullah Vs. Khalil Ullah Khan and Another, , wherein a Division Bench of that Court stated that:

A decree for specific performance only declares the right of the decree-holder to have a transfer of the property covered by the decree executed in his favour. The decree by itself does not transfer title. That this is so is apparent from the fact that in order to get title to the property the decree-holder has to proceed in execution in accordance with the provisions of Order 21, Civil P.C. So long as the sale-deed is not executed in favour of the decree-holder either by the judgment-debtor in the suit or by the Court, the title to the property remains vested in the judgment debtor and till the execution of the sale deed the decree-holder has no right to the possession of the property. It is only the execution of the sale deed that transfers title to the property.

13. Second case is of Shakuntla Devi Vs. Kamla and Others, , wherein the Apex Court referring to its earlier decision in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, held that:

Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.

14. The other case cited on behalf of the petitioner by Raghunath Pradhani Vs. Damodra Mahapatra and Others, , wherein the Apex Court stated that no question of res judicata can arise because the basic issue in the appeal is as regards the validity of the auction sale in favour of respondent No. 2. The Apex Court, therefore, held that the failure, of the judgment-debtor to raise any particular contention cannot operate as res judicata, actually or constructively, either against him or against the appellant. Reliance is also placed on the case of Smt. Isabella Johnson Vs. M.A. Susai, wherein the Apex Court held that an issue

on the point of jurisdiction could not be res judicata.

15. Admittedly, the judgment of this Court is dated 27-9-1991 and the Decree under execution was dated 3-9-1994 and both the parties were fully aware as to what the said judgment or decree contemplated. In other words, the J.D. knew that the decree was a composite decree and the sale deed could not be executed in view of the judgment of this Court dated 27-9-1991 and if that is so one does not know why these objections did not find place in the objections filed on 20-11-1995.

16. Admittedly, the objections filed by the judgment-debtor to the execution of the decree were disposed of by the order of the executing Court dated 20/11/1995 and subsequently warrant of possession was issued on 28/11/1995. In other words the objections now taken could have been taken in the reply/objections filed on 17-2-1995. Could a Judgment Debtor be allowed to take objections piecemeal and then allowed to file appeals, revisions, writs? If such a course is adopted will an execution application come to an end before eternity? In order to overcome such situations that we follow the principle of constructive res judicata which is embodied in Section 11, Explanation 4, C.P.C. and which provides that any matter which might or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. In other words an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The doctrine underlying Explanation IV is that the parties having had an opportunity of controverting the matter that should be taken to be the same thing as if the matter had been actually controverted and decided. In other words the objections now being taken are deemed to have been heard and decided and this principle applies even to the different stages of the same proceedings. In this context the observations of this Court in Ushadevi Balwant v. Devidas Shridhar (supra) are apt, relevant and binding. "It is well settled that Section 11, C.P.C. is not exhaustive and the principle of res judicata applies to proceedings other than suits".... "It is equally well settled that the principle of res judicata applies to execution proceeding. "... "and where at a particular stage of execution proceedings a contention that a Decree is a nullity because the Court had no jurisdiction, is not raised, that contention cannot be raised later at the same stage of execution proceedings. Chief Justice Chagla (as His Lordship then was) had noticed more than half century back that it was notorious how long and wearily execution proceedings are dragged on, and if the Court refuses to give effect to this principle of res judicata it will be open to the J.D. to raise issue of jurisdiction at any stage of execution proceedings realizing that the other objections he had taken had failed. The position has certainly worsened down the years and when it comes to execution of Decrees particularly as regards

possession of immovable properties the Decree Holders are driven to frustration and exasperation. This is precisely the case at hand. The learned Single Judge of Rajasthan High Court in *Smt. Pushpa v. Ganpatsingh and Ors.* (supra) after taking note of the pronouncements of the Apex Court in *Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others*, , of this Court in *Ushadevi Balwant v. Devidas Shridhar* (supra) and *Prem Lata Agarwal Vs. Lakshman Prasad Gupta and Others*, has concluded that "the position of law which emerges is that the judgment-debtor if he so desires must raise all objections to the executability of the decree which are available to him at one and the same time at appropriate stage and if he does not do so he is precluded from raising fresh objection in a piece-meal manner at a subsequent stage even in the same execution proceedings".

17. I have my respectful agreement with the above proposition of law, and therefore, on the principle of constructive *res judicata*, the J.D. could not be allowed to raise fresh objections by their reply dated 29-9-2007, all his objections to the execution deemed to have been taken and decided by the executing Court by Order dated 20-11-1995 nor they can be allowed to be taken for the first time in this writ petition. It is interesting to note that the J.D. could have pressed for the said objections at the time the Executing Court decided the issue of jurisdiction, in case the J.D. was serious about the same. It is obvious that the J.D. was only taking chances to delay the proceeding.

18. Be that as it may none of the judgments referred to on behalf of the J.D. are applicable to the facts and context of this case. There is no issue of jurisdiction involved in this case and even if there was one, the same has attained finality by order dated 19-3-2008. In *Shankuntla Devi v. Kamla and Ors.* (supra) there were two declaratory decrees obtained from a Court established contrary to an existing law and what was held that they would not come in the way of a suit for possession of the suit property, and, that was an exception carved out by the Apex Court to the principle of *res judicata*. In *Smt. Isabella Johnson v. M.A. Susai (dead)* by LR"s (supra), two petitions were filed for eviction before the Rent Controller who held that the petitions were not entertainable by the Rent Controller. Then a suit for eviction was filed before the City Civil Court. A plea of jurisdiction was taken that it is the Rent Controller who had jurisdiction. The City Civil Court held that since the respondent had taken the plea before the Rent Controller that it was not the Rent Controller but the Civil Court which had jurisdiction and the said plea was upheld it was not open to the respondent to take inconsistent plea and the suit was decreed. That decision was upheld by Additional Chief Judge of City Civil Court. In second appeal the High Court held that City Civil Court had no jurisdiction and it was exclusively with the Rent Controller. It was contended before the Apex Court that the earlier decision of the Rent Controller to the effect that it was the City Civil Court who had jurisdiction constituted *res judicata* between the parties on the question of jurisdiction and what was held by the Apex Court is that a decision on question of jurisdiction of the Court or pure question of law unrelated to the right of the

parties to a previous suit is not *res judicata* in subsequent suit. In *Ragunath Pradhani v. Damodra Mahapatra and Ors.* (supra) the D.H. himself had brought to the notice of the Court that permission was required of competent authority to sell the property of the J.D. as he was a member of the Schedule Tribe and therefore it was held that the J.D. having failed to take objection for attachment could not be precluded from taking that objection on the principle of constructive *res judicata*.

19. Alternatively, the petition is devoid of any merits, even if merits are to be considered. Warrant of possession was first issued on 27-11-1995. The J.D. did not assail that order. The present order only revives the said order pursuant to D.H's application dated 10-2-2006. The said order dated 27-11-1995 was kept in abeyance at the instance of the said Sheikh Akbar Ali who inspite of having failed in his appeal before this Court continues to file litigations before the Executing Court. His litigations ought to have been dismissed with exemplary costs. It is rather curious to note, that he without being a party, the Executing Court decided the issue of jurisdiction at his instance.

20. This is not a case of composite Decree in *strictu sensu*. A composite Decree presupposes obligations to be met on both sides which are so conditioned that performance by one is conditional on performance by the other. In the case at hand the Decree had to be performed or complied by the J.D. himself by delivery of possession and execution of registered sale deed and payment of costs. The Defendant had to make payment of balance amount of Rs. 1.7 lacs. The judgment of this Court dated 27-2-1991 does not at all come in the way of the D.H. in obtaining the possession of the suit flat though it will come in the way of the execution of the sale deed. The D.H. has made his position clear that the balance amount will be paid at the time of execution of the sale deed and for the present has opted to take delivery of possession only and payment of costs. It will be difficult to foresee what would be the result of the S.C.S. No. 52/90/A filed by the said Kamat and others. The Decree Holder need not wait to take possession of the suit flat for the execution of the Decree that may be passed in the said Civil Suit filed by Kamats. Since the judgment of this Court dated 27-2-1991 does not come in the way of the D.H. occupying the suit flat, the D.H. Could not be deprived in 14 obtaining possession of the same. In fact the said judgment recognizes that the prospective buyers can take occupancy in the building. The submissions made on behalf of the J.D. are devoid of any merit. The option exercised by the D.H. To take possession of the suit flat now and pay the balance of sale price at the time of the execution of the sale deed cannot be denied to him on the specious plea that possession cannot be given because sale cannot be executed. At the most the J.D. could have insisted that he be paid the balance sale price. But that is not his case. This Petition is only an attempt to frustrate the Decree obtained by the D.H. and to deprive him of the possession of the suit flat.

21. Therefore, the petition is hereby dismissed. Rule discharged.

22. Learned Counsel Shri Diniz prays for suspension of this judgment to enable him to approach the Supreme Court. Mr. Usgaonkar, the learned Senior Counsel, objects. Having regard that the D.H. has waited for 14 long years and another 4 weeks would not make much of difference, I am inclined to stay the execution of the warrant of possession and this judgment for a period of 4 weeks.