
(2016) 10 BOM CK 0146

In the Bombay High Court

Case No : First Appeal No.797 of 2016 With Civil Application No.4357 of 2016 And Civil Application No.1521 of 2016. Along With First Appeal No.798 of 2016. With Civil Application No.4358 of 2016. And Civil Application No.1523 of 2016

Veljiben

APPELLANT

Vs

Kanaiyalal Purshottamdas Shah

RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97
Transfer of Property Act, 1882 — Section 52

Citation : (2017) 2 BCR 581 : (2017) 1 MhLJ 335 : (2017) 1 RentLR 60

Hon'ble Judges : Dr. Shalini Phansalkar Joshi, J.

Bench : Single Bench

Advocate : Mr. Karan Bhosale, i/by Ms. Neha Bhosale, Advocates, for the Appellants in all the First Appeals.; Mr. Satyan N. Vaishnav, a/w. Ms. Nupur J. Mukherjee, i/by Mr. Vipul Shukla, Advocates, for the Respondent Nos. 1 to 4, 7, 8 and 10

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.(Oral) - Admit.

2. Learned counsel for the respondents waives service of notice. By consent, these First Appeals are heard finally and disposed of at the stage of admission itself.

3. All these First Appeals, along with the Civil Applications therein, are heard and decided together by this common Judgment, as the issues involved and the reliefs claimed therein are the same, coupled with the fact that the respondents herein are also the same.

4. These First Appeals are filed against the Judgment and Order passed by City Civil Court, Mumbai in three different Chamber Summons filed by the appellants/obstructionists, under Order 21, Rule 97 of the Code of Civil Procedure, 1908,

seeking declaration that the Decree passed in Suit No.1173 of 1971 dated 15th April 1997 by the City Civil Court, Mumbai, cannot be executed against them; and that the order passed in Chamber Summons No.397 of 1999 on 19th September 2000 to take forcible possession of the suit land by removing original defendant Nos. 1 and 2 from the said land and also for removing the suit structures standing thereupon by breaking open the lock with the help of Police, is illegal.

5. The appellant in First Appeal No.797 of 2016 and 798 of 2016 - Smt. Veljiben - is the mother of appellant - Nitin - in First Appeal No.799 of 2016. She claims to be in possession of Gala Nos.28 and 29; whereas, her son claims to be in possession of Gala No.30 in T.M. and D.M. Chawl since 1996.

6. Respondent Nos. 1 to 11 - original plaintiffs had filed Suit bearing No.1173 of 1971 against respondent Nos.12 and 13, (hereinafter referred to as, "defendant Nos.1 and 2"), for declaration of their rights, title and interests in respect of the suit land, admeasuring about 28,427.40 square meters, equivalent to 34,000 square yards, bearing Survey No.92, Hissa No.4 (Part), Survey No.118, Hissa No.1 (Part) and Survey No.120, Hissa Nos.3, 4 and 5, situate at Village Pahadi, Taluka Borivali in Greater Bombay. According to the appellants, their property is, however, situate on C.T.S. No.454/G, which forms part of Survey No.120. It is further their case that the suit land is a large plot of land, which is not bounded by any demarcation. Respondent Nos.1 to 11, who are original plaintiffs, are claiming possession of only a portion of the larger plot from respondent Nos.12 and 13, who are original defendant Nos.1 and 2, and under the guise of execution of the Decree, they are attempting to grab the surrounding land and areas. Therefore, it is necessary to restrain respondent Nos.1 to 11 from executing the Decree against the appellants and, in the meanwhile, to get the suit land officially surveyed and measured by the District Inspector of Land Records, (for short, "DILR"), by appointing him as Court Commissioner.

7. According to learned counsel for the appellants, the Court Receiver was appointed in the year 1980 to measure the suit land and to demarcate the total construction standing thereon. As per the report of the Court Receiver, there was an encroachment to the extent of 1,094 square yards on the suit land at the time of filing of the Suit. The Court Receiver was directed by an order dated 27th October 1980 to take symbolic possession of the encroached area to the extent of 1,094 square yards. Accordingly, the Court Receiver has taken possession of the suit land and in the list prepared by the Court Receiver, the name of the uncle of appellant - Nitin, who was earlier in possession of the suit Galas, was not appearing, thereby clearly indicating that the uncle of the appellant - Nitin was on a separate piece of land forming part of Survey No.120 and not on the suit land bearing Survey No.118.

8. It is further case of the appellants that the Officers of the Court Receiver had visited the suit land on 4th July 2013 and demanded possession of the suit premises for execution of the Decree dated 15th April 1997 passed in the above-

said Suit No.1173 of 1971. According to the appellants, this Decree cannot be executed against them, as the suit structures are not falling in Survey No.118, relating to which the Decree was passed, but their suit structures are falling in Survey No.120. Hence, the appellants filed the Chamber Summons before the Trial Court, obstructing execution of the Decree against them. In the Chamber Summons, the relief was sought for appointment of DILR as Court Commissioner to survey and measure the suit land, in order to know the exact location; whether the suit structures really fall in Survey No.118 or 120.

9. It is further urged that, as the suit structures are forming part of C.T.S. No.454/G, which is declared as slum area, under Notification dated 4th February 1989, published in the Government Gazette dated 2nd March 1989, and re-notified in the Government Gazette dated 19th December 1991, as well as under Notification dated 30th December 1993, published in the Government Gazette dated 20th January 1994, without permission of the Competent Authority, under Section 22 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, the decree also cannot be executed.

10. With these submissions, it was urged before the Trial Court that the Decree cannot be executed against the appellants. However, the Chamber Summons preferred by the appellants came to be dismissed by the Trial Court vide impugned Judgment and Order and hence it is urged that the findings recorded by the Trial Court, in paragraph No.38 of its impugned Judgment and Order, do not touch the real dispute and controversy between the parties. It is submitted that, the Trial Court has rejected the appellants' application for appointment of DILR as a Court Commissioner to measure the land, calling it as a last ditch attempt made by the appellants, only to obstruct execution of the Decree. It is submitted that, as the appellants are having independent right to remain in possession of the suit structures, as their structures are not falling in the suit land, in respect of which the Decree came to be passed, their possession needs to be protected.

11. In support of this submission, learned counsel for the appellants has relied upon the maps produced on record, at Page Nos.252 and 253 of the paper-book, drawn by the DILR and by the City Survey Officer, to contend that C.T.S. No.454/G is part of Survey No.120, which is on the periphery of the suit land and not the part of the suit land. According to learned counsel for the appellants, therefore, having regard to these maps, it is necessary that respondent Nos.1 to 11 be restrained from executing the decree against them and if there is any doubt, at-least, pass an order for fresh survey and measurement of both the lands by appointment of DILR as Court Commissioner, in order to ascertain exact location of the suit structures; to know whether they fall in the four corners of the suit land, as described in the Decree, or, in the surrounding area.

12. These Chamber Summons and the Appeals came to be resisted strongly by learned counsel for the respondent Nos.1 to 11 and in my considered opinion, rightly so. In the first place, it is a matter of record that the decree passed in

Civil Suit No.1173 of 1971 on 15th April 1997 against original defendant Nos.1 and 2 is confirmed upto the Hon"ble Supreme Court. It pertains not only to Survey No.92, Hissa No.4 (Pt), Survey No.118, Hissa No.1 (Pt), but also Survey No.120, Hissa Nos.3, 4 and 5. The said Suit was filed by respondent Nos.1 to 11 for declaration and also for possession of the suit land. In that Suit, plaintiffs had filed Notice of Motion, under Order 39, Rule 2 of CPC, and also an application on 29th March 1980 for appointment of Court Receiver to measure the suit land in order to ascertain the exact area encroached upon by original defendant Nos.1 and 2. That application was allowed and the Court Receiver was appointed to measure the suit land and to demarcate the total construction thereon. The Court Receiver measured the suit land and submitted his report on 30th March 1980. The report demonstrates that the Court Receiver found encroachment to the extent of 1,094 square yards. In pursuance of this report, by an order dated 27th October 1980, the Court Receiver was directed to take symbolic possession of the encroached portion from defendant Nos.1 and 2 and other occupants. Defendant Nos.1 and 2 challenged the appointment of Court Receiver by preferring Appeal No.460 of 1981, which came to be dismissed. Accordingly, the Court Receiver took symbolic possession from defendant Nos.1 and 2 and other occupants and prepared the list of persons, who were found in possession of the suit land through defendant Nos.1 and 2.

13. Admittedly, the names of the appellants are not appearing in the said list. Hence, it clearly indicates that when possession of the suit land was taken over by the Court Receiver, appellants were not in possession. According to the very case of the appellants also, they came in possession since 1996. The law is well settled, as observed by this Court in the case of Aboobakar Abdulrehman and Co. v. Shreeji Properties, AIR 1993 Bombay 265 after going through the various decisions, that, "during the time the property is in custody / charge of the Court in the hands of the Receiver on behalf of the Court, no rights of the Receiver on behalf of the Court, no rights can be created in the property which would defeat the ends of justice and incapacitate the Court from giving relief to the one who is entitled to it according to the decree or final order of the Court."

14. As the appellants, admittedly, came in possession of the suit land after the suit land became custodia legis since 27th October 1980, they have no right to resist or obstruct execution of the decree.

15. Moreover, it is also a matter of record that the appellants are claiming their possession through original defendant No.2, as his tenants. It is again a matter of record that the appellants had filed Suits for declaration of their tenancy rights in the suit structures in the Small Causes Court against defendant No.2. In this respect, it would be useful to refer to the cross-examination of appellant - Nitin Welji Satra, who has examined himself in his own Chamber Summons and also as Power of Attorney holder of his mother Veljiben, who is applicant in other two Chamber Summons. It is admitted by him that appellants are in possession of the suit structures since 1996. Previous to appellants, uncle of appellant - Nitin

was in possession of the suit structures i.e. Gala Nos. 28 to 30. The uncle of appellant - Nitin had gifted the suit structures to him and his mother. The Gift Deed was oral. However, it is not mentioned in his affidavit that his uncle had gifted the suit structures. Further it is stated that the appellant - Nitin has paid maintenance charges to defendant No.2-Rajendra Brothers. However, he is not having any receipt to show that he has paid this amount as maintenance charges. He has admitted that, in all those receipts, defendant No.2-Rajendra Brothers had mentioned that the amount was received from him and his mother towards the rent. He has admitted that he has not filed any application to correct the contents of the rent receipts to show that he has paid those charges as maintenance and not as rent. However, he has not taken any action against defendant No.2 for issuing rent receipts instead of maintenance receipts. He has further admitted that, in the affidavit filed in support of the Chamber Summons, he has stated that defendant No.2 had issued a rent receipts in his favour. Further, he has admitted that he has filed a Suit in the Small Causes Court, Mumbai, wherein he has sought a declaration that he is tenant of the suit structures. He has not filed any Suit or application in any Court claiming himself as owner of the suit structures, on the basis of the alleged oral Gift Deed.

16. Thus, his cross-examination is more than sufficient to prove that the appellants are not having any independent right over the suit structures and they are claiming those rights through original defendant No.2 as his tenants. This Rajendra, who has issued rent receipts to the appellants, is a son of defendant No.1-Tarachand and on the rent receipts, the address of Tarachand Mishra Chawl is mentioned, which clearly shows that the appellants' structures are standing on the suit land.

17. It, therefore, follows that, when the appellants are claiming possession over the suit land on the basis of the tenancy created during pendency of the Suit, then such tenancy or possession being hit by the principle of *lis pendens*, under Section 52 of the Transfer of Property Act, they have no right at all to resist execution of the decree. The law on this aspect is no more *res integra* and no authority is required to state the legal position that an obstructionist can successfully resist execution of the decree only he is able to establish his independent right, title over the property. In this case, on their own pleadings and evidence, the appellants have miserably failed to do so, as they are claiming through the Judgment-Debtor.

18. As to the contention raised by the appellants relating to exact location of the suit structures, if one has regard to the facts discussed above, then it is apparent that this contention is clearly a last ditch attempt on the part of defendant Nos.1 and 2 to protract execution of the decree one way or another and now through appellants, whom they have inducted in the suit structures during pendency of the Suit. Once it is held that the appellants are claiming through original defendant No.2, then it follows that the decree is passed in respect of the structures which were falling in part of the suit land, on which defendant Nos.1

and 2 were found to have made encroachment in the year 1980, when Court Receiver was appointed to measure the suit land in order to assess the encroachment made thereon by defendant Nos.1 and 2.

19. It is also a matter of record that in Execution Application No.102 of 1999, arising out of the decree passed in Suit No.1173 of 1971, respondent Nos.1 to 11 - original plaintiffs had taken out Chamber Summons No.397 of 1999 for direction to Court Receiver to take possession of the suit land, by removing structures standing thereon, from the tenants, occupants, agents and the defendants. After service of notice of that Chamber Summons, original defendants took out Notice of Motion No.3077 of 1999 for setting aside the decree dated 15th July 1997. However, the same was dismissed. Defendant No.2 preferred Appeal from Order No.600 of 2000, which also came to be dismissed by this Court. The Chamber Summons No.397 of 1999 taken out by the plaintiffs was made absolute on 19th September 2000. Defendant No.2 challenged that order by filing Writ Petition No.5680 of 1998 in this Court, which came to be dismissed by this Court on 10th January 2013. Thus, it is clear that after all the attempts made by defendant No.2, the Judgment-Debtor has failed, now this is one more attempt made by him, through his tenants - the appellants herein, to obstruct execution of the decree.

20. Even in respect of the contention of the appellants that suit structures fall in Survey No.120, which is on periphery of Survey No.118, the learned counsel for respondent Nos.1 to 11 has produced on record the copy of the common order passed by this Court on 9th July 2015 in Writ Petition Nos.6456 of 2015, 6558 of 2015, 6460 of 2015 and others, which were preferred by these appellants and other occupants challenging the order passed by the executing court on 26th June 2015 in Chamber Summons No.984 of 2015 filed by the appellants and other occupants for amending their pleadings relating to location of their suit structures on the basis of the plan drawn by DILR. The same documents and the plans, which are now relied upon, were produced and relied upon in the Trial Court and in this Court also in these Writ Petitions. The similar contention was advanced that their structures are in Survey No.120 and not in Survey No.118. It was also contended that under the garb of executing the decree passed in S.C. Suit No.1173 of 1971, the respondents - decree holders will dispossess them from Survey No.120. This Court has categorically observed, while dismissing the Writ Petitions, that, the amendment proposed by the appellants is malafide, not bona fide and is made with a view to delay execution of the decree. Special Leave Petition No.21286 of 2015 preferred against the said order also came to be dismissed by the Hon'ble Supreme Court on 7th August 2015. Hence, now nothing remains at all to look into that issue again.

21. Now, once the decree is passed against original defendant No.2, it follows that the present appellants, who are claiming through defendant No.2, are also bound by the said decree and now it is too late in a day for the appellants to contend that the said decree is not binding on them and, therefore, it should not

be executed on the count that their structures are falling outside the area of the suit land.

22. As to the contention of the appellants that the suit structures have been declared as falling in slum area and hence, without permission of the Competent Authority, under Section 22 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, decree cannot be executed against them, it would be again useful to refer to the cross-examination of the appellant - Nitin.

23. He has admitted that he has not paid any charges to Slum Rehabilitation Authority in respect of his structures and, by mistake, he has not mentioned in the Suit filed in Small Causes Court that the structures are falling in the slum area. He has also admitted that he has not received any notice from Slum Rehabilitation Authority or Mumbai Metropolitan Region Development Authority in respect of the suit structures and he is also not having document, like, photo-pass, to show that the suit structures are falling in the slum area.

24. In this respect, learned counsel for the respondents has also pointed out that the dispute involved in the instant case is already covered in earlier litigation and has attained finality. It is a matter of record that there were in all 34 occupants, against whom the decree was sought to be executed. Out of them, 18 occupants had filed Chamber Summons in the Trial Court. On dismissal of those Chamber Summons, they had preferred various Appeals in this Court, bearing No.1190 of 2015 and others, and this Court has, vide its order dated 24th February 2016, dismissed all those Appeals. Against the said order, Review Petition No.3 of 2016 was preferred, which also came to be dismissed on 12th April 2016. Against the said order, Special Leave Petition No.13566-13597/2016 was preferred in the Hon'ble Supreme Court and it also came to be dismissed on 6th June 2016.

25. Even the cursory perusal of the averments made in the Special Leave Petition and in the earlier Chamber Summons preferred by the other occupants reveals that the similar contentions, which are raised in these Appeals, were raised therein also, that, the structures in their possession are not falling in Survey No.118, but in Survey No.120 and the said area is covered under the Slum Zone. All those contentions were considered at length by this Court in the above-said First Appeals and thereafter, having regard to all the documents produced on record, especially, the fact that these occupants are claiming possession through original defendant No.2 as the tenants of defendant No.2, they have no independent right to remain in possession of the suit structures and there was also no ground or reason to have any confusion about the location of the suit structures; especially, considering the map drawn by the Court Receiver, at the time of taking possession of the suit land. Those contentions were rejected. The said observations and findings, as recorded by this Court in the above-said First Appeals, were challenged before the Supreme Court and, as stated above, the Hon'ble Supreme Court, in Special Leave Petition No.13596-13597/2016, has categorically held that, no ground for interference is made out in exercise of its

jurisdiction under Article 136 of the Constitution of India. All Civil Special Leave Petitions were, accordingly, dismissed. It was also further directed that all the petitioners therein should vacate and handover peaceful possession of the premises in their occupation on or before 31st July 2016. It is admitted position on record that, accordingly, all the petitioners therein have handed over peaceful and vacant possession of the premises in their possession.

26. Now, so far as the present appellants are concerned, having regard to the fact that they have raised the same contentions, which were already raised in the said litigation filed by those occupants, and as those contentions are already rejected on merit by this Court and those findings have achieved finality, being confirmed by the Apex Court by dismissing the Special Leave Petitions preferred by them, the issue involved in the present Appeals being no more open for consideration, the net result is that these Appeals and the Civil Applications filed therein for measurement of the land through DILR need to be and, accordingly, stand dismissed.

27. These matters are circulated again on 6th October 2016 by learned counsel for the appellants seeking stay to the order passed by this Court on the ground that the status-quo order was running till 19th August 2016. Now the appellants intend to approach the Hon"ble Supreme Court against this order passed by this Court and hence the same protection may be extended to the appellants, otherwise the Court Receiver may demolish the suit structures.

28. Learned counsel for the respondents strongly resists this prayer on the count that the appellants are not at all in possession of the suit structures. They have already created third party interests. The Court Receiver has sealed the suit structures. The matter is kept lingering since 1971 and hence when there is no order of status-quo running as on today or till yesterday, when the matter was decided, there is no question of extending the said protection.

29. There is much substance in the submission advanced by learned counsel for the respondents that, as on the date, when the matter was decided yesterday by this Court, the order of status-quo was not in existence. It was not extended from 19th August 2016. Moreover, it is the Court Receiver who is in possession and not the appellants and the matter is being protracted since the year 1971. Hence, there is no question of granting any stay to this order passed by this Court or extending the order of status-quo. This prayer is, accordingly, rejected.