

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4405 OF 2016

Ashok Kumar Babulal Parasramka legal representative
of Babulal Parasramka ... Petitioner
Vs.
Gumedelli Mohan Ravindira ... Respondent

Mr. Madhav Jamdar for Petitioner.
Mr. S. M. Suryawanshi for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 18, 2016

P.C. :

Heard Mr. Jamdar, learned Counsel for petitioner and Mr. Suryawanshi, learned Counsel for respondent at length. Rule. Mr. Suryawanshi waives service for respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 29.06.2013 passed by the learned Judge presiding over Court Room No.20 of the Court of Small Causes at Mumbai in Execution Application No.299 of 2012 as also the judgment and order dated 09.02.2016 passed by the Appellate Bench of the Small Causes Court in Revision Application No.200 of 2013. By these orders, the Courts below granted the execution application filed by the respondent, hereinafter referred to as 'decree-holder'.

3. In support of this Petition, Mr. Jamdar submitted that respondent had instituted R.A.E.Suit No.1089 / 1831 of 2008 against Babulal

Santoshkumar inter alia contending that said Babulal is a monthly tenant in respect of room No.24, situate at Joshi Wadi, Kalbadevi Road, Mumbai 400 002 (for short 'suit premises'). By judgment and decree dated 14.03.2012, the learned trial Judge decreed the Suit. In that order, the learned trial Judge observed that defendant Babulal is duly served but he remained absent. Hence, as per the order dated 30.04.2010, the Suit proceeded ex-parte against the defendant.

4. In pursuance thereof, plaintiff-decree holder filed execution application for issuing notice to the defendant before execution of the decree and for execution of the decree accordingly. On behalf of the defendant, his son Ashok Babulal filed reply inter alia contending that Babulal Parasramka was the proprietor and he was carrying on business in the name of “Babulal Santoshkumar”. There is no person by name “Babulal Santoshkumar”. His father Babulal Parasramka expired on 28.06.2009. Plaintiff-decree holder did not bring on record his heirs and legal representatives. Even though he is in possession of the suit premises, he was not served with any notice of the Court. It is further contended that plaintiff-decree holder is having his office on the first floor of the said building and his Constituted Attorney Arumugam Mudaliyar is attending the office. He was well aware that defendant Babulal Santoshkumar expired on 28.06.2009. Decree-holder has obtained judgment by playing fraud upon the Court by filing false Suit and suppressing true facts. He submitted that by the impugned order, the learned trial Judge granted the execution application and ordered issue of warrant of possession. In paragraph 6, the learned trial Judge observed that decree-holder was not aware of death of Babulal Santoshkumar. He submitted that the said finding is contrary to record. As against this, the Appellate Bench did not deal with this aspect at all. He invited my attention to paragraph 8 of the order of the appellate

Bench and submitted that the matter requires consideration.

5. On the other hand, Mr. Suryawanshi supported the impugned orders. He has taken me through paragraph 6 of the trial Court's order and submitted that the learned trial Judge has observed therein that there are two kinds of decrees namely, one set of decree which is passed without jurisdiction and therefore, is a nullity and the other set of decree, which suffers from defect of procedural law or some irregularity but these decrees are executable. The learned trial Judge has also referred to decision of ***Balvant N. Viswamitra Vs. Yadav Sadashiv Mule (dead) through LRs, (2004) 8 SCC 706*** and thereafter recorded a finding that there is nothing on record to show that the death of defendant Babulal Santoshkumar was well within the knowledge of decree-holder. Mr. Suryawanshi was however, not in a position to demonstrate that the appellate Court has dealt with this aspect.

6. In view thereof, the order passed by the appellate Court cannot be sustained and as such, is liable to be set aside. Hence, the following order:

- a. The judgment and order dated 09.02.2016 passed by the Appellate Bench of the Small Causes Court is quashed and set aside;
- b. Revision Application No.200 of 2013 is restored to the file of the Appellate Court;
- c. Parties agree that they will appear before the Appellate Court on 01.08.2016 and for that purpose, no fresh notice be issued to them;
- d. The appellate Court will deal with the contentions recorded herein as also any other contention that is available to the parties and pass the order in accordance with law;

- e. All contentions of the parties on merits are expressly kept open;
- f. The appellate Court is requested to dispose of the Revision Application within two month from 01.08.2016;
- g. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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