

Dattya Vs. Vithal

Dattya Vs. Vithal

SooperKanoon Citation : sooperkanoon.com/355535

Court : Mumbai

Decided On : Apr-26-1988

Reported in : 1990(1)BomCR304; 1989MhLJ741

Judge : K.N. Patil, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 2(1) and 35(2)

Appeal No. : Civil Revision Application No. 53 of 1988

Appellant : Dattya

Respondent : Vithal

Advocate for Def. : R.R. Jethlia, Adv.

Advocate for Pet/Ap. : A.G. Godhamgaonkar, Adv.

Judgement :

K.N. Patil, J.

1. Petitioner is the original judgment debtor. Respondent is the legal representative of original Decree-holder Dattya Gangya. In this civil revision petition, the petitioner challenges the order dated 16-1-1988 passed by the Civil Judge, Senior Division, Nanded, directing execution of the decree passed in Special Civil Suit No. 15 of 1968 holding that the compromise for adjustment dated

3-1-1978 filed in Special Darkhast No. 31 of 1977 is null and void and does not prevent the decree-holder from executing the decree.

2. The facts in brief are :

Special Civil Suit No. 15 of 1968 was filed by Dattya Gangya against Gangya Dhondya Mahar (defendant No. 1), Dhondabai w/o Gangya Mahar (defendant No. 2) and Dattya s/o Dhondya Mahar (defendant No. 3), claiming to be the adopted son of defendant Nos. 1 and 2 and praying for recovery of Khas possession of the agricultural lands, survey Nos. 115-A, 123 and 127 situate at village Pangri Taluka and District Nanded and for cancellation of the sale-deed executed by defendant No. 2 in favour of defendant No. 3 in respect of lands survey Nos. 123 and 127. The suit was decreed on 7-2-1968. Defendants Nos. 1 to 3 filed First Appeal No. 66 of 1970 in the High Court. The first appeal was decided on 16-11-1977. The decree for possession was modified and a joint decree for possession was passed in favour of the plaintiff and defendants Nos. 1 and 2.

3. On 3-12-1977 decree-holder Dattya Gangya filed Special Darkhast No. 31 of 1977 for recovery of Rs. 676/- to which he was entitled by way of costs. It may be mentioned that the decree-holder did not apply for execution of the decree for possession of the agricultural lands but the execution was restricted to the recovery of amount of costs and the Court had ordered issuance of warrant under O. 21, R. 43 of the Code of Civil Procedure ('Code' for short). On 3-1-1978, an application was filed on behalf of the decree-holder requesting the Court to take up the Darkhast on Board, as the parties wanted to file a compromise petition. According the compromise was filed in the Court on the same day which is signed by the judgment-debtor and bears the thumb mark of the decree-holder. It is also signed by Their Advocates. By this compromise the decree holder agreed to give half share in all the three lands to the judgment debtor. It is also mentioned in the compromise that the judgment debtor delivered possession of half share in all three lands to the decree-holder with standing crops. The judgment debtor agreed to pay Rs. 600/- in full satisfaction of the costs amount. On this compromise the Court made an endorsement 'Seen the purshis'. On 18-2-1978 the decree-holder passed a purshis informing the Court that he received the amount of costs from

the judgment debtor and, therefore, the darkhast be disposed off in full satisfaction. On 18-2-1978 the Executing Court passed the following order on Exhibit 1 in Special Darkhast No. 31 of 1977 :

'Dt. 18-2-1976 Read Exhibit 5. Darkhast is closed in full satisfaction'.

Civil Judge, Sr. Dn.

Nanded.

4. On 15-7-1980, the respondent Vithal Dattya filed Special Darkhast No. 12 of 1980 for execution of the decree. The darkhast was filed for recovery of possession of three lands and costs. On 5-1-1982, the darkhast was dismissed as the decree-holder and his Advocate were absent. It was pointed out by the judgment debtor that the decree was fully satisfied in view of the compromise and the adjustment of the decree recorded in Special Darkhast No. 31 of 1977. Again Respondent filed Special Darkhast No. 24 of 1982 in which he challenged the compromise on the ground of fraud. He denied that there was compromise or adjustment of the decree. On the other hand, petitioner-judgment debtor contended that the decree was fully satisfied in view of compromise. The Executing Court dismissed the execution application on 11-3-1983 on the ground that same was not tenable in view of the compromise in Special Darkhast No. 31 of 1977. Respondent Vithal challenged the dismissal of Special Darkhast No. 24 of 1982 in Civil Revision Application No. 540 of 1983. It was found that the Executing Court passed the order on an erroneous assumption of the compromise being recorded and/or certified and made no efforts to go into and determine serious questions raised by the Darkhastdar qua the alleged compromise. It was also pointed out that the High Court had passed the decree for joint possession in favour of the plaintiff and original defendants Nos. 1 and 2 and defendants Nos. 2 and 3 were not parties to the alleged compromise. The dismissal of Special Darkhast No. 24 of 1982 was set aside and the Executing Court was directed to proceed with the case according to law.

5. After the remand of the case, parties adduced oral evidence in support of their contentions. Respondent Vithal examined himself and one witness Datta Kerba

Hemde. Petitioner Datta Dhondya examined himself and Shri Ugrasen Mukhedkar, Advocate. The Executing Court has found that there was no necessity for the decree-holder to compromise the dispute after having obtained decree in the suit. The compromise purshis does not mention specifically the portions of the lands given to the judgement debtor and the decree holder. It has held that there was no compromise between the parties and the alleged compromise dated 3-1-1978 was not recorded by the Court and does not effect the rights of decree-holder to execute the decree. Consequently, the Executing Court has ordered the execution of the decree and as stated earlier, aggrieved by the said order, the judgement debtor has come in revision.

6. The first question that arises for consideration is whether there was a compromise or settlement between the parties. Mr. Mukhedkar, Advocate, deposed that on 30-12-1977, the parties had approached and informed him about the compromise. He told them to come to the Court about 3/4 days thereafter. His evidence is that the judgment debtor and the decree-holder came and told him the terms of the compromise. He prepared the compromise which was signed by the parties and their Advocates. The compromise purshis was filed in the Court on 3-1-1978. Mr. Mukhedkar, Advocate, has been practising at Nanded since 1953. Dattya-decree holder was his client since 1966. There was no reasons for Mr. Mukhedkar to deceive his client by obtaining his thumb marks on the blank papers and utilise it for preparing the compromise. I have carefully gone through the evidence of Mr. Mukhedkar and I do not find any circumstance which would create doubt about his testimony. His evidence is consistent with compromise purshis which was filed in the Court on 3-1-1978. The Court made an endorsement 'Seen the purshis at Exhibit 7' on 3-1-1978. It is true that the compromise purshis was not properly drafted. It does not state specifically as to which half portion of the lands is given to the judgement debtor and which half portion in all the three survey numbers is given to the decree-holder. It is not also dated. It may be that these defects crept in because the purshis was drafted in hurry. Mr. Mukhedkar in his own land-writing has written the purshis stating that the decree-holder agreed to receive Rs. 600/- in full satisfaction of the costs amount. In the circumstances, it is difficult to believe the evidence of Respondent Vithal and that his father's thumb impression was obtained by the advocate saying that is was required for

withdrawing the amount from the Court. It has not been satisfactorily explained by the respondent as to why on 3-1-1978 the judgement debtor and the decree holder came to the Court when the matter was not before the Court. Admittedly, an application was filed on 3-1-1978 for taking the execution proceedings on the Board on the ground that the parties wanted to file the compromise. Respondent Vithal in his evidence has categorically admitted that his father Dattya did not complain that his thumb impressions were obtained by the Advocate by misrepresenting him that they were required for the purpose of recovery of the amount. Had the compromise been brought out as a result of fraud, father of respondent would have made complaint to the Court. The fact that the decree holder during his life time did not question the compromise would be sufficient to reject the contention of Respondent Vithal that there was no compromise and the thumb impressions of his father were obtained by fraud. The Executing Court has given undue importance to the circumstance that the parties compromised the dispute after the decision of the first appeal and that there was no necessity for the decree holder to enter into the settlement after obtaining the decree. It is not the duty of the Executing Court to ascertain the reasons as to why the parties had entered into the settlement or the adjustment of decree. In view of the compromise purshis filed by the parties in the Court, there should be no difficulty in holding that the parties had entered into the compromise or settlement.

7. Mr. R.R. Jethlia, for the respondent, argued that the adjustment not having been recorded, the decree stands and the Executing Court has rightly directed the execution of the decree. Sub rule (1) of Rule 2 of the Order 21 of the Code provides that a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree. Sub-rule (1) of Rule 2, of Order 21 of the Code provides that where any money payable under a decree of any kind is paid out of Court, in whole or in part, to the satisfaction of the decree-holder, the decree-holder shall certify such payment of adjustment to the Court whose duty it is to execute the decree and the Court shall records the same accordingly. Although the parties filed the compromise on 3-1-178, the proceedings continued before the Court on 18-2-1978, on which date the Court passed following order:

'Read Exhibit 5. Darkhast is closed in full satisfaction.'

It is not disputed that Exhibit 5 was the application filed by the decree holder for the execution of warrant under Order 21 of Rule 43 of the Code. The order passed on Exhibit 1 in Special Darkhast No. 31 of 1977, mentioned above, does not show that the Court referred to the compromise (exhibit 7) which was filed by the parties on 3-1-1978. The terms of the compromise have also not been mentioned nor there is reference about the settlement of the decree by the parties in the final order. On 18-2-1978, the decree-holder filed a purshis informing the Court that he received the costs amount from the judgment debtor and the darkhast should be disposed off a satisfied. In view of the said purshis, the Executing Court passed the order saying that the Darkhast was closed in full satisfaction. It may be mentioned that the darkhast was for the recovery of amount of costs. The decree holder had not prayed for possession of the suit lands as per the decree passed in the suit. There is absolutely no reference to the compromise or the settlement or adjustment of the decree by the parties in the order made by the Court on Exhibit 1 in Special Darkhast No. 31 of 1977. Special Darkhast No. 31 of 1977 was disposed off in full satisfaction because the decree holder informed the Court that he received the amount of costs. It is obvious that the adjustment of the decree has not been recorded by this Executing Court.

8. Mr. Godhamgaonkar for the petitioner argued that mere certification of the adjustment of the decree by the decree-holder could be sufficient compliance of sub-rule (1) of Rule 2 of Order 21 of the Code and absence of recording of the adjustment would not attract sub-rule (3) of Rule 2 of Order 21. In support of his argument that it is not necessary that the adjustment should have been both certified and recorded. Mr. Godhamgaonkar, relied upon a decision reported in Velayudhan Pillai v. Krishna Pillai A.I.R. 1954 TC 288. In Velayudhan Pillai case (supra) it has been held that :---

'The words used in Order 21, Rule 2(3) are 'certified or recorded' and not 'certified and recorded'.'

In Dattatraya Kashinath Chhatre v. Vithaldas Bhagwandas Darbar A.I.R. 1942 Bom 59 it has been held that the word 'or' in sub-rule (3) of Order 21, Rule 20

must be read as conjunctive 'and'. While dealing with this provision, it was observed :

'The view of the Allahabad High Court relying on the use of disjunctive 'or' between 'certified' and 'recorded' was that 'certified' means certified under sub-rule (1) and 'recorded' means recorded under sub-rule (2); but the ignores altogether the obligation imposed on the Court under sub-rule (1) to record the adjustment and it seems to me that construction of Order 21, Rule 2, would defeat to a large extent the purpose of the rule. The purpose of the rule appears to be to ensure that an executing Court can either act upon the decree in the form which it originally took, or if there has been an adjustment, it can act upon an adjustment recorded by the Court.'

The result is that the payment of adjustment which has not been certified and recorded cannot be recognised by the Court executing the decree. In the present case the decree holder certified the adjustment by filing compromise or settlement purshis, however, there is no evidence or record to indicate that the adjustment was recorded by the Court.

9. Another aspect of the case is that the decree sought to be executed is a joint decree and has to be executed as such. The decree for possession of the lands was made in favour of Dattya Gangya and defendants Nos. 2 and 3 jointly. Admittedly, defendants Nos. 2 and 3 were not the parties to the adjustment of the decree. An adjustment of a joint and indivisible decree for khas possession by some out of the entire body of the decree-holders is neither bona fide nor valid in law. It is not open to one of the three joint decree holder of the decree to adjust the decree so as to bind other decree-holders. One out of several decree-holders needs to have specific authorisation from other decree to enter into a compromise or adjustment on behalf of the other decree-holders. No such specific authorisation in favour of Dattya was alleged by the judgment debtor in his objection. Petitioner Dattya Dhondya does not allege that there was specific authorisation in favour of Dattya by other decree-holders to enter into the alleged compromise or adjustment. The decree holder had, therefore, no authority to agree to give half of the lands from the three survey numbers to the judgment debtor by way of

adjustment of the decree ignoring the rights of the other decree-holders to have khas possession of the three lands jointly with him. Ascertaining the respective shares of the decree-holders in a joint decree is foreign to the nature of the execution proceedings. In the absence of any specific authority it cannot be said that the adjustment of the decree by the decree-holder Dattya with the judgment debtor Dhondya is a legal adjustment.

10. In Dattatraya Chhatre's case (supra) it has been held that an application under Rule 2(1) being made by the decree-holder in prima facie an application against his own interests. No duty is cast upon the Court to consider whether the arrangement is proper one or not. The Court must, however, consider whether the arrangement to be recorded is an adjustment, that is to say, a legal adjustment. The Court, under sub-rule (1), is not a 'mere recording machine', it has to satisfy itself that the adjustment which it is asked to record is a legal adjustment.

11. Under Order 21, Rule 2(1) of the Code, a decree-holder may certify the adjustment of the decree. However, the Court is not bound to record the same. It is true that the Executing Court is not concerned to go into the dispute as to whether the adjustment has been proper or not but it is not bound to record the adjustment which is not legal.

12. In the instant case the Executing Court has not recorded the adjustment, may be, because it is not legal. Whatever it may be, since the adjustment has not been recorded, it cannot be recognised under Order O. 2, R. 2(3) of the Code. In my opinion, therefore, the adjustment not having been recorded, the decree stands and the Executing Court must execute the decree ignoring the compromise of the settlement.

13. Mr. Jethlia argued that the finding of the Executing Court that there was not compromise is a finding of fact and cannot be interfered in revision and for this purpose he relied upon a decision reported in M/s. D.L.F. Housing and Construction Co. (p) Ltd. v. Sarup Singh and others, : [1970]2SCR368 . In the instant case, the lower Court has totally ignored the written compromise which was filed by the parties in the proceedings on 3-1-1978 and the finding is based on the surmises that there was no need for the decree-holder to compromise the dispute

after the decision of the first appeal. This has necessitated me to consider the evidence. I am convinced that the finding of the trial Court that there was no compromise is untenable in view of the oral and the documentary evidence on the record.

14. To conclude, petitioner, judgment-debtor, could not resist the execution of the decree successfully in view of the bar under Order 21, Rule 1(3) of the Code.

15. In the result, revision fails and is dismissed. No order as to costs. Rule discharged.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com