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(1997) 07 BOM CK 0116

Bombay High Court (Aurangabad Bench)

Case No: Civil Revision Application No. 371 of 1997

Ramchandra Multani — APPELLANT

Vs

Chander Sharma — RESPONDENT

Date of Decision: July 9, 1997

Acts Referred:

- Bombay City Civil Court Act, 1948 - Section 12, 3, 5
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 43, 38, 39(2)
- Judicial Services Recruitment Rules, 1956 - Rule 3, 5

Citation: (1998) 3 BomCR 169 : (1997) 3 MhLj 444

Hon'ble Judges: R.G. Deshpande, J

Bench: Single Bench

Advocate: R.R. Mantri, for the Appellant; L.B. Pallod, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R.G. Deshpande, J.
The questions those need to be decided in the present matter are, as to whether the City Civil Judge, Bombay is subordinate to the Court of Civil Judge, Senior Division and, whether was the Civil Judge, Senior Division right in transferring a decree for execution to City Civil Court, Bombay u/s 39(2) of the Civil Procedure Code, 1908.

2. In nutshell, the facts of the case can be narrated as under :---

The present petitioner-Ramchandra, filed Special Civil Suit No. 54/1992 in the Court of Civil Judge, Senior Division, Ahmednagar, naturally against the respondent-Chander Sharma. The learned Civil Judge, Senior, Division, Ahmednagar, who dealt with the matter, by his Judgement and order dated 5th December 1996 decreed the suit and necessary decree was drawn. To get the said decree executed, Special Darkhast No. 61/97 was initiated at the instance of the petitioner-decree holder. The total amount due

on the date of the execution petition was Rs. 17,91,154/-. It would be necessary to mention at this stage only that during the pendency of the suit, the learned Civil Judge, Senior Division, had already passed an order of attachment before judgment of the movable property of the present judgment-debtor. The property is in the nature of positive and negative prints of two films, i.e. movies, the names of which are, "Ghar Ki Mahabharat" and "Meri Janeman". This attachment before judgment was naturally by deputing a Special Bailiff from Ahmednagar Court itself and the said attachment was ordered to be continued by necessary orders passed by the learned Judge of the trial Court, from time to time as is clear from Annexure "A" page 10 of the petition.

3. The petitioner in the above-said Special Darkhast No. 61/97 did request the learned Civil Judge, Senior Division, Ahmednagar to direct further attachment of the said prints under Order 21, Rule 43 of the CPC who, in turn, issued necessary warrant addressed to the City Civil Court, Bombay to attach the said films. The petitioner took the warrant to City Civil Court, Bombay and prayed for Special Bailiff. However it is the grievance of the petitioner that no such Special Bailiff was provided by the City Civil Court, Bombay and hence action could not be taken; on the other hand, the said warrant was returned by the Registrar of the City Civil Court, Bombay unexecuted.

4. Inaction on the part of the City Civil Court, Bombay compelled the petitioner to file an application Exh. 16 on 1-4-1997, before the learned Civil Judge, Senior Division, Ahmednagar who had passed the decree to grant Special Bailiff to attach the said prints, so that necessary action to dispose of the said property could be taken. However surprisingly, according to the petitioner, the learned Judge of the trial Court by his order dated 2-4-1997 passed below Exhs. 1 and 16, not only declined to grant Special Bailiff but suo motu passed an order directing transfer of the decree itself to the City Civil Court, Bombay. This powers of suo motu transfer of the decree appear to have been exercised u/s 39(2) of the Civil Procedure Code. It is the grievance of the petitioner that since the property was already under attachment of the Court of Civil Judge, Senior Division, Ahmednagar and the same being a movable one, the learned Judge of the trial Court should have ordered for Bailiff under Order 21, Rule 43 of the CPC and should have further ordered in respect of its disposal for recovery of the decreetal amount.

5. The petitioner''s grievance is that the prints i.e. negative and positive of above-said two movies, no doubt, are perishable one and immune to natural decay. He had, therefore, sought for immediate action for its safe custody and disposal. It is the grievance of the petitioner that there is no other property movable or immovable, with the judgment debtor as per the knowledge of the petitioner, from which such a huge decreetal amount could be recovered. The petitioner states that the prints of the movies is not a commodity which could be sold freely in open market.

6. Since the learned Civil Judge, Senior Division, Ahmednagar passed the order of transfer of the decree to City Civil Court, Bombay, that too of his own motion, the present petitioner - decree holder is naturally aggrieved by the same. According to the petitioner,

the order is per se illegal as u/s 39(2) of the Code of Civil Procedure, the learned Civil Judge, Senior Division, could not have transferred the decree for execution suo motu to City Civil Court, Bombay, as according to the petitioner, the City Civil Court, Bombay is not a subordinate Court to Civil Judge, Senior Division, Ahmednagar.

7. I have heard Shri R.R. Mantri, the learned Advocate for the petitioner, at length, as also Shri L.B. Pallod, for the sole-respondent.

8. Shri Mantri, the learned Advocate for the petitioner, argues that by no stretch of imagination, the City Civil Court could be termed or treated as a subordinate Court to the Court of Civil Judge, Senior Division and, therefore, according to him, the [earned Judge of the trial Court, committed an error in transferring the decree for execution to City Civil Court, Bombay that too on his own motion. To find out the correctness in this argument, I have gone through the provisions of the Bombay Judicial Service Recruitment Rules, 1956 as also through the provisions of the City Civil Court (Bom.) Act. 1948.

9. Section 3 of the City Civil Court (Bom.) Act, 1948 deals with Constitution of City Court, which reads as under:---

"3 Constitution of City Court :-- The State Government may be notification in the Official Gazette, establish for the Greater Bombay a Court, to be called the Bombay City Civil Court. Notwithstanding anything contained in any law, such Court shall have jurisdiction to receive, try and dispose of all the suits and other proceedings of a civil nature arising within the Greater Bombay, except suits or proceedings which are cognizable -

(a) by the High Court as a Court of Admiralty or Vice-Admiralty or as a Colonial Court of Admiralty, or as a Court having testamentary, intestate or matrimonial jurisdiction, or

(b) by the High Court for the relief of insolvent debtors, or

(c) by the High Court under any special law other than the Letters Patent; or

(d) by the Small Cause Court:

Provided that the State Government may, from time to time, after consultation with the High Court, by a like notification extend the jurisdiction of the City Court to any suits or proceedings (which are cognizable by the High Court as a Court having testamentary or intestate jurisdiction or for the relief of insolvent debtors."

10. Section 5 of the said Act deals with the subordination to and superintendence by High Court, which clearly says that the City Civil Court shall be deemed to be a Court subordinate to and subject to the superintendence of the High Court within the meaning of the Letters Patent of the High Court and of the Code o! Civil Procedure, 1908. This section makes it clear that the City Civil Court is subordinate to High Court only and there is no other Court to which it could be said to be subordinate, else necessary mention

would have been made in section 5 itself of the Act. It is also necessary to refer to section 12 at this stage of the Act. Section 12 bars even the jurisdiction of High Court except in certain cases. Section 12 reads as under :--

"12. Notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court:

Provided that the High Court may, for any special reason, and at any stage remove for trial by itself any suit or proceeding from the City Court."

11. Another section relevant to find out the exact placement of City Civil Court in the hierarchy is section 15 of the Act. As per section 15 appeal is provided directly to the High Court from every decree passed by the Judge of the City Civil Court, which clearly means that there is no other Court in between the City Civil Court and the High Court which could be said to be superior to or to which the City Civil Court could be treated to be subordinate. This provision if read along with certain relevant Rules from the Bombay Judicial Service Recruitment Rules, 1956 (hereinafter referred to as "the Rules" for the purposes of brevity), would make it still clear that the City Civil Court, Bombay cannot be said to be subordinate to Civil Judge, Senior Division. Rule 3 of the Rules deals with the constitution of service which gives a clear picture that the judicial services shall consist of two branches, namely, Junior Branch and Senior Branch. Sub-Rule (2) of Rule 3 above deals with the constitution of Junior constituent branch which, of course, if seen carefully, does not include the Judge of City Civil Court, Bombay. However, Civil Judges (Sr. Dn.); Chief Judicial Magistrates and Addl. Chief Judicial Magistrates, appear to have been included in the Junior Branch. This is clear from Clause (2) of sub-Rule (2) of Rule 3, which appears to have been introduced in the Rules by Government notification dated 22nd December 1981. Rule 4 deals with the method of recruitment to the Junior Branch which also, again, include in sub-Rule (2) thereof the recruitment of Civil Judges (Sr. Dn.), Chief Judicial Magistrates and Addl. Chief Judicial Magistrates. All these provisions are required to be seen to find out the exact placement of Civil Judge, Sr. Dn., in judicial hierarchy.

12. Rule 5 of the above-said rules deals with the method of recruitment to the Senior Branch which include the recruitment of Principal Judge (and the Additional Principal Judge,) Bombay City Civil Court, District Judges etc. Rule (ii) of sub-Rule 2 of Rule 5 deals with the appointment to the post of Judges of the City Civil Court, Bombay. The relevant clause thereof is Clause (b) which reads as under :--

"(b) in consultation with the High Court from (the District Judges, the Chief Judge (and the Additional Chief Judges) of the Small Causes Court, Bombay, and (the Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrates, Bombay)."

13. From the above-said study of the relevant provisions of the Act and the Rules, it is clear beyond doubt that the City Civil Court, Bombay, by no stretch of imagination, could

be said to be a subordinate Court to the Court of Civil Judge, Sr. Dn. and if this Court comes to this conclusion, then it would be easier to find out as to whether the order passed by the learned Civil Judge, Senior Division, Ahmednagar, transferring the decree suo-motu for execution to City Civil Court, Bombay, could be said to be well within his powers or in excess of jurisdiction vested in him.

14. Section 39 of the CPC deals with the subject of transfer of decree. Sub-section (1) of section 39 is as under :--

"Section 39. Transfer of Decree :---

(1) The Court which passed a decree may, on the application of the decree holder, send it for execution to another Court of Competent jurisdiction-

(a) ...

(b) ...

(c) ...

(d) ...

(2) The Court which passed a decree may of its own motion send it for execution to any Subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed."

15. Sub-section (2) of section 39 clearly directs that the Court which passed a decree may of its own motion send it for execution to any Subordinate Court of competent jurisdiction. Sub-section (3) say about which Court could be said to be a Court of competent jurisdiction. Reverting back to the relevant facts in the present Revision Application, we see that Exh. 16 which was filed by the petitioner decree-holder clearly mentions that the applicant thereby has asked for a Special Bailiff under Order 21, Rule 43 and the petitioner was ready to bear ail the necessary charges therefore .Exh. 16 is required to be referred here because it is clear from Exh. 16 dated 1-4-1997 that the petitioner decree-holder had not at any point of time, requested the learned Judge of the trial Court to transfer the decree to City Civil Court, Bombay. However, the order passed by the learned Judge below Exhs. 1 and 16 on 2nd April 1997, was of his own motion, without there being any request from the petitioner to transfer the decree to City Civil Court at Bombay for execution or for that purpose to any other Court. It is, therefore, clear that the learned Judge of the trial Court exercised the powers under sub-section (2) of section 39. This cannot be said to be powers exercised under Order 21, Rules 5 and 8, because the provisions of Order 21 Rules 5 and 8 merely prescribes the procedure of

execution.

16. Sections 38 and 39 of the CPC lay down that the Court which passed the decree is primarily the Court to execute the decree but such a Court may send the decree for execution to another Court, either on the application of the decree-holder or of its own motion; however certain conditions are to be satisfied. In the present case in hand, the decree-holder did not ask the Court to send the decree for execution to another Court. But the Court of its own motion sent the decree for execution to City Civil Court, Bombay. Section 39(2) says that it could only be sent under that section, for execution to any Subordinate Court of competent jurisdiction. However, as contended by Shri Mantri and as I have observed above, City Civil Court, Bombay cannot be said to be a Subordinate Court to the Court of Civil Judge; Senior Division, even if it would have otherwise been competent to entertain the suit. In the present case, that question also does not arise because while deciding the competent jurisdiction of the Court, we will have to find out whether the suit could have been, at its initial stage tried by the City Civil Court from pecuniary jurisdiction point of view. It would, again, be worthwhile to see that neither section 38 of the CPC which provides that decree may be executed by the Court passing it or by Court to which it is transferred for execution nor section 39 which provides for power to send the decree for execution to another Court give any indication as to the pecuniary jurisdiction of the Court to which the decree is transferred for execution. The pecuniary jurisdiction of the Court to which decree can be transferred has to be determined according to the amount or value not of the decree but of the claim as was originally made in the suit. Competency of the transferee Court to execute the decree has, thus, to be determined with reference to its competency to entertain the suit in which the decree under execution is passed. In the instant case, the suit was valued at Rs. 13,57,500/-, whereas the pecuniary jurisdiction of the City Civil Court, Bombay even at the relevant time, was limited to Rs. 50,000/- which clearly means even on that count, the decree could not have been sent for execution to City Civil Court, Bombay. For this proposition, I could draw help from the reported judgment in the matter of Bindraban Kanhaiyalal Agrawal v. Kasturilal Nyahalchand Sodi and others, reported in 1978 M.L.J. 561. Thus, it is clear that where the decree is transferred for execution on the Court"s own motion, conditions in sub-section (2) of section 39 must be satisfied, namely, that it must be made to a Subordinate Court of competent jurisdiction. In the instant matter, in my opinion, the learned Judge has definitely exceeded his jurisdiction in transferring the decree for execution to City Civil Court, Bombay.

17. Shri Mantri, the learned Advocate appearing for the petitioner, invited my attention to the reported judgment in the matter of Chandravathi Amma and Others Vs. Cheripuram Payapattillath, . Relying on this judgment, Shri Mantri argued that if the decree-holder would have applied for transfer to any particular Court then there was no necessity to comply with the provisions of sub-section (2) of section 39 of the Civil Procedure Code. However, when the Court of its own decided to transfer the decree for execution, then the said powers were invested in the Court only by section 39(2), which prescribes certain

conditions; to repeat the condition of the Court being Subordinate Court and the Court also being a Court of competent jurisdiction, which has to be accepted.

18. In view of what is observed above, I do not find it difficult to observe that the order dated 2nd April 1997, passed by the learned Civil Judge, Senior Division, Ahmednagar, needs to be quashed and set aside and a further specific direction is hereby given to the learned Civil Judge, Sr. Dn. Ahmednagar to execute the decree by providing necessary assistance in the nature of Special Bailiff for execution of the decree in accordance with law. Needless to direct that the decree-holder shall furnish all necessary papers to the Court and give all necessary cooperation for immediate execution of the decree. Taking into consideration that the property in question is perishable and the properly which has a tendency of speedy decay, the execution shall be carried out with top-most priority.

19. In the result, the Revision Application is allowed. The Rule is made absolute in the above terms. However, in the circumstances of the case, there would be no order as to costs in this Revision.

20. Revision application allowed.