

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4504 OF 2022

Hirabai Dattatray Mankar

....Petitioner

V/S

Dodke Associates
through its Partner

....Respondent

...

Mr. Ashish A. Gatagat for the Petitioner.

Mr. Sanjay Kshirsagar for Respondent No.1.

...

CORAM: SANDEEP V. MARNE, J.

DATE : 24 JANUARY 2023.

ORAL JUDGMENT:

1 Rule. Rule made returnable forthwith. By consent of parties, Petition is heard finally.

2 By this Petition, Petitioners challenge order dated 11 September 2019 passed by 6th Joint Civil Judge Senior Division, Pune in Regular Darkhast No.781 of 2012. By that order the Executing Court has recorded that nothing in the decree remains to be executed on account of execution of the sale deed by Decree-Holder and Judgment-Debtor in favour of third party. The Decree is held to be satisfied and the execution proceedings are closed.

3 Though the Petitioners were not parties to the suit, they came to be added as Judgment Debtors to the execution proceedings bearing Regular

Darkhast No.781 of 2012. Petitioners filed their objections to the execution on 8 March 2005 and 28 April 2005. It is contended that without deciding their objections, the executing Court has proceeded to close the execution proceedings by recording satisfaction of decree.

4 Appearing for the Petitioners Mr. Gatagat, learned Counsel would draw my attention to the Objection Applications filed by Petitioner Nos.1 and 2. He would further draw my attention to the Development Agreement dated 31 January 2008 executed in favour of M/s. Rahul Constructions (second assignee of decree) in which the share of Petitioner Nos.1 and 2 was acknowledged. He would also draw my attention to the power of attorney dated 31 January 2008 executed in favour of the second assignee which is restricted to land admeasuring only 29 gunthas.

5 Mr. Gatagat, would therefore contend that since the share of Petitioner Nos.1 and 2 in the suit property was admitted in the Development Agreement executed in favour of second assignee, the executing court ought to have decided the Objection Application filed by Petitioner Nos.1 and 2 rather than recording satisfaction of the decree. He would therefore, press prayer clause (b) of the Petition for restoration of execution proceedings for adjudication of Objections filed by the Petitioners.

6 Per contra Mr. Kshirasagar, the learned Counsel appearing for the Respondent No.1 would contend that Petitioner Nos.1 and 2 did not pursue their objections filed in the year 2005 for 14 long years till the impugned order was passed on 11 September 2019. He would rely on judgment of this Court in ***Shakuntala Shamsingh Mali vs. Housing Development Finance Corporation Ltd. (2014) 2 Mh.L.J. 974*** in support of his contention that no relief can be granted in the light of negligent conduct on the part of Petitioners. He would also seek dismissal of the Writ Petition on account of delay in filing the present Petition.

7 Mr. Kshirasagar, the learned Counsel would also draw my attention to the prayers made in the Objection Application and submit that the prayers were in the nature a fresh suit which otherwise would not have been decided in execution proceedings. He would submit that the Petitioners would otherwise not be remediless as they can always file their own suit seeking declaration of their share in the suit property, if any. He would further submit that half of the property is otherwise retained by the family and the Petitioners, who are sisters, can always file their own proceedings claiming their share in the property.

8 Rival contentions of the parties now fall for my consideration.

9 The proceedings arose out of Special Civil Suit No.1407 of 1992 filed for specific performance of Agreement to Sale. The Suit was compromised and decreed on 17 December 1994 under which Defendants in the suit were directed to execute sale deed of the property by accepting an amount of Rs.3,68,750/- from Plaintiffs. It appears that despite the decree, Defendants failed to execute sale deed in favour of Plaintiffs on account of which execution proceedings came to be filed by the first assignee of the Decree in the year 2004. Though the Petitioners were not parties to the suit, they were added as parties to the execution proceedings. They filed their objections to the execution of the decree in the year 2005. In the Objection Applications declarations was sought to the effect that Petitioner Nos.1 and 2 have undivided share in the suit property with further prayers for partition and separate share. The prayers were thus in the nature of a fresh suit. After lodging the objections it appears that the Petitioners did not pursue their objections before the executing court. In the meantime, several developments occurred when the decree was assigned twice. Ultimately a sale-deed of the suit property came to be executed in favour of the third assignee and the entire dispute was amicably resolved. On an Application being made by the third assignee about satisfaction of the decree, the trial Court has passed order on 11 September 2019 recording satisfaction of the decree.

10 Upon being repeatedly questioned as to whether the Petitioners or their Advocates were present before the Court when the order dated 11 September 2019 was passed, the learned Counsel for the Petitioners is unable to answer the query. On the contrary, the learned Counsel appearing for Respondent No.1 has strenuously submitted that the Petitioners never attended or prosecuted their objections before the executing Court for 14 long years, from which an inference is required to be drawn that they were negligent and not interested in pursuing their objections. In this regard, reliance of Mr. Kshirasagar on the judgment of this Court in ***Shakuntala Shamsingh Mali*** (supra) is apposite. This Court held in paragraphs 9 to 13 as under:

“9. Adv. Mr. S.V. Adwant for the contesting respondent No.1 draws my attention to the fact that the execution proceeding Spl. Dkt. No.11/1998 was initiated way back on 21-02-1998. According to him, the petitioner has merely resorted to a formality by submitting an application Exh.19 raising objections and has thereafter not resorted to any diligent steps to have the said application decided. He further states that if the submissions of the petitioners are accepted, it would mean that any litigant would file objections u/s. 47 of the Civil Procedure Code and thereafter leave the application pending so as to stall the progress of the execution proceedings.

10. According to Adv. Mr. Adwant, if this modus operandi is approved by any pronouncement of the Court, it would amount to litigant's taking dis-advantage of the same as is found in this case.

11. He is in agreement with the learned Advocate for the petitioners so far as the transfer of Spl. Dkt. No.11/1998 to the Civil Judge, J.D. Chalisgaon, Dist.Jalgaon and it being renumbered as R.D. No.24/2001.

12. He further submits that despite the said Darkhast having been transferred and it being received on 30-03-2001 in the Court of Civil Judge, J.D. Chalisgaon, as is evident from page No.15 of the paper book, the petitioners have thereafter not initiated any step to have Exh.19 decided. **According to him, the conduct of the petitioners clearly indicates that they are negligent, inasmuch as, have deliberately kept Exh.19 pending to stall the execution proceedings.** In the original proceedings, also the petitioners were negligent and even in these proceedings, Exh.19 is pending for a period of almost 11 years. The impugned order of attachment is dated 07-10-2011. He clarifies that the order of attachment was also passed earlier on 04-07-1998 as can be seen from page No.15 of the paper book.

13. In the light of the above, though I am in respectful agreement with a view taken by the learned Single Judge of this Court in the Sarojini's case (supra), the same can be of no avail to the petitioners in the light of their conduct and negligence on their part.”

(emphasis supplied)

11 In the present case also the objections appear to have been filed merely as a formality and the same was never prosecuted. Two years after satisfaction of decree was recorded by the executing court, Petitioners seems to have smelled an opportunity of re-opening the execution proceedings citing the pretext of non-decision of their objection, which they did not bother to prosecute for 14 long years. The closed execution proceedings cannot be permitted to be reopened for such indolent Petitioners, that too for decision of their objections which can be decided only in a suit.

12 Perusal of prayers raised in the objection petitions would indicate that the same are in the nature of prayers which would be sought in a fresh suit. In execution proceedings such prayers for partition and separate possession could not otherwise have been granted. Such prayers can always be sought by the Petitioners by filing a separate suit. In this regard Mr. Kshirasagar has relied upon judgment of this Court in ***Lalitikumar Ramlal Sharma vs. Jadavbai Murlidhar Shama (2002) 4 Mh.L.J. 649***. In which it is held that bar of filing separate suit is not attracted if objecting person is not party to a suit. In the present case, Petitioners were not parties to the suit and therefore a separate suit filed by them seeking partition and separate share may not be barred.

13 In the result, I do not find any error being committed by the executing court in passing the order dated 11 September 2019. The Petition is devoid of merits, it is dismissed without any order as to costs. Rule discharged.

(SANDEEP V. MARNE, J.)