

(2018) 03 BOM CK 0113

In the Bombay High Court

Case No : Civil Revision Application No.131 of 2017

SHANKARLAL S/O CHHANULAL NAGPURE

APPELLANT

Vs

PRAMODKUMAR S/O PRALHADRAI AGRAWAL AND ANOTHER

RESPONDENT

Date of Decision : 23-03-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 7 Rule 3, Order 20 Rule 3, Section 47, 152

Citation : (2018) 03 BOM CK 0113

Hon'ble Judges : MANISH PITALE, J

Bench : Single Bench

Advocate : V.R. Borkar, A.N. Vastani

Final Decision : Dismissed

Judgement

1.The applicant herein, the original defendant, has sought to invoke revisional jurisdiction of this Court, challenging order dated 10.08.2017 passed by

the executing Court, whereby his objection to execution of decree passed in favour of the respondents herein, has been overruled.

2. The respondents-plaintiffs had filed a suit for declaration, permanent injunction and mandatory injunction before the Court of Civil Judge, Senior

Division, Gondia (trial Court). It was the claim of the respondents that the applicant herein had illegally made construction on a lane on the north west

side of the suit property. The respondents prayed for removal of such illegal construction made on the lane. The applicant appeared before the trial

Court and filed his written statement. But thereafter , he did not participate in the proceedings before the trial Court. The respondents adduced oral

and documentary evidence in support of their claim and by judgment and order dated 20.01.2005, the trial Court decreed the suit, granting a

declaration that the construction made by the applicant over the aforesaid lane

was illegal and further directed the applicant to remove such construction over the lane.

3. The said decree was put into execution by the respondents by filing Regular Darkhast No.20 of 2006 before the executing Court. The applicant

herein appeared before the executing Court and filed an objection dated 16.12.2015, claiming that since the respondents had failed to give proper

description of the suit property of the lane in question, the decree was inexecutable. It was claimed that the description given by the respondents was

vague and improper and that, therefore, the execution proceedings deserved to be dropped.

4. By the impugned order dated 10.08.2017, the executing Court has overruled the objection of the applicant, holding that accepting the contentions of

the applicant would amount to going behind the decree, which was impermissible. Aggrieved by the aforesaid order of the executing Court, the

applicant has filed this revision application.

5. Mr. V.R. Borkar, learned counsel appearing on behalf of the applicant submits that the impugned order is unsustainable because the executing

Court failed to appreciate that when the existence of lane was not at all identifiable, the execution of the decree was impossible. It is submitted on

behalf of the applicant that a perusal of the plaint would show that the respondents failed to identify the suit property and the lane in question by giving

description of boundaries and in the absence of a map filed along with the plaint, there was violation of Order VII Rule 3 of the CPC, which further

demonstrated that the decree was inexecutable. Reliance was also placed on the report dated 16.12.2015 of the Commissioner to contend that identity

of the property was in serious doubt and that, therefore, the objection filed on behalf of the applicant ought to have been accepted by the executing

court. The learned counsel appearing on behalf of the applicant relied on the judgment of the Honâ??ble Supreme Court in the case of Bhavan Vaja

and ors. .vs. Solanki Hanuji Khodaji Mansang and another -AIR 1972 Supreme Court, 1371.

6. Per contra, Mr. A.N. Vastani, the learned counsel appearing on behalf of the respondents submitted that the contentions raised on behalf of the

applicant virtually amounted to challenging the judgment and decree passed by the trial Court in favour of the respondents. The said decree had

attained finality in the absence of any appeal filed against the same. It was pointed out that the appellant failed to participate in the proceedings before the trial Court, beyond filing his written statement and that, therefore, at the stage of execution of the decree, it did not lie in his mouth to contend that the judgment and decree passed by the trial Court was meritless. The learned counsel further submitted that sufficient details were stated in the plaint on behalf of the respondents to identify the suit property and the lane in question and that only because a map was not filed along with the plaint, it could not be said that the decree passed by the trial Court was inexecutable. As regards the report of the Commissioner, it was submitted that the tenor of the report demonstrated that the Commissioner had acted beyond his authority and he had made comments as regards the merits of the decree passed by the trial Court which was wholly unwarranted. Even in the contents of the said report, it was pointed out that there were indications about the existence of the lane in question and the fact that the applicant had illegally made construction thereon. It was submitted that the applicant-defendant was not entitled to make submissions as regards the merits of the judgment and decree passed as far back as on 20.01.2005, particularly when he had chosen not to lead any evidence before the trial Court. The learned counsel appearing on behalf of the respondents placed reliance on judgments of the Honâ??ble Supreme Court in the case of Brakewel Automotive Components (India) Pvt. Ltd. .vs. P.R. Sel Vam Alagappan- 2017(6) Mh.L.J.47 and Pratibha Singh and another .vs. Shanti Devi Prasad and another- (2003) 2 Supreme Court Cases 330 and the judgment of this Court in the case of Sheikh Hassain Sheikh Mehaboob .vs. Bashir Ahmad Sheikh Mehabood -2000 (4) Mh.L.J. 528.

7. Having heard the counsel for the parties and upon perusal of the record, the points that arise for determination in this revision application are as to whether the executing Court was justified in overruling the objection of the applicant and whether the applicant was justified in his claim that the decree passed by the trial Court was inexecutable.

8. A perusal of the judgment and order dated 20.01.2005 passed by the trial Court shows that beyond filing written statement, the applicant did not participate in the proceedings before the trial Court at all. No evidence was led on his behalf and the trial Court proceeded on the basis of the oral and

documentary evidence produced on record by the respondents. It was found by the trial Court that despite a prohibitory order requiring the applicant to stop construction over the lane in question, he had proceeded to do so. The Court rendered findings on facts in favour of the respondents, holding that the applicant indeed made illegal construction over the lane in question and on that basis it granted declaration in favour of the respondents, further directing the applicant to remove the said illegal construction. A perusal of the plaint in the present case shows that in paragraphs 3 and 4, the respondents have given description of the suit property and their grievance regarding illegal construction made on the lane in question by the applicant.

9. The main contention of the applicant is that in the absence of a plaint map or detailed description of the suit property and lane in question, the decree passed by the trial Court is rendered inexecutable. A perusal of the impugned order and even the report of the Commissioner shows that there is no substance in the aforesaid contention raised on behalf of the applicant. Even if, further steps are to be taken while actually executing the decree in question, there are enough powers with the executing Court to take appropriate steps so that the decree is properly satisfied. The applicant failed to lead any evidence before the trial court when the proceedings were undertaken in the suit filed by the respondents and now the contentions raised on his behalf are nothing but an attempt to go behind the decree and in an ingenious way to raise objection on merits of the judgment and decree passed by the trial Court, even though admittedly it has attained finality in the absence of any challenge raised to the same on behalf of the applicant.

10. Such a judgment debtor who has failed to place his contentions on merits before the trial Court and who has failed to challenge the judgment and order passed against him, cannot be permitted to raise objection on merits of the decree before the executing Court. It is settled law that the executing court cannot go behind the decree and it has been so noted in a recent judgment in the case of *Brakewel Automotive (supra)*, rightly relied upon by the learned counsel appearing on behalf of the respondents. The relevant portion of the said judgment reads as follows:-

“19. It is no longer *res integra* that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order

jeopardizing the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity

that the same is rendered non est and is thus inexecutable. An erroneous decree cannot be equaled with one which is a nullity. There are no

intervening developments as well as to render the decree inexecutable.

20. As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives

relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law

being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing

on the validity or the executability thereof.

21. â?!

22. Though this view has echoed time out of number in similar pronouncements of this Court, in Dhurandhar Prasad Singh vs. Jai Prakash University

and others, AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite

different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is

microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the

same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in

ignorance of such provision of law or the law was promulgated making a decree inexecutable after its passing. None of the above eventualities as

recognised in law for rendering a decree inexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by

multiplying the decisions favouring the same view.â??

11. On the question as to the approach to be adopted by the Court when identity of the property may raise some concern, the Hon'ble Supreme Court

has held in the case of Pratibha Singh (supra) as follows:-

â??17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by

overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 of the CPC is capable of being cured. After all a successful plaintiff should

not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each

case-which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 of the CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the CPC.â??

12. In respect of approach of the Court, in the context of a judgment debtor who has not cared to attend the proceedings before the trial Court when the decree is passed, this Court in the case of Sheikh Hassain Sheikh Mehaboob .vs. Bashir Ahmad (supra) has held as follows:-

â??11. It is thus well-settled that the decree obtained from the trial Court and upheld by the first Appellate Court cannot be allowed ordinarily and normally to be defeated at the executing stage because that would render all the previous efforts and exercise futile. It is also well-settled that the decrees obtained from the Courts of competent jurisdiction cannot be allowed to be rendered paper-tigers; they have to be treated as alive and kicking. The only exception known to law in this regard is where a decree can be said to be a nullity, the reason for the same being that there would really be no decree to execute; and it is because of this that the executing Court would not incur the reprobation that it is going behind the decree. Similar view has been expressed by the Apex Court in a decision in Sunder Dass vs. Ram Prakash reported in AIR 1977 SC 1207.

12. In the case at hand, admittedly the applicant appeared in Regular Civil Suit No.66/1997 filed by the non-applicant against him for the recovery of possession of the suit property but instead of filing the written statement or raising the objections (now raised by him in the executing proceedings), he preferred to remain absent and thereby allowed the decree to be passed against him. As such, in view of a ratio laid down in the aforesaid decisions cited on behalf of the non-applicant, the applicant is now estopped from raising the objection (Exh.12). If really, the applicant was aware that the suit

property does not belong to Sk. Yusuf, the vendor of the non-applicant, then he ought to have contested the suit filed by the non-applicant against him

and raised the said objection by adducing evidence in that regard but he has not done so for the reasons best known to him. In this view of the matter

and considering the settled principle of law as laid down in the decisions cited supra, I am of the view that the learned trial Judge has rightly rejected

the objection (Exh.12) raised by the applicant and, therefore, in my opinion, the impugned order calls for no interference by this Court in exercising its

revisional jurisdiction.â??

13. Considering the aforesaid position of law and applying the same to the facts of the present case, it is evident that it is too late in the day for the

applicant to claim that the decree passed in favour of the respondents is inexecutable. As laid down by the Honâ??ble Supreme Court in the case of

Pratibha Singh (supra) that the Court is not powerless to resolve a concern about the exact identity of the property in the context of which a decree is

to be executed because sufficient powers are available with the Court under Sections 47 and 152 of the CPC to ensure that the decree is executable.

The reliance placed by the counsel for the applicant on the judgment of the Honâ??ble Supreme Court in the case of Bhavan Vaja (supra) is

misplaced because all that the Honâ??ble Supreme Court has laid down in the judgment is that it is the duty of the executing Court to execute the

decree and for that reason the Court can look into and take into consideration pleadings and proceedings leading upto the decree. In the present case,

the executing Court is certainly looking to the pleadings and proceedings leading upto the decree for execution thereof and it cannot be said that the

applicant has made out a case for declaring that the decree itself is inexecutable. Therefore, there is no error committed by the executing court while

passing the impugned order and overruling the objection raised on behalf of the applicant herein.

14. Accordingly, this revision application is dismissed with no order as to costs.