

**(1992) 10 BOM CK 0047**

**In the Bombay High Court**

**Case No : Writ Petition No. 3958 of 1991**

Bhalchandra Shrikrishana Vaidya and Another

APPELLANT

Vs

Smt. Saraswatibai Vinayak Mande and Another

RESPONDENT

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**Date of Decision : 14-10-1992**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35

**Citation : (1992) 94 BOMLR 287**

**Hon'ble Judges : V.P. Tipnis, J**

**Bench : Single Bench**

**Final Decision : Dismissed**

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## **Judgement**

V.P. Tipnis, J.—By this petition the original judgment debtors are challenging the legality and correctness of the order, dated 29th August, 1991 passed by the learned Joint Civil Judge, Senior Division, Thane as the Executing Court by which order the learned Judge was pleased to grant application at Exh. 24 preferred by the decree holders and dismiss the application at Exh. 34 preferred by the judgment debtors. The learned Judge by the said order was further pleased to direct issuance of warrant of possession under Order XXI, Rules 35 and 36 of the property in suit bearing House No. 109/E and 111/A as shown in the certified copy of the Will along with the plaint at Exh. 69 in Special Civil Suit No. 47 of 1979.

2. The respondents-original decree holders admittedly obtained a decree for possession of two houses as also some ornaments etc. In the Special Civil Suit No. 47 of 1979 filed by them against the present petitioners.

3. It is also an admitted position that after the decree, the present petitioners challenged the same by preferring First Appeal before this Court and this Court by its judgment and order, dated 28/29th August, 1990 delivered in First Appeal No. 215 of 1987 was pleased to confirm the decree as passed by the Trial Court and dismissed the aforesaid first appeal. Admittedly there has been no further

proceedings in that behalf.

4. Thereafter the decree holders filed darkhast for execution of the decree. In the prayer clause they mentioned that the Court be pleased to deliver possession of the suit property to the decree holders by attornment of tenancy and by affixing copy of the warrant in some conspicuous place on the suit property and by proclaiming to the occupants the substance of the decree in regard to the property. We are not concerned in this proceeding with the other prayers. This application for execution was filed on 1.11.1990. It appears that there has been further application on behalf of the decree holders complaining that they have not received the gold ornaments and therefore the value thereof be ordered to be paid to them by the decree holders. The said application was made on 27th June, 1991. It appears that thereafter on the very same day i. e. 27th June, 1991 the decree holders made a further application in the pending darkhast proceedings. It was pointed out that the decree holders have prayed for possession in respect of the Municipal House Nos. 109/E and 111/A in lane No. 53, situated at Rambaug, Kalyan, District Thane. The decree holders further submitted that the sketch of the aforesaid house properties was filed by the judgment debtors themselves in the Trial Court in the said Special Civil Suit No. 47 of 1979. The decree holders filed the certified copy of the sketch of the Municipal House Nos. 109/E and 111/A. It was submitted that since the sketch was admitted and filed by the judgment debtors now there should not be any dispute about the description of the said house properties. It was prayed by the said application that the Court be pleased to issue possession warrant directing the Court bailiff to hand over the possession of the house properties as shown by letter ABCD (House No. 111/A) and EFGH (House No. 109/E) in the certify copy of the sketch of the said house properties. The said application was opposed by the judgment debtors. It was contended that the decree holders cannot make use of the sketch attached to the Will Exh. 69. It was also contended that the decree was only in respect of the two houses meaning thereby only structures and the land underneath those structures and nothing more. It is relevant to notice that the judgment debtors simultaneously made an application at Exh. 34 asking the Court to mark the decree as satisfied inasmuch according to the judgment debtors symbolical possession was already given to the decree holders by attornment of tenancies of various tenants in pursuance to the execution application.

5. The learned Judge of the Executing Court rightly understood the crux of the controversy between the parties i. e. as to what is the identity of the two houses mentioned in the decree. The decree holders obviously contended that the houses will mean also land appurtenant thereto and particularly as understood by the judgment debtors themselves, which is indicated by the sketch attached to the Will which they wanted to rely upon during the trial, which Will was at Exh. 69, whereas it was contended by the judgment debtors that so far as the decree is concerned it merely mentions two houses by number and therefore, the Plaintiff is entitled for nothing more than the actual structures of these two

houses and nothing of the land surrounding the houses. In short the controversy before the Executing Court was regarding the exact identification of these two houses mentioned by number in the decree. The learned Judge made a reference in his order to the fact that the suit of the decree holders was based on the Will executed by Saraswatibai (their mother). The learned Judge rightly held that the description of the houses mentioned in the Will will be important for deciding as to whether open land surrounding the suit houses are included in the description of the houses or not. The learned Judge observed that from the conduct of the judgment debtors themselves they have no dispute about the description of the houses in their written statement. The learned Judge accepted the contention of the decree holders that proper identification of the suit properties referred as two houses by number, map or sketch attached to the Will at Exh. 69 produced by the judgment debtors themselves during the trial is relevant and material. The said map clearly shows that open place surrounding both the houses under the sketch is drawn to the scale. The learned Judge accordingly negated the objections raised by the judgment debtors and upheld the contention of the decree holders resulting into granting of Exhibit No. 24 i. e. application of the decree holders and dismissal of the Exhibit 34 i. e. application of the judgment debtors by his impugned order.

6. Shri Jahagirdar, learned Counsel appearing for the petitioners, in support of the petition, assailed the correctness of the order on several grounds. He firstly contended that inasmuch as after the filing of the execution application the decree holders were collecting the rent from the tenants in those two buildings and inasmuch as even in the Municipal records their names were shown and recorded and in fact nothing remained to be executed and their application for marking the darkhast as satisfied or execution was proper and ought to have been granted. Consequently the application of the present nature for seeking possession of open land surrounding the houses also in accordance with the sketch map was not maintainable at all. He secondly contended that in any case without amendment of the darkhast application it was impermissible for the learned Judge of the Executing Court to entertain the application of the nature and make order thereon granting the same. On merits of the matter Shri Jahagirdar contended that on proper reading of the plaint and the decree as also the Will executed by Saraswatibai in favour of the decree holders at Exh. 73 in the Trial Court, what was given by Saraswatibai to her two daughters was nothing more than the structures of these two houses and, therefore there is no question of any open land surrounding these houses being given to the plaintiffs and therefore the application could not and should not be granted. Shri Jahagirdar further contended that the learned Judge was clearly in error in relying upon the sketch annexed to the Will at Exh. 69 inasmuch as the said Will was rendered ineffective for any purpose by virtue of the judgment of the Trial Court is also by virtue of the judgment of this Court in first appeal as mentioned above. Shri Jahagirdar, therefore submitted that even on merits the learned Judge was wrong in allowing the application made by the decree holders.

7. Shri Rane, learned Counsel appearing for the decree holders on the other hand submitted that the learned Judge of the Executing Court was perfectly justified in assessing the material available on record which was produced during the trial for the purpose of identifying the extent and the nature of the suit houses in respect of which decree for possession in favour of the decree holders was passed. Shri Rane referring to the Will and the descriptions of the boundaries of the houses, contended that it clearly indicates that not only houses but some land appurtenant to these houses ought to be held to be included in the description of houses by their numbers. Therefore, Shri Rane contended that it was not only open but proper for the learned Judge of the Executing Court that he should have referred to the map which was annexed at Exhibit 69. Shri Rane submitted that the order of the learned Judge suffers from no illegality.

8. I have heard the learned Counsel on both sides at some length. With the assistance of the counsel on both sides I have also gone through the relevant portions to the judgment of the Trial Court as also the judgment of this Court, including various documents to which the learned Counsel made specific reference. I have also perused the authorities cited by both the counsel in support of their rival contentions.

9. Now what is really important in this matter is the issue as to whether the houses mentioned by their numbers should mean only the structures and the land underneath or also some surrounding land as claimed by the decree holders.

10. So far as the first submission of Shri Jahagirdar is concerned I do not find that there is any merit in it. As mentioned earlier though execution application was filed there is nothing on record that the Court through its bailiff had given the symbolical possession as prayed for in the darkhast application. Secondly as late as in June, 1991 admittedly the decree holders made an application for equivalent value of certain ornaments which they did not receive and on the very same day they made an application for actual possession of the houses and certain land surrounding it with reference to the map at Exh. 69. Thus the execution application was very much alive when the Trial Court decided these two applications. It is relevant to notice that in fact the judgment debtors themselves preferred an application at Exh. 34 asking the Court to mark the decree satisfied by terminating the execution proceedings. In view of the facts it must be held that the execution proceedings were very much pending and alive. As such the 1st submission of Shri Jahagirdar cannot be accepted. So far as the second submission of Shri Jahagirdar is concerned that there should have been an amendment to the execution application and then alone the Executing Court could have considered granting or refusing the reliefs. I do not find any merit as well in this submission. As stated earlier admittedly the execution proceedings were pending as on the date of the application and as such grant of the application itself would tantamount to permitting the amendment of the original application. In substance no fault could be found with the procedure followed by the Trial Court.

11. Shri Jahagirdar relied upon the judgment of the Division Bench of this Court in *Radhalal v. Chabilchand and Ors.* AIR 1955 Nag. 79, regarding the effect of the symbolical possession. In my opinion this authority is not relevant for deciding the issue before me. In the aforesaid judgment the facts revealed that the decree holder had obtained symbolical possession in execution of the decree in respect of the property which were mortgaged, and which he had purchased in an auction in the execution of the decree. Admittedly in the said case after the sale was confirmed on 5.4.1940 the decree holder applied for and obtained delivery of possession on 17.2.1941. The application for execution by way of actual delivery of possession was made on 3.4.1943. It is under those facts that the Division Bench held that such second execution application was not permissible and could not have been entertained. In view of this distinction reliance placed by Shri Jahagirdar on the aforesaid ruling does not help the case of the judgment debtors.

12. Coming to the crux of the matter i. e. what is the identity of the suit houses it is extremely relevant to notice that Exhibit 69 which is a Will purported to have been executed by Saraswatibai on 8.9.1957 bequeaths these very two houses in favour of the judgment debtors. These very two houses are also described in the map or sketch annexed to the said Will and the said sketch is drawn to the scale. In fact during the trial of the very suit the judgment debtors had relied upon the said Will in support of their title to these two houses. Although their claim on the basis of the Will was negated by the Trial Court as well as by the Appellate Court, it does not mean that the documents exhibited loses all its relevance for all purposes. When it is a question of identification of the property, it is settled law that the Executing Court can make reasonable inquiries in that behalf and also look to the material on record of the suit itself. Under the circumstances when such map which describes these two houses alongwith the land appurtenant thereto on all four sides and which matter is capable of actual ascertainment with reference to the sketch attached to the Will, in my opinion the learned trial Judge of the Executing Court was fully justified in taking into consideration the aforesaid map and allowing the application of the decree holders by issuing the orders of warrant of possession under Order XXI, Rules 35 and 36 with reference to the aforesaid, As stated earlier the question before the Executing Court was the identity of the property and I do not find anything wrong or illegal or improper in the manner in which the learned Judge has identified the property.

13. In the result I do not find any merit in this petition and the same stands dismissed with costs. Rule stands discharged.

14. At this stage Shri Jahagirdar, learned Counsel for the judgment debtors pointed out that according to the judgment debtors if the decree as sought for with reference to the sketch, is executed, then the entire access or approach to the remaining property, admittedly bequeathed in favour of the judgment debtors, is totally blocked. I am not going into this issue for the simple reason

that such issue was not raised before the Trial Court and there is no material before the Court to adjudicate upon the same. In such case, in my opinion it will be always open to the party concerned to move the Executing Court in accordance with law, and the Executing Court will dispose of such an application in accordance with law.

15. At this juncture Shri Jahagirdar, the counsel for the petitioners prays that the proceedings of the execution may be stayed for a period of 8 weeks. After hearing the parties I direct that the proceedings of the darkhast, only so far as they relate to the delivery of possession of the house properties with reference to the sketch is concerned, may be stayed. It is made clear that the darkhast may proceed in respect of the rest of the properties and decree.

16. Writ of this order to go down forthwith. Certified copy expedited.