

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 4567 OF 2015

1. Smt. Chandra Mohini W/o. Ashok
Kumar Bhutani, Aged about 65 years,
Occupation : Business,
2. Ku. Rakhi D/o. Ashok Kumar Bhutani,
Aged about 40 years, Occupation : Business,
3. Pankaj S/o. Ashok Kumar Bhutani,
Aged about 42 years, Occupation : Business.
4. Ku. Komal W/o. Sumit Khattar
(Nee : D/o. Ashok Kumar Bhutani,
Aged about 35 years, Occupation : House Wife.

Petitioner Nos. 1 to 4 R/o. Mal Road,
Kamptee, District : Nagpur.

.... Petitioner Nos. 1 to 4 are
Legal Representatives of
Original Defendant No.3.

5. Mrs. Madhu wd/o. Anant Bhutani,
aged about 60 years, Occu.: House Wife,
6. Sandeep S/o. Anant Bhutani,
Aged about 38 years, Occu.: Business,
7. Ms Seema d/o. Anant Bhutani,
Aged about 36 years, Occu.: Student,

Petitioner nos. 5 to 7 are R/o. Mal Road,
Kamptee, District : Nagpur.

8. Mrs. Kavita w/o. Lokesh Raheja,
Aged about 34 years, Occu.: House Wife,
R/o. 108, Mall Road, Kamptee, Nagpur.

.... Petitioner Nos. 5 to 8 are
Legal Representatives of
Original Defendant No.4.

9. Subhash S/o. Diwanchand Bhutani,
Aged about 62 years, Occu.: Business,
R/o. B.No.108, Mall Road, Kamptee,
Nagpur. Original Deft.No.8.
10. Shri Mahendra Kumar S/o. Diwanchand
Bhutani, Aged about 64 years, Occupation:
Business, R/o. B.No.108, Mall Road,
Kamptee, Nagpur. Original Deft.No.11.
11. Smt. Kulwashna W/o.Surendra Kumar Arora,
Aged about 66 years, Occupation: House
Wife, R/o. C-95, Nirman Vihar New Delhi.
.... Original Deft.No.7.
12. Jitendra S/o. Diwanchand Bhutani,
Aged about 56 years, Occupation:
Business, R/o. B.No.108, Mall Road,
Kamptee, Nagpur. Original Deft.No.11.
- **PETITIONERS.**

// **VERSUS** //

1. Mrs. Krishnakumari Wd/o. Ruplal Bhutani,
Aged about 63 years,
2. Mahesh S/o. Ruplal Bhutani,
Aged about : 45 years,
3. Naresh S/o. Ruplal Bhutani,
Aged about : 41 years,
4. Rajkumar S/o. Ruplal Bhutani,
Aged about : 39 years,
5. Ms Rekha D/o. Ruplal Bhutani,
Aged about : 35 years,
6. Deepak S/o. Ruplal Bhutani,
Aged about : 31 years,

Respondent Nos. 1 to 6 are
R/o. Rai Bahadur Oli, Netaji
Chowk, Kamptee, Distt. Nagpur.

7. Mrs. Hemlata Kumar, (Daughter of
Ruplal Bhutani, Aged about 48 years,
R/o. Kanha Engineering Works,
Chhoti Market, Modi Nagar,
Gaziabad (U.P).

8. Mrs. Mamta Chhabra, (Daughter of
Ruplal Bhutani), Aged about 43 years,
R/o. 9/5, Madhuban Gokul Park,
Vasai, Bombay.

.... Respondent Nos. 1 to 8 are
Legal Representatives of
Original Plaintiff No.1.

9. Kulbhushanlal S/o. Malikchand Bhutani,
Aged about Major, R/o. Bungalow No.108,
Kamptee Road, Nagpur.

.... Original Plaintiff No.2.

10. Mrs. Pushpa Wd/o. Jaiprakash Bhutani,
Aged about 48 years,

11. Girish S/o. Jaiprakash Bhutani,
Aged about Major,

12. Anil S/o. Jaiprakash Bhutani,
Aged about : Major.

13. Ajay S/o. Jaiprakash Bhutani,
Aged about : Major

14. Ku. Kanchan D/o. Jaiprakash Bhutani,
Aged about : Major

Respondent nos. 10 to 14 are
R/o. 88, Mall Road, Kamptee,
District : Nagpur.

.... Respondent Nos. 10 to 14 are
Legal Representatives of
Original Plaintiff No.3.

15. Shri Rajesh S/o. Mukundlal Bhutani,
Aged about : Major,
R/o. 9, Motilal Nehru Marg,
Bhilai, State : Chhatisgarh.

16. Smt. Harishi W/o. Ramesh Malhotra,
Aged 45 years, r/o. 803, Casurinab
Evershine Green, Andheri (W),
Oshiwada, Mumbai.

17. Smt. Jyoti W/o. Kailash Malhotra,
Aged 40 years, R/o. 71-B,
2nd Floor, Collector Colony,
Mumbai – 74.

.... Respondent Nos. 15 to 17 are
Legal Representatives of
Original Defendant No.2.

.... **RESPONDENTS.**

Shri. Shyam Dewani, Advocate for Petitioners.
Shri. R.L.Khapre, Advocate for Respondent Nos. 1 to 6.

CORAM : Z.A.HAQ, J.
DATED : AUGUST 12, 2015.

ORAL ORDER :

01. Heard the learned advocates for the respective parties.

02. The petitioners have challenged the order passed by the
Executing Court rejecting the application filed by them seeking permission to
adduce evidence to substantiate the objections raised by them under Section
47 of the Code of Civil Procedure.

03. After the award was passed on 22nd March, 1993 and it was filed before the Civil Court on 26th March, 1993, the Civil Court by the judgment and decree dated 13th April, 2006 made the award as Rule of Court. First Appeal No. 444 of 2006 was filed before this Court challenging the judgment and decree passed by the Civil Court. The First Appeal is dismissed on 11th July, 2014. The decree holder has filed execution proceedings in which an objection has been filed under Section 47 of the Code of Civil Procedure. The contention of the objector is that the decree holders have no right to attach movable property of the objectors. The objections which are raised before the executing Court are as follows :

- i) That the executing Court has not issued notice of the execution proceedings though the execution is filed after two years of the passing of the decree and directly the order for attachment is issued.
- ii) That the decree is passed against the dead persons and therefore, it is null and void *ab-initio*.
- iii) That the decree holders had intentionally brought on record only two legal representatives of Mukundlal Bhutani and other legal representatives i.e. two daughters, one daughter-in-law and one grandson are deliberately not brought on record.
- iv) That Smt. Rani Gurudasmal Gulati who was defendant in the civil suit was not served with the suit summons and after she expired on 10th September, 2001 her legal representatives are not brought on record.

- v) Ku. Sarladevi daughter of Diwanchand Bhutani who was defendant in the civil suit was insane, still no guardian was appointed to represent her.
- vi) That the decree has been passed *ex-parte* without following due process of law and without there being material on the record to show that the defendants were served.

04. The petitioners filed application (Exh.49) praying for permission to adduce evidence to substantiate their objections. The decree holders opposed the application. The executing court by the impugned order has rejected the application (Exh.49). The petitioners, being aggrieved by the order passed by the executing Court has filed this petition.

05. Shri Shyam Dewani, learned advocate for the petitioners has made elaborate submissions to urge that the decree passed by the trial Court is in-executable in view of the objections raised before the executing Court. It is submitted that the executing Court has committed an error by rejecting the application (Exh.49) and not granting the prayer for adducing the evidence which has the effect of depriving the petitioners of substantiating their objections. It is submitted that the petitioners cannot file separate suit and the objections are to be raised by the petitioners under Section 47 of the Code of Civil Procedure and therefore, the executing Court should have granted proper opportunity to the petitioners to substantiate their objections by leading evidence.

The learned advocate for the petitioners has relied on the following judgments :

- i. Judgment given in the case of Pride of Asia Films Vs. Essel Vision, reported in 2004(5) Bom. C.R. 870.
- ii. Judgment given in the case of Sharad G. Ambole Vs. Gauramma K. Medar, reported in 2008 (1) Bom.C.R. 111,
- iii. Judgment given in the case of Sarojini Nunes Vs. Lennet Godinho, reported in 2008 Law Suit (Bom.) 3762.
- iv. Judgment given in the case of Amba Bai Vs. Gopal, reported in AIR 2001 SC 2003.
- v. Judgment given in the case of Rajendra Prasad Vs. Khirodhar Mahto, reported in 1994 Supp (3) SCC 314.
- vi. Judgment given in the case of Kishun Vs. Bihari, reported in AIR 2005 SC 3799.
- vii. Judgment given in the case of Nergish Vs. Pramod, reported in 2010 (1) Mh.L.J. 264.
- viii. Judgment given in the case of Ashish Vs. Mills Mazdoor Sabha, reported in 2012 (5) Mh.L.J. 948.
- ix. Judgment given in the case of Girjappa Rambhau Sutar Vs. Yashwanta Gangaram Gandale, reported in 2005 (2) AII MR 712.
- x. Judgment given in the case of M/s. Woolways Vs. Central Bank of India, Chandigarh, reported in AIR 1990 P & H 92.
- xi. Judgment given in the case of K. Venkarayappa Vs. Ellen Industries, Coimbatore, reported in AIR 1985 AP 261.
- xii. Judgment given in the case of B.S.Singh Vs. R.D. Singh, reported in AIR 1973 SC 204.
- xiii. Judgment given in the case of Yakub Ibrahim Vs. A. Gulamabbas, reported in AIR 1958 (Bom) 51.

xiv. Judgment given in the case of Venkayamma Vs. Tirapayya, reported in AIR 1955 (Mad) 32.

xv. Judgment given in the case of Jaimal Shah Vs. Ila Pandya, reported in 2001(2) Mh.L.J. 297.

xvi. Judgment given in the case of Uday Pundalik Nadkarni Vs. Amarnath N.S.Talwadkar, reported in 2006(5) Bom.C.R. 738.

xvii. Judgment given in the case of Sardar H. Attar Vs. Usman Papamiya Attar Shaikh, reported in 2008(1) Bom.C.R. 646.

06. Shri Khapre, learned advocate for the respondent Nos. 1 to 6 has submitted that the petitioners have filed application (Exh.49) with the evil design of prolonging the execution proceedings. It is submitted that there are no bonafides on the part of the petitioners. The learned advocate for respondent Nos. 1 to 6 has submitted that the objections raised by the petitioners can be decided by the executing Court on the basis of the material on the record and the executing Court has recorded that the objections of the petitioners will be decided on the basis of the oral submissions and the documents on the record.

The learned advocate has relied on the judgment given by the Division Bench of this Court in the case of *Chandrashekhar Manohar Tanksale Vs. Pandharinath Vithobaji Neware*, reported in **2014(7) Bom.C.R. 167** and has submitted that the petitioners cannot be permitted to raise objections which are required to be proved by leading evidence and such objections cannot be permitted to be raised for the first time in the execution proceedings. It is prayed that the petition be dismissed with costs.

07. The thrust of the submissions made on behalf of the petitioners was on the point as to how the decree passed by the trial Court is unsustainable in law. Most of the judgments relied upon by the learned advocate for the petitioners are on the point that the decree passed against the dead person is nullity in the eye of law. The issue before this Court is not as to whether the decree passed by the trial Court is proper or not. But the issue at this stage is as to whether the executing Court has committed an error by rejecting the application (Exh.49) filed by the petitioners seeking permission to adduce evidence. The judgments relied upon in support of the argument that the executing Court should have granted permission to the petitioners to lead evidence are :

- i. Judgment given in the case of Sharad G. Ambole Vs. Gauramma K. Medar, reported in 2008 (1) Bom.C.R. 111,
- ii. Judgment given in the case of Sarojini Nunes Vs. Lennet Godinho, reported in 2008 Law Suit (Bom.) 3762.
- iii. Judgment given in the case of M/s. Woolways Vs. Central Bank of India, Chandigarh, reported in AIR 1990 P & H 92.

As far as the judgment given in the case of *Sharad Ambole* (supra) is concerned, the Court has recorded that in the facts of that case the objectors were entitled to have full opportunity to lead evidence, if they desired to prove their contentions. Similarly, in the case of *Sarojini Nunes* (supra) this Court left it to the executing Court to examine as to whether the objectors be permitted to lead evidence to prove their contentions. In the

judgment given in the case of *M/s. Woolways* (supra), the Court recorded that the executing Court should not have dismissed the objections without going into the merits and the executing Court is under obligation to decide the objections under Section 47 of the Code of Civil Procedure, in a judicial manner and if the parties intended to lead evidence, permission should have been granted to lead evidence. The learned advocate for the petitioners has not been able to point out that the executing Court is under obligation to allow the parties to adduce evidence in every case to substantiate the objections under Section 47 of the Code of Civil Procedure. In the present case, considering the nature of the objections, the executing Court found that the objections can be decided on the basis of the documents available on the record. The conclusions of the executing Court cannot be faulted with.

The judgment given in the case of *Yakub Ibrahim Vs. A.Gulamabbas*, reported in **AIR 1958 (Bom) 51** and the judgment given in the case of *Venkayamma Vs. Tirapayya*, reported in **AIR 1955 (Mad) 32** are not on the point which falls for consideration in the present petition. Whether the decree is sustainable or not in view of the non-consideration of the effect of Section 48 of the Indian Partnership Act, 1932 cannot be considered at this stage as the subject matter of this petition is only the legality of the order passed by the executing Court rejecting the prayer of the petitioners to adduce evidence.

08. The decree passed by the Civil Court is maintained by this Court in First Appeal No.444 of 2006. Considering the observations of the Division Bench of this Court in the judgment given in the case of *Chandrashekhar Manohar Tanksale Vs. Pandharinath Vithobaji Neware*, reported in **2014(7) Bom.C.R. 167**, it cannot be said that the petitioners are entitled as of right to adduce evidence.

09. I find no patent illegality or infirmity in the impugned order. It cannot be said that the executing Court has committed any error of jurisdiction.

The petition is **dismissed**. In the circumstances, the parties to bear their own costs.

JUDGE

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