

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 844 OF 2011

Kulwant Singh Chadha .. Applicant

Vs.

Ms.Patpati Tikamdas and another .. Respondents

Mr.Shoaib I.Memon, Advocate for the Applicant.

Mr.P.K.Dhakephalkar, Senior Advocate i/b Mr.Sagar A.Rane, for Respondent No.2.

CORAM : R.G.KETKAR, J.
DATED : 17th NOVEMBER, 2015

P.C. :

. Heard Mr.Shoaib I.Memon, learned Counsel for the applicant and Mr.P.K.Dhakephalkar, learned Senior Counsel for the respondent No.2 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original plaintiff has challenged the judgment and order dated 05/11/2011 passed by the learned Judge, City Civil Court, Greater Bombay in Notice of Motion No. 2703 of 2010 in S.C.Suit No. 2487 of 2005. By that order, the learned trial Judge partly allowed the Motion taken out by respondent No.2. The learned trial Judge condoned the delay in filing the Motion and set aside the exparte decree dated 06/03/2006. While setting aside the exparte decree dated

06/03/2006 passed in S.C.Suit No. 2487 of 2005, the learned trial Judge imposed costs of Rs.3,000/- to be paid directly to the plaintiff or by depositing the same in the Court within 14 days from the date of the order. The learned trial Judge further directed the applicant, hereinafter referred to as plaintiff, to amend the plaint by bringing on record Naresh Tikamdas Lilani, hereinafter referred to as the claimant, as a party defendant in place and instead of defendant.

3. The applicant had instituted S.C. Suit No. 2487 of 2005 for declaration that he became the owner of flat No. 15, 2nd floor, Casabella Co-operative Societies Limited situate on Plot No. 692, Khar (West), Mumbai (for short 'suit flat') by adverse possession against Ms.Parpati Tikamdas (for short 'original defendant'). After service of suit summons, original defendant remained absent and, therefore, ex parte decree was passed on 06/03/2006.

4. On 29/10/2010, Notice of Motion No. 2703 of 2010 was taken out by Shri Kamlesh Ghanshyamdas Kakkar claiming to be constituted attorney of the claimant. In support of that Motion, Kamlesh made affidavit inter alia contending that original defendant expired on 19/02/1992 at Barbados leaving behind her son Naresh Tikamdas Lilani, the claimant herein, being the only heir and legal representative of original defendant, since deceased. It was further contended that in the month of April 2010, the claimant came to India and visited plaintiff at his residence as he was not paying rent

of flat and permitted increases since 1966 or thereabout. The reference was also made to the notice dated 28/04/2010 issued to the plaintiff by the claimant. The reference was also made to response given by the plaintiff on 13/05/2010 wherein it was stated that plaintiff became owner of the suit flat as per the decree passed in S.C.Suit No. 2487 of 2005. It was specifically contended that original defendant had expired on 19/02/1992 and the decree obtained by the plaintiff on 06/03/2006 is a nullity. It was further asserted that the plaintiff had suppressed execution of agreement of tenancy dated 04/02/1966 whereby his father was inducted as a tenant in the suit flat. By suppressing this fact, the plaintiff had obtained the decree from the Court by playing fraud. On these among other grounds, prayer was made for setting aside the exparte decree by condoning the delay in taking out the Motion. As noted earlier, by the impugned order, the learned trial Judge has allowed the Motion partly. It is against this order, original plaintiff has instituted this Civil Revision Application.

5. In support of this Application, Mr.Memon strenuously contended that Kamlesh Kakkar was not authorised to file application under Order 9 Rule 13 of C.P.C. on behalf of the claimant as he does not have any personal knowledge. Even the power of attorney dated 29/09/2010 does not authorise Kamlesh Kakkar to file application under Order 9 Rule 13 on behalf of the claimant. In

support of this proposition, he strongly relied upon the decision of the Apex Court in the case of *Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd.*, **AIR 2005 Supreme Court, 439.**

6. Mr.Memon further submitted that only defendant can file application under Order 9 Rule 13 of C.P.C. It is also not made clear by Kamlesh Kakkar that original defendant died leaving behind legal representative other than the claimant. In the entire affidavit in support of Motion, no reference is made to other heirs and legal representatives of the original defendant, since deceased. He has taken me through the affidavit made by Kamlesh Kakkar in support of the Motion.

7. Mr.Memon further submitted that the Suit was instituted in the year 2005. The plaintiff took all the necessary steps for effecting service on the original defendant. Even, notice was published and it was pasted. In short, he submitted that after complying all the necessary formalities for effecting service on the original defendant, the trial Court proceeded with the Suit as original defendant remained absent and passed exparte decree on 06/03/2006. He submitted that the decree is duly drawn up and was registered with the Sub-Registrar of Assurances by paying the requisite stamp duty and registration charges. As the decree is registered, it is a constructive notice to the world at large. He also made reference to correspondence exchanged with the Society. In

short, he submitted that though exparte decree was passed on 06/03/2006, present Motion is taken out on 29/10/2010 and suffers from gross delay and latches. He invited my attention to the notice dated 28/04/2010 issued by the claimant through advocate to the plaintiff and reply dated 13/05/2010. At least after receipt of the reply dated 13/05/2010, the claimant acquired knowledge about passing of exparte decree. However, Motion is taken out in October 2010. The learned trial Judge, therefore, was not justified in condoning the delay and setting aside exparte decree. For all these reasons, he submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr.Dhakephalkar supported the impugned order. He submitted that the original defendant had expired on 19/02/1992. The plaintiff's father was inducted as a tenant. The plaintiff has instituted Suit for declaration of ownership by way of adverse possession. The original defendant died leaving behind Naresh Lilani as her only heir and legal representative. Kamlesh Kakkar is duly authorised to make application on behalf of the claimant under Order 9 Rule 13 of C.P.C. Basically, Suit instituted by the plaintiff for declaration of ownership by way of adverse possession itself is misconceived. In support of this proposition, he relied upon the decision of the Apex Court in the case of *Gurudwara Sahib Vs. Gram Panchayat Village Sirthala* **2014 (4)**

Mh.L.J.74. Though the plaintiff is the son of original tenant, the said fact was suppressed from the Court and the decree is obtained by playing fraud upon the Court that too against a dead person which is a nullity. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is evident from the record that original defendant expired on 19/02/1992 and to that effect, death certificate was produced on record. Her legal representatives were not brought on record. Once it is accepted that the sole defendant had expired, the trial Court could not have passed the decree against a dead person. Thus, decree passed on 06/03/2006 against original defendant is a nullity. On behalf of the claimant application was made by Kamlesh Kakkar. Mr.Memon submitted that Kamlesh Kakkar has no personal knowledge. The power of attorney also does not authorise him to make an application under Order 9 Rule 13 of C.P.C. He relied upon the decision of the Apex Court in the case of **Janaki Vashdeo Bhojwani** (*supra*). The said aspect is considered at length by the learned trial Judge from paragraphs 10 to 14. After considering the provisions of C.P.C. and in particular, Order 3 Rules 1 & 2, the learned trial Judge held that Kamlesh Kakkar is not deposing on behalf of the claimant. He has made

application on his behalf for setting aside exparte decree under Order 9 Rule 13 of C.P.C. By power of attorney dated 29/09/2010, specific power is given by the claimant to Kamlesh Kakkar to take out necessary proceedings for setting aside the exparte decree. The said power of attorney is executed before the Indian Embassy/High Commission of India at Barbados. There is no reason to disbelieve the said power of attorney executed by the claimant in favour of Kamlesh Kakkar. The learned trial Judge accordingly held that Kamlesh Kakkar was duly authorised to make an application under Order 9 Rule 13 of C.P.C. for setting aside exparte decree.

10. Mr.Memon submitted that there is no material on record to establish that the claimant is the heir and legal representative of the original defendant. The said aspect is considered by the learned trial Judge from paragraphs 15 to 17. The learned trial Judge considered the death certificate issued by the Registrar of the Supreme Court u/s. 34(1) of Vital Statistics Registration Act, 1980 as applicable in Barbados. This being an authenticated death certificate issued by the authorities under that Act, it is established by the claimant that original defendant has expired on 19/02/1992. After the death of original defendant, the claimant applied for Letters of Administration in respect of the estate left by his deceased mother-original defendant. The Supreme Court of Judicature at Barbados granted Letters of Administration dated 08/12/1992.

Mr.Memon submitted that the original Letters of Administration is not produced on record. In fact, on behalf of the claimant, only three documents were produced on record namely i) power of attorney dated 29/09/2010 ii) death certificate dated 19/02/1992 and iii) notice dated 28/04/2010. In other words, save and except these documents, no documents were produced by Mr.Kakkar. As against this, Mr.Dhakephalkar submitted that certified copy of the Letters of Administration was produced on record. Perusal of the findings recorded by the learned trial Judge in paragraph 16 shows that the Letters of Administration were produced on record. The learned trial Judge, therefore, held that the claimant is the heir and legal representative of the original defendant. He is therefore, entitled to make an application for setting aside exparte decree passed in S.C. Suit No. 2487 of 2005.

11. The learned trial Judge has also considered the effect of passing decree against a dead person from paragraphs 18 to 24 as also considered whether the suit flat was let out to father of the plaintiff under the tenancy agreement dated 04/02/1966 and recorded a prima facie finding that father of plaintiff was occupying the suit flat as a tenant and occupation of the father of the plaintiff in the suit flat was on the basis of the tenancy agreement and was not adverse to the defendant. The learned trial Judge thereafter considered plea of fraud based on the decision of the Apex Court in

the case of *S.P.Chengalvaraya Naidu (Dead) by Lrs Vs. Jagannath (Dead) by Lrs. and others*, (1994) 1 SCC 1 and noted in paragraph 24 that plaintiff did not disclose the tenancy agreement dated 04/02/1966 executed by and between the plaintiff's father and original defendant. The learned trial Judge also observed that service of summons was sought to be effected at the address given in the cause title of the plaint when in fact the defendant was residing in Madras (Chennai). The learned trial Judge, therefore, recorded a finding that the decree was obtained by playing fraud and by misleading the Court.

12. Finally, the learned trial Judge also considered whether the application under Order 9 Rule 13 of C.P.C. is maintainable. The Court recorded that it can be set aside on two grounds namely i) that suit summons was not duly served and ii) the defendant was prevented by any sufficient cause from appearing in the Court. After considering the material on record, ultimately, the trial Court held in paragraph 29 that the application under Order 9 Rule 13 of C.P.C. is maintainable as basically the decree was passed against a dead person and it is sought to be set aside by the son of original defendant. The learned trial Judge also recorded a finding in paragraphs 32 and 33 that there was no service of summons in the eyes of law upon the defendant. The learned trial Judge also considered the issue of limitation in paragraphs 34 to 37 and held

that the claimant has made out a sufficient cause for condoning the delay in filing the application. Considering the material on record and findings recorded by the learned trial Judge, I do not find that any case is made out for invocation of powers under Section 115 of C.P.C. Mr.Memon was not in a position to demonstrate that findings recorded by the trial Court are perverse being based upon no material or that it is contrary to the material on record. No case is made out for invocation of powers under Section 115 of C.P.C. Hence, Application fails and the same is dismissed.

13. It is expressly made clear that the observations made herein are tentative and prima facie and are made only for the purpose of considering correctness of the impugned order. The learned trial Judge will decide the Suit on the basis of evidence on record and in accordance with law uninfluenced by the observations made in the impugned order or in this order.

14. At this stage, Mr.Memon seeks extension of time of 4 weeks for carrying out amendment as per the impugned order. Time stipulated in the impugned order for carrying out amendment is extended by a period of 4 weeks from today. Order accordingly.

(R.G.KETKAR, J.)