

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION STAMP NO.3588 OF 2016

Ramsagar Shivmurti Yadav : Petitioner.
Versus
State of Maharashtra and ors. : Respondents.

**Mr. Anil Kumar Tripathi a/w Mr. Pandey Prem Kumar Omani for the
Petitioner.**
Mrs. V S Nimbalkar, AGP for the Respondent No.1
Mr. Rajesh S Datar for the Respondent No.2.

CORAM : R. M. SAVANT, J.
DATE : 11th February 2016

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 09/12/2015 passed by the learned District Judge-7, Thane by which order the Civil Revision Application filed by the Petitioner against the order dated 08/10/2015 passed in the Application (Exhibit 66) filed by the Petitioner herein came to be dismissed.

2 The Petitioner herein is the Judgment Debtor No.2 in Execution Application No.18 of 2011 filed by the Respondent No.22 for execution of the decree passed in Regular Civil suit No.133 of 2004 which decree is dated 18/10/2010. The decree has been passed on the grounds of arrears of rent and sub-letting. The Petitioner herein was the Defendant No.2 to the suit in

question and the allegation was that the Defendant No.1 had sublet the premises to the Defendant No.2 i.e. the Petitioner herein.

3 It is an undisputed position that the suit summons were served on the Petitioner, however, the Petitioner did not remain present in the suit as it is his case that the Plaintiff represented to the Petitioner that the Plaintiff would not obtain any adverse orders against the Petitioner and the matter would be amicably resolved. It is labouring under the said impression that it is the case of the Petitioner that he had not filed the written statement nor did he remain present in the suit. The suit premises is a Gala being No.3, admeasuring 163 sq.ft. situated in Gaonkar Industrial Society, Gurukul Society, Panchpakhadi, Thane which is of the ownership of the Respondent herein. It seems that the suit as originally filed was against the Defendant Nos.1 and 2. The Defendant No.1 it seems had expired prior to filing of the suit. On the Plaintiff acquiring knowledge of the death of the Defendant No.1 it seems that an application came to be filed for bringing the heirs of the Defendant No.1 on record which application was allowed by the Trial Court by order dated 13/09/2015 and the heirs of the Defendant No.1 were accordingly impleaded. It appears that one of the heirs of the Defendant No.1 appeared in the Court pursuant to the receipt of the summons but thereafter it seems that he also remained absent. As indicated above the Trial Court has decreed the suit by the judgment and decree dated 18/10/2010. The decree was put in execution by the Plaintiff by

filing Regular Darkhast No.18 of 2011. On receipt of the notice of the execution proceedings the Petitioner herein filed an Appeal in the District Court, however, since the Appeal was belated by about one year the Petitioner filed an application for condonation of delay. Suffice it would be to state that the said Application being Misc. Application No.271 of 2011 came to be rejected by the learned District Judge by order dated 06/03/2013, this resulted in the Petitioner filing Writ Petition No.6086 of 2013. A learned Single Judge of this Court dismissed the said Writ Petition by the order dated 21/12/2013. The learned single Judge has in his order adverted to some of the antecedent facts leading to filing of the said Writ Petition. After dismissal of the said Writ Petition, the Petitioner filed an Application under Order IX Rule 13 of the Code of Civil Procedure and also filed an application for condonation of delay and stay application. The application for condonation of delay and the stay application were rejected which has resulted in filing of further proceedings by way of Writ Petitions. It seems that the Petitioner has also filed a Writ Petition directly challenging the decree passed by the Trial Court i.e. the decree dated 18/10/2010, notwithstanding the fact that the application for condonation of delay in filing the Appeal was dismissed which dismissal was confirmed by a learned Single Judge of this Court in Writ Petition No.6086 of 2013. It seems that two Writ Petitions arising out of the orders rejecting the application for condonation of delay and also the application for stay were dismissed by the order dated 23/09/2015 passed by a learned Single Judge of this Court

(Coram : M S Sonak, J) as also the Petition filed challenging the decree was dismissed on 21/10/2015 by the same learned Single Judge M S Sonak, J. It appears that the said Petition has been dismissed on merits, however, in the absence of the advocate for the Petitioner.

4 The Application which is in contention in the present Petition i.e. the Application (Exhibit 66) is concerned, the same has been filed under Sections 47, 151 and Order VII Rule 11 of the Code of Civil Procedure and the ground made out is that the suit filed against the Defendant No.1 was a nullity as the same was filed against a dead person. The said Application (Exhibit 66) was rejected by the Executing Court i.e. the learned Civil Judge, Junior Division, Thane. Taking exception to the order passed by the Executing Court the Petitioner filed the Revision Application being No.4 of 2015. In the said Revision Application the Petitioner filed an application for amendment of the said Revision Application to incorporate the averments leading to the maintainability of the suit on the ground that the ultimate effect of the orders that are passed is that the Defendant No.2 would be a trespasser and therefore the suit filed against a trespasser is not maintainable under the provisions of the Rent Control Act. The Revision Application filed by the Petitioner was considered by the learned District Judge, Thane who has by the impugned order rejected the same. The learned District Judge has referred to the antecedent facts which have been narrated herein above which involve filing of

various proceedings by the Petitioner. It is on the basis of the said proceedings filed, that the learned Judge has observed that the Petitioner i.e. the Judgment Debtor has left no stone unturned to challenge the decree as also to obstruct the execution of the said decree.

5 In so far as the ground of the suit being nullity on the basis that it was filed against the Defendant No.1 who was dead on the date of filing of the suit is concerned, the learned Judge did not countenance the said ground on the touchstone of the judgments which have been relied upon in the impugned order. Apart from the reliance placed on the judgments of the Apex Court as well as this Court the learned Judge has also observed that the said ground has already been rejected by the Courts in the proceedings filed by the Petitioner challenging the said decree. The learned Judge has also observed that in any event in so far as the said ground is concerned, no grievance was made by the heirs of the Defendant No.,1 and the said grievance is sought to be made by the Defendant No.2. The learned Judge has also observed that the said ground is not available to the Petitioner as the same would be barred by the principles of res-judicata or constructive res-judicata.

6 The learned counsel appearing for the Petitioner Shri Tripathi was at pains to demonstrate once again before this Court that the suit filed was a nullity in so far as the Defendant No.1 is concerned. The learned counsel for

the Petitioner sought to place reliance on some of the judgments which were cited before the Courts below.

7 In my view, it is not possible to accept the said contention of the learned counsel for the Petitioner, considering the conspectus of facts which have been narrated in the instant order from which it can be seen that the Petitioner has filed numerous proceedings after the decree came to be passed. The instant Application (Exhibit 66) can therefore be said to be the last ditch attempt on the part of the Petitioner to see to it that the decree is obstructed and not executed. It is required to be borne in mind that the suit has been decreed on the ground of arrears of rent and subletting and the ground of subletting directly concerns the Petitioner who was the Defendant No.2. The heirs of the Defendant No.1 and the Defendant No.2 i.e. the Petitioner herein were very much served with the suit summons. The Defendant No.2 i.e. the Petitioner herein did not appear in the suit for the alleged reason that the Plaintiff gave him an impression that the matter would be settled. Pertinently instead of prosecuting the proceeding for setting aside the decree on the said ground, he is challenging the decree on the ground that the same is a nullity as the suit was filed against a dead person. In my view, therefore, no case for exercise of writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

8 At this stage, the learned counsel appearing for the Petitioner prays for the stay of the execution proceedings on the ground that the Petitioner desires to approach the Apex Court. In the facts and circumstances of the present case especially having regard to the fact that the proceedings are going on since 2004 and the decree is of the year 2010, the execution proceedings are not stayed, however, the possession not to be handed over to the Respondent for a period of four weeks from date. It is made clear that there is no impediment for the Executing Court to proceed with the execution proceedings.

[R.M.SAVANT, J]