

(2018) 02 BOM CK 0090
In the Bombay High Court
Case No : 364 of 2017

Nandkishor Hemraj Khandelwal

APPELLANT

Vs

Chandrakalabai Kisanrao Marotkar

RESPONDENT

Date of Decision : 26-02-2018

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 47](#),
[Order 21 Rule 101](#), [Order 21 Rule 97](#), [Order 21 Rule 99](#)
a> - Questions to be determined by the Court executing decree

Citation : (2018) 02 BOM CK 0090

Hon'ble Judges : Manish Pitale

Bench : Single Bench

Advocate : K.P. Kanugo, N.S. Deshpande

Final Decision : Allowed

Judgement

1. In this appeal, while issuing notice for final disposal on 3.7.2017, this Court framed following substantial question of law: In view of rejection of the objection raised below Exh.58, whether it was permissible for the objector to again raise a fresh objection under Exh.185?

2. This Second Appeal is admitted on the above quoted question of law and today I have heard counsel for the parties on the same.

3. The appellant herein, is the plaintiff, who had filed Regular Civil Suit No.2 of 2001, being a suit for specific performance against the respondent Nos.2 and 3, the defendant Nos.1 and 2 in the aforesaid suit. The said suit was decreed in favour of the appellant by judgment and order dated 4.4.2003 passed by the trial Court. The said decree had attained finality as it was never challenged. The appellant/ decree holder put the aforesaid decree to execution in the year 2004.

4. The respondent no.1 herein being an objector to the said decree filed her objection before the Executing Court being an application under Section 47 r/w

Order XXI Rules 97, 99, 101 of the Code of Civil Procedure (CPC), it was marked as Exh.58 and the same was filed in the year 2011. The said objector (respondent no.1 herein) claimed in her objection that she was a cosharer of the property in question and that therefore, the respondent nos.2 and 3/defendants could not have executed the agreement in favour of the appellant, which ultimately led to the decree of specific performance being granted in his favour.

5. The said application/objection at Exh.58 was rejected by the Executing Court by its order dated 4.8.2011. In the said order, the Executing Court discussed the contentions raised on behalf of the respondent/objector on merits and rejected the same. It is an admitted position that the said order dated 4.8.2011 passed by the Executing Court below (Exh.58) was never challenged and that it attained finality.

6. It appears that thereafter, there were a series of objections to the execution of the decree filed on behalf of other objectors, which also stood rejected. After the passage of about 5 years from the rejection of her objection at Exh.58 by the Executing Court, the respondent no.1, on 10.6.2016 again filed an objection before the Executing Court in the form of application under Section 47 read with Order XXI Rules 97, 99 and 101 of the Code of Civil Procedure. It was marked as Exh.185 before the Executing Court. In this objection, filed after about 5 years of the rejection of her earlier objection, the respondent no.1 raised similar contentions claiming that the decree could not be executed .

7. By order dated 22.6.2016, the Executing Court rejected the said objection at Exh.185 with costs. The Executing Court recorded the fact that the earlier objection at Exh.58 filed by respondent no.1 had been rejected on 4.8.2011 and it had attained finality and yet the respondent no.1 had again filed an objection after about 5 years raising similar contentions while objecting to the execution of the decree. The Court also took note of the fact that there were a series of objections filed on behalf of the other parties also and that for the same reason, the appellant/decreed holder had failed to enjoy the fruits of the decree, which had been passed in his favour as far back as on 4.4.2003. The relevant portion of the order dated 22.6.2016 passed by the Executing Court on Exh.185 reads as follows:

" 7. I have gone through the record. The present objector Chandrakalabai had filed objection as per Exhibit58. I have gone through Exhibit58. The said allegations have already been raised by the objector in the Exhibit58. Further I have gone through the order dated 04082011, the objection of the objector is rejected by the court. Further, the objector submitted that the subject property is a joint family property and therefore, she is having right in the subject property. I have gone through Exhibit58. The said objection also raised in the Exhibit58. The said objection also decided by the court. The second objection raised by the objector is that the issues have not been framed in the objection filed by the objector vide Exhibit58 and therefore, Exhibit58 is not said to have been decided on merits. I have gone through the record. Manay chances had been given to the

present objector to proceed Exhibit 58. Further the present objector is not challenged the order dated 04082011 below Exhibit 58 and therefore, I am of the view that the order dated 04082011 is final and conclusive.

8. The objector further submitted that DH has obtained decree by playing a fraud on the court and the JD No.1 might have executed the said document under the influence of liquor. She further submitted that JD No.2 has not put his signature upon the alleged agreement to sale dated 04111999. I have gone through the record. The JD No.1 also has taken objection in the present execution as per Exhibit 173. The said objection is also decided by the court and rejected the same with costs. Further, one objector namely Devrao Kakde had taken objection as per Exhibit 98 before the court on the same issues. The said objection also decided and rejected by the court on merits.

9. The objector also submitted that, the minor son and daughter of JD No.1 filed suit against JD No.1 and 2 and present objector i.e. RCS No.14/16 for partition, declaration and separate possession. I have gone through the record. The son and daughter of JD No.1 i.e. Chetan Kumar and Vaishnavi have already raised the objection as per the Exhibit 25 decided on merits on dated 29012016. The order dated 2901= 2016 have not challenged by the son and daughter of JD No.1 and therefore I am of the view that said order dated 29012016 is final and conclusive.

10. I have gone through the record. The present objector who is the mother of JD No.1 and 2 had taken objection in the present execution. Further JD No.1 and 2 also had taken objection in the present execution. The son and daughter of JD No.1 and 2 also had taken objection in the present execution proceeding. All the objections rejected by the court. I am of the view that present objection filed by the objector with intention to prolong the execution proceeding. Further, the decree holder is prevented from getting the fruits of decree. All the issues raised by the objector in the present application are decided by the court. Therefore, I am of the view that the present objection of the objector is liable to be rejected with heavy costs of Rs. 2000/-.

8. Being aggrieved by the said order, the respondent no.1 filed Regular Civil Appeal no.123 of 2016 before the District Court, Amaravati. By the impugned judgment and order dated 24.11.2016, the District Court has allowed the appeal, set aside the order dated 22.6.2016 passed by the Executing Court and a direction has been given to the Executing Court to decide the objection of the respondent no.1 below Exh.185 in accordance with the provisions of the Civil Procedure Code. Aggrieved by the said order, the present second appeal is filed, wherein the above mentioned question of law has been framed by this Court.

9. Mr. Kanugo, learned counsel appearing on behalf of the appellant, submits that the impugned judgment and order is wholly erroneous because the objection raised on behalf of the respondent no.1 below Exh.58 already stood rejected by order dated 4.8.2011 of the Executing Court and that the subsequent application/

objection at Exh.185 filed by the respondent no.1 ought not to have been entertained by the Executing Court and that it was correctly rejected. The Court below had committed a grave error in allowing the appeal, without appreciating that the appellant was deprived of enjoying the fruits of the decree which was passed in his favour on 4.4.2003. On this basis, the learned counsel for the appellant submitted that the impugned judgment and order deserves to be set aside.

10. On the other hand, Mr. N.S.Deshpande, learned counsel appearing on behalf of the respondent no.1, submitted that the impugned judgment and order was sustainable and that objection raised on behalf of the respondent no.1 deserves to be decided on merits.

11. The present case is a classic case of abuse of the process, which is prevalent in Courts in our country. The Hon''ble Supreme Court has observed in *Satyawati Vs. Rajinder Singh* reported in (2013)9 SCC 491 that the difficulties for a litigant in this country start when a decree is passed in his favour by the Trial Court. In paragraph No.12 of the said judgment, the Hon''ble Supreme Court has held as follows:

"12. It is really agonizing to learn that the appellantdecreeholder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellantplaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in *General Manager of the Raj Durbhnga vs. Maharajah Coomar Ramaput Sing* had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforesaid judgment of the Privy Council in *Kuer Jang Bahadur vs. Bank of Upper India Ltd.*, the Court was constrained to observe that: (AIR p.448)

"Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgmentdebtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights."

12. The facts of the present case demonstrates that the aforesaid observation made by the Hon''ble Supreme Court applies in all force in the present case. The decree of specific performance was granted in favour of the appellant in the present case on 4.4.2003, which is more than 15 years ago and yet he has not been able to enjoy the fruits of the decree. The decree has been objected repeatedly on one or other ground by filing of applications before the Executing Court.

13. The respondent no.1 had filed one such application (Exh.58) way back on 3.3.2011, which stood rejected on merits on 4.8.2011. This order attained finality. Yet, after about five years of such rejection, the respondent no.1 filed another application objecting to the execution of the decree, virtually on the same ground on which she had filed the earlier application that was rejected.

14. The Executing Court correctly rejected the subsequent application filed in the year 2016 (Exh.185) and in the order rejecting the said application, the Executing Court recorded in paragraph Nos.7 to 10, not only about the rejection of the earlier application of respondent no.1 but also a series of such applications filed by other objectors, which were rejected. The relevant portion of the said order has been quoted above.

15. Despite such glaring facts, the District Court, by the impugned order has allowed the appeal of respondent no.1 thereby setting aside the order of Executing Court and sending the matter back to the Court for another ground of litigation which the decree holder would be made to suffer. The court below has committed grave error in observing in its judgment and order that the earlier application filed by respondent no.1 before the Executing Court at Exh.58 was not decided on merits. This observation is wrong on the face of the record. Apart from this, the Court below has erred in observing that a fair opportunity was not granted to the respondent no.1 for adjudicating her rights in the suit property. The said observation is clearly unsustainable because the respondent no.1 exercised her rights by filing the application/objection at Exh.58, which stood rejected on 4.8.2011 by the Executing Court and such order had attained finality. The Court below seems to have placed emphasis only on procedure, without appreciating the substance of the matter. In any case, even if procedural aspect was to be emphasized, the facts of the present case show that the subsequent application/objection filed on behalf of respondent no.1 at Exh.185 deserved to be rejected, because similar earlier application/objection at Exh.58 stood rejected on 4.8.2011, which had attained finality.

16. In this backdrop, substantial question of law framed above, on which the counsel for the parties have been heard exhaustively, deserves to be answered in favour of the appellant and this appeal deserves to be allowed.

17. Accordingly, this appeal is allowed with costs. The impugned judgment and order dated 24.11.2016 passed by the Court below is quashed and set aside.

18. Looking to the fact that the decree in the present case was passed in favour of the appellant on 4.4.2003, the Executing Court is directed to expedite the proceedings for execution of the said decree.