

(2001) 08 BOM CK 0072

In the Bombay High Court

Case No : Civil Rev. Application No. 519 of 1992

Babasaheb Tidke and others

APPELLANT

Vs

Karbhari More (since deceased through his L.Rs.) and
another

RESPONDENT

Date of Decision : 20-08-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 144, 151, 47

Citation : (2001) 08 BOM CK 0072

Hon'ble Judges : B.B. Vaganyi, J

Bench : Single Bench

Advocate : V.D. Salunke, for the Appellant;

Final Decision : Dismissed

Judgement

B.B. Vaganyi, J.—Heard learned Advocate Shri V. D. Salunke for the petitioners, Respondents are served.

2. This Civil Revision Application is directed against the order of restoration of land bearing survey No. 66 of village Kari, Taluka Majalgaon, District Beed, dt. 22-11-1991 passed by the Civil Judge, Junior Division, Majalgaon.

3. Adumbrated in brief, the facts giving rise to this Civil Revision Application are as under:

One Karbhari More had executed agreement to sell the land bearing revision survey No. 66 admeasuring 7 acres and 37 gunthas of village Kari to Laxman Vishnuba Tidke. Laxman Tidke was ready and willing to perform his part of the contract, Karbhari More was rather reluctant to perform his part of the contract. Laxman, therefore, filed Regular Civil Suit No. 137/1966 for grant of relief of specific performance of contract and for recovery of actual possession of the land agreed to be sold. Karbhari More contested the said suit. The trial Court decreed the suit. Karbhari More did not file appeal in the District Court and ultimately the decree passed in Regular Civil Suit No. 137/1966 achieved finality.

4. After the decree having achieved finality, Karbhari More thought it fit to execute a sale deed in favour of Laxman Tidke and did execute registered sale deed in favour of Laxman Tidke on 27-9-1968. However, he did not deliver possession of the land survey No. 66 to Laxman Tidke.

5. As Karbhari More refused to deliver possession of the land survey No. 66, Laxman Tidke filed Regular Civil Suit No. 165/1971 for possession. The said suit was decreed in favour of Laxman Tidke. Feeling aggrieved by the judgment and decree passed by the trial Court, Karbhari More had preferred Regular Civil Appeal No. 123/1976. The said appeal came to be dismissed in the year 1977. Karbhari More did not file Second Appeal thereafter and thus the decree for possession passed in Regular Civil Suit No. 165/1971 became final.

6. Petitioner No. 1 Babasaheb and petitioner No.2 Adinath are sons of Laxman Tidke. Petitioner No. 3 Waman is real brother of Laxman Tidke. Petitioners filed Execution Petitioner No. 2/1978 against legal representatives of deceased Karbhari More. The petitioners filed execution petition on the ground that Laxman Tidke died while he was on pilgrimage. The executing Court, without examining correctness of the statement made by the petitioners, issued warrant of possession on 7-4-1978. In response to the warrant of possession, the heirs of original judgment debtor were dispossessed on 11-4-1978 and the possession was delivered to the petitioners.

7. The heirs of Karbhari More came to know, subsequent to dispossession, that original decree holder Laxman Tidke is alive. The heirs of original judgment debtor filed Miscellaneous Application No. 1/1986 invoking inherent jurisdiction u/s 151 of CPC and requested the executing Court to recall the earlier order. The petitioners No. 1 and 2 did not file their say. However, petitioner No.3 contested the application filed by heirs of judgment debtor on the ground that the application for recalling the earlier order is not maintainable u/s 151 of Civil Procedure Code.

8. After having heard both the sides and after having considered the legal position, the executing Court allowed the application by order dt. 21-11-1991. The land survey No. 66 is ordered to be restored to the heirs of original judgment debtor. Correctness of this order is challenged by filing Civil Revision Application u/s 115 of Civil Procedure Code.

9. Learned Advocate Shri V.D. Salunke submitted that the application for restoration of the suit land is filed by the heirs of original judgment debtor u/s 144 of Civil Procedure Code. As there is no modification or reversal of the former order by the competent Court, the powers of restitution cannot be invoked u/s 144 of Civil Procedure Code. So far as the factual position is concerned, there is no modification or reversal of the former order. Therefore, prayer for restitution as contemplated u/s 144 of CPC is not justified in law. It is true that the heirs of judgment debtor have filed the application for restitution u/s 144 of Civil Procedure Code, however, this is a partial truth. The heirs of judgment debtor

have also filed application for restoration u/s 151 of Civil Procedure Code. In fact, the heirs of judgment debtor have submitted application under sections 144 and 151 of Civil Procedure Code. The learned executing Court is well aware about the legal requirements for invoking jurisdiction u/s 144 of CPC for restitution. The learned Executing Court has dealt with this aspect in paragraph No. 17 of the impugned order. The executing Court has not at all invoked its power of restitution u/s 144 of Civil Procedure Code. Therefore, the submissions of learned Advocate Shri V. D. Salunke are liable to be rejected.

10. Learned Advocate Shri V. D. Salunke then submits that remedy of separate suit is available to the heirs of judgment debtor and, therefore, the learned executing Court should not have passed the order of restoration. I find little substance in this submission because the orders are passed by the executing Court in execution petition No. 2/1978. Therefore, the separate suit is barred by section 47 of Civil Procedure Code.

11. Learned Advocate Shri V. D. Salunke submits that the petitioners are entitled to execute the decree passed in favour of Laxman Tidke. It is tried to be argued that Laxman Tidke was not heard for a period of seven years and, therefore, the petitioners being sons and brother, are entitled to execute the decree passed in Regular Civil Suit No. 165/1971. This argument has no legs to stand. The case made out before the executing Court was altogether different. It was represented to the executing court that Laxman Tidke died at Rameshwar while he was on pilgrimage and having made such a representation, the petitioners solicited necessary orders from the executing Court. Even otherwise, there was absolutely no material on record to show that Laxman Tidke was unheard for more than seven years.

12. It is interesting to note that Laxman Tidke had filed Regular Civil Suit No. 190/1979, against his brother Waman Tidke who is petitioner No. 3 in this Civil Revision Application. The said suit filed by Laxman was for declaration of his exclusive title to the land survey No. 66 and for perpetual injunction. The trial Court decreed the suit in favour of Laxman Tidke. The judgment in RCS No. 190/1979, Exh.53, was brought on record in Miscellaneous Application No. 1/1986. It is clearly seen from the record that the relations between Laxman and Waman were not smooth. Waman, present petitioner No. 3, tried to claim proprietary rights in land survey No. 66. It is seen that petitioners formed an alliance to grab land survey No. 66 and having committed fraud on the executing Court, obtained possession of the land survey No. 66. Petitioners were not at all entitled in law to file execution petition on the basis of decree passed in RCS No. 165/1971. During lifetime of Laxman Tidke they have absolutely no right to file execution petition.

13. Learned Advocate Shri V. D. Salunke finally submits that the application filed by legal representatives of original judgment debtor is not maintainable in law. According to him, the legal representatives of judgment debtor could have challenged the correctness of the order by filing Civil Revision Application. He

also submits that the heirs of original judgment debtor could have also filed review petition. Learned Advocate Shri V. D. Salunke further submits that a legal remedy was available to the heirs of the original judgment debtor and, therefore, the executing Court was incompetent to invoke its inherent jurisdiction u/s 151 of Civil Procedure Code. In order to buttress his view, he relied upon Nain Singh Vs. Koonwarjee and Others, .

14. I thoroughly examined the objection raised by the learned Advocate Shri V. D. Salunke with regard to maintainability of the application filed by the heirs of original judgment debtor. It is true that heirs of judgment debtor could have challenged the correctness of impugned order. However, it cannot be said, by any stretch of imagination, that the application filed by heirs of original judgment debtor is not maintainable u/s 151 of Civil Procedure Code. If fraud would not have been practised on the executing Court by the present petitioners, the petitioners were justified in raising the objection to the maintainability of the application u/s 151, Civil Procedure Code. The petitioners colluded between themselves in order to grab possession of land survey No. 66 and practised fraud on the executing Court.

They misled the Court by saying that Laxman Tidke, original decree-holder died at Rameshwar while he was on pilgrimage.

15. In fact, Laxman Tidke was alive when execution petition No-2/1978 was filed in the Court. The petitioners suppressed this fact. They misled the executing Court by saying that Laxman Tidke was no more alive. The executing Court did not verify the correctness of the statement made by the petitioners and issued warrant of possession under Order 21, Rule 35 of Civil Procedure Code. After having noticed the element of fraud, the executing Court recalled its earlier order. The learned executing Court did not say in specific words that the earlier order is recalled. The executing Court entertained the application filed by the heirs of original judgment debtor for restoration of possession and passed appropriate order invoking its inherent jurisdiction u/s 151 of Civil Procedure Code. The facts of the present case would clearly go to show that the learned executing Court was well within its jurisdiction while passing the order of restoration u/s 151 of Civil Procedure Code.

16. Somewhat similar kind of issue was before the Division Bench of this Court long back. In case of Basangowda vs. Churchigirigowda, ILR (34) Bom 408, the Division Bench of this Court observed that the Court can invoke its inherent power to correct its own proceedings where it has been misled. In the said case, a compromise was presented in a suit which was signed by defendant's pleader, who was not specially authorized in that behalf. The Court passed a decree in terms of the compromise. The defendant then applied to the Court to set aside the decree on the ground that he had not engaged the pleader and that he had not authorized the Pleader to compromise the suit. After having found that the Pleader had no authority to compromise, the Court set aside the decree and set down the suit for hearing.

17. A reference with profit can be made to the case of Dadu Dayal Mahasabha Vs. Sukhdev Arya and Another, . In case of Dadu Dayal Mahasabha, the suit was allowed to be withdrawn by an unauthorised person by misleading the Court. The said withdrawal order was tried to be recalled u/s 151 of Civil Procedure Code. The Supreme Court has observed that a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. The Supreme Court approved the ratio of Baswangowda, referred supra, and observed that the order which is outcome of misrepresentation cannot bind the opposite party and has to be vacated.

18. The Supreme Court in case of L. Moolchand and Others Vs. Fatima Sultana Begum and Others, has explained the scope of inherent powers u/s 151 of Civil Procedure Code. The Supreme Court has held that interests of justice are the primary consideration in granting or not granting prayers in a petition u/s 151 of Civil Procedure Code. The Supreme Court has further observed that no rule or procedure can curtail inherent powers of the Court. It is said that the Court's role is of a balancer. The Supreme Court in case of Budhia Swain and Others Vs. Gopinath Deb and Others, has laid down certain guidelines for invoking inherent powers u/s 151, Civil Procedure Code. It is said that a Tribunal or Court may recall an order earlier made by it if :

- (1) The proceedings culminating in the order suffer from inherent lack of jurisdiction which is patent.
- (2) Fraud or collusion have been used to obtain the judgment and,
- (3) There has been a mistake by the Court prejudicing a party and,
- (4) A judgment has been rendered in ignorance of fact that necessary party has not been served at all or has died and the estate was not represented.

19. The ratio of Nainsingh, cited supra, heavily relied upon by learned Advocate Shri V. D. Salunke cannot be pressed into service so far as the facts of the present case are concerned. The element of fraud or collusion was absent in the case of Nainsingh, referred supra. Therefore, the reliance on case of Nain Singh Vs. Koonwarjee and Others, is misconceived.

20. In the present case, the element of fraud is present. In order to grab the agricultural piece of land, petitioners joined hands with each other and practised a fraud on executing Court. The petitioners had no authority to file execution petition. In law, they were not entitled to execute the decree passed in RCS No. 165/1971. They misled the executing Court by saying that the decree holder Laxman Tidke died at Rameshwar while he was on pilgrimage. They are successful in getting possession of land survey No. 66 from heirs of original judgment debtor. The real issue cannot be diverted by saying that the legal heirs of original judgment debtor should have exhausted remedy u/s 115 of Civil Procedure Code. The paramount consideration is substantial justice. If the objection of the petitioners, who are perpetrators of the fraud, is accepted, it

would tantamount to negation of justice. The law ought not to fail in dispensing justice to those with a serious grievance. Fraud and deceit ought not to benefit perpetrators of fraud. A right does not arise in favour of petitioners out of their unlawful act. The perpetrators of fraud cannot be allowed to retain possession of the land any more. It is to be noted that Laxman Tidke has not at all supported the action of the petitioners. On the contrary, he filed Regular Civil Suit No. 190/1979 against the petitioner No.3 and is successful in getting a relief of declaration of his exclusive title to the land in dispute. In my view, the executing Court has rightly recalled its earlier order and restored the possession of survey No.66 to the heirs of judgment debtor. The impugned order does not at all suffer from illegality. The learned executing Court has not committed any impropriety in passing the order of restoration. The Civil Revision Application therefore, must fail,

21. In the result. Civil Revision Application stands rejected. Rule discharged. Interim relief stands vacated.