

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

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47 CIVIL REVISION APPLICATION NO. 52 OF 2003

NASIR ALI GHSUMIYA DIED BY L RS GHASUMIYA NISAR AL
VERSUS

KAUTIK PILA CHAUDHARI DIES BY L RS BHAGWAN KAUTIK

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Mr. P. V. Mandlik, Senior Advocate, i/by Mr. Milind K
Deshpande, Advocate for the petitioner.

Mr. P R Katneshwarkar, Advocate for Respondents 1 & 2

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CORAM : S. V. GANGAPURWALA, J.

DATE : 5th October, 2015

PER COURT :

1. The suit filed by the present respondents seeking possession of land survey No. 52/3 initially came to be dismissed. However, the said suit is decreed by this Court in second appeal, thereby directing the present petitioners/original defendant to deliver possession of the suit property to the original plaintiff/present respondents.

2. The plaintiff/present respondents filed execution proceeding bearing Regular Darkhast No.100/1976 for executing the said decree of possession. Pursuant to the notice issued by the Court, the defendant/ present petitioners raised objections to the execution by

filing their say. The Court framed following points for determination:

- "1) Whether the D.H. is entitled to get possession of field Gat No.75 ?
- 2) Whether in the alternatively, the D.H. is entitled to get possession of S.No.52/3 merged in Gat No.76 after consolidation Scheme which is in the possession of Jivram Tukaram Mahajan ?
- 3) What order ?"

The Court passed order to proceed for taking possession of Gat No. 75 and negatived the objection raised by the present petitioners vide their say. The said order is passed below Exhibit-1 on 15.11.1983.

3. Subsequently, the present petitioners filed an application under section 47 of the Code of Civil Procedure (Exhibit 142) raising the same objections which they had raised earlier by filing their say. The application Exhibit 142 is rejected. Aggrieved thereby, the present civil revision application.

4. Mr. Mandlik, the learned senior counsel for the petitioners, submits that the petitioners have every right to raise an objection under section 47 of the

Code of Civil Procedure when it affects the jurisdiction of the Court so also when it raises the question between the parties to the suit. According to the learned senior counsel, the suit was seeking possession of Survey No.52/3, which, in consolidation scheme, is converted into Gat No. 76. The petitioners are allotted Gat No. 75. No order directing possession of Gat No. 75 could have been passed by the executing Court nor the darkhast could proceed for recovery of possession of Gat No. 75. These aspects can be raised by the petitioners by filing an objection under section 47 of the Code of Civil Procedure. The learned counsel relies on the judgment of the Apex Court in a case of **Mathura Prasad Bajoo Jaiswal Vs. Dossibai N. B. Jeejeebhoy, reported in AIR 1971 SC 2355.**

5. According to the learned senior counsel, erroneous decision of the Court in respect of its jurisdiction cannot operate as res judicata. The learned senior counsel submits that the executing Court cannot go behind the decree and identify the property as to which property the decree is passed. The learned counsel relies on the judgment of the Apex Court in a

case of **Century Textile Industries Ltd. Vs. Deepak Jain and another reported in 2009 (4) Scale 501.**

6. Mr. Katneshwarkar, the learned counsel for the respondents submits that to find out true effect of the decree, the Executing Court can, in appropriate case, take into consideration the pleadings as well as the proceedings so also ascertain the circumstances. The learned counsel relies on the judgment in the case of **Bhavan Vaja and others Vs. Solanki Hanuji Khodaji Mansaang and another reported in AIR 1972 Supreme Court 1371.** The learned counsel submits that the principles of *res judicata* is applicable even in the execution proceedings. The learned counsel relies on the judgment of the learned single judge of this Court in the case of **Damodar Bhagwat Pande Vs. Narayan Bhagwat Pande, reported in 1999 (1) Mh. L.J. 187.** According to the learned counsel, the objection to execution of decree can be made only once and not repeatedly. The learned counsel relies on the judgment of the Apex Court in the case of **R.P.A. Valliammal Vs. R. Palanichami reported in 1997 (10) SCC 209.**

7. With the assistance of learned counsel, I have gone through the orders passed.

8. Prior to the order impugned in the present revision, the same objection was raised by the present petitioners by filing their say to the darkhast application and the Court, after framing points for determination, had given finding thereby negating the objection raised by the present petitioners and directed the darkhast to proceed for taking possession of Gat No.75 vide order dated 15.11.1983 passed below Exh.1. The same objection is sought to be raised again by the same judgment debtor by filing an application Exh. 142, purportedly under section 47 of the Code of Civil Procedure. The said application is filed almost after 14 years of the rejection of the earlier objection raised by the present petitioners by filing their say.

9. The *prima donna* question would be, whether such a subsequent objection in the wake of the earlier objection and rejection of the same by the Court would be tenable.

10. Section 11, Explanation VII of the Code of Civil Procedure reads as under.

11. Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree."

11. Reading the above provision, it is manifest that the principles of *res judicata* are made applicable to execution proceedings also. The references in section 11 to "any suit", "issue" or "former suit" shall be construed as references respectively to a proceeding for execution of decree,

question arising in such a proceeding and a former proceeding for the execution of that decree.

12. It is trite that principles of *res judicata* also apply to the two stages of the same proceedings. Useful reference can be had to the judgment of the Apex Court in the case of **Prahlad Singh Vs. Col. Sukhdeo Singh, reported in 1987 (1) SSC 727.**

13. In the present case, the objection as to the execution *vis-a-vis* the right of the decree holder to claim possession of Gat No. 75 was decided by the Executing Court after hearing the decree holder and the judgment debtor and by a speaking order, has rejected the objection raised by the judgment debtor vide order dated 15.11.1983 passed below Exh.1. The same objection which was earlier decided was again sought to be raised by the judgment debtor by filing an application under Section 47 of the Code. The order passed below Exhibit-1 on 15.11.1983 would certainly operate as *res judicata* for entertaining the subsequent application. Even the Apex Court in a case of **R.P.A. Valliammal**, referred supra has observed as under:

"The opportunity to object to executability of the decree could be taken only once and repeated applications appear to be unwarranted. It is not in dispute that the petitioner's mother had already agitated the right title to the property and claimed that to the extent of her right, the execution was not valid in law. That right having been negatived and having become final, the petitioner cannot have any higher right than the mother herself had. The petitioner having allowed the orders to become final, it would not be open to the petitioner to raise the contentions thereafter.

14. The order passed below Exh.1 dated 15.11.1983 is not assailed before this Court. It is submitted by the petitioners that the said order is assailed by filing the substantive suit bearing R.C.S. 34/1997. The petitioners may prosecute the said suit as may be permissible in law. However, in view of the earlier order dated 15.11.1983 being passed, subsequent application Exh.142 again raising the same objection which was already decided vide order dated 15.11.1983 would not be tenable and same would be barred by principles of *res judicata*. The principles of *res judicata* apply to two stages of the same proceeding.

15. Considering the above, the civil revision

application is dismissed. However with no order as to costs.

16. At this stage, Mr. Mandlik, the learned senior counsel seeks continuation of interim order passed by this Court earlier. Mr. Katneshwarkar, the learned counsel for the respondents opposes the said request and submits that since the year 1964, the present respondents are litigating and waiting to get fruits of the decree. Considering the fact that the interim relief was in force, the same is continued for a period of four weeks from today. Needless to state that on lapse of four weeks, the said interim protection would come to an end.

(S. V. GANGAPURWALA, J.)

JPC