IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5064 OF 2016

Smt. Hasumati Indukumar Shah
(since deceased) Through L.R.:
Piyush Indukumar Shah
And Anr. ...Petitioners

Versus

Husauni Gulam Abbas Nulwala
(Since Deceased) and Ors. ...Respondents

....

Mr. Prashant G. Karande, Advocate for the Petitioners.
Mr. M.J. Pandya a/w. S.S. Manjrekar, Advocate for Respondent No.2.

....

CORAM : R. G. KETKAR, J.

DATE : 17th June, 2016

P.C.

1. Heard Mr.P.G. Karande, learned Counsel for the petitioners and Mr.M.J. Pandya, learned Counsel for respondent No.2, at length.

2. By this petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the plaintiffs, have challenged the judgment and order dated 3.3.2016 as also the issues framed on 4.3.2016 by the learned Judge, presiding

over Court Room No.32 of the Court of Small Causes at Bombay (Bandra Branch) below Exhibit-1 in Marji Application No.117/2013 in T.E. & R. Suit No.5/6 of 2011. By order dated 3.3.2016, the learned trial Judge directed framing of issue in respect of validity of the decree and directed the parties to adduce evidence if any. By order dated 4.3.2016, the learned trial Judge framed following issues :

> "
> ISSUES
> 1 Whether the decree passed in T.E. & R. Suit No.5/6 of 2011 is nullity ?
> 2 Whether the decree is executable ?
> 3 What order ? "

3. Mr. Karande submitted that the plaintiffs instituted the suit against defendants, namely, (1) Husauni Gulam Abbas Nulwala, (2) Mahomed Gulam Abbas Nulwala and (3) Nuruddin Gulam Hussein Rungwala. Despite service of suit summons vide Exhibits-6, 9, 10, 11 and 16, as the defendants remained absent, the suit proceeded exparte against them. Eventually the learned trial Judge decreed the suit on 22.12.2012 and directed the defendants to hand over quiet, vacant and peaceful possession of Plot No.BD/1, situate at Laxmi Industrial Estate, New Link Road, Goregaon(W), Mumbai – 400 104 (for short, 'suit

premises') to the plaintiff together with structures standing thereon within three months from the date of the order. The learned trial Judge also directed notice before execution.

4. In view thereof, the Constituted Attorneys of the plaintiffs took out application under Order 21 Rule 22 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') seeking permission to execute the decree. Respondent No.2, hereinafter referred to as defendant No.2, resisted the application by filing reply Exhibit-9 *inter alia* contending that defendant No.1 expired on 25.9.1981 and defendant No.3 expired on 23.1.2005. The suit was instituted in the year 2007, thus, the suit was instituted against defendant Nos.1 and 3 who were dead at that time. Defendant No.2 produced the death certificates along with reply. The learned trial Judge therefore directed framing of issue in respect of validity of decree and directed the parties to adduce evidence if any.

5. Mr. Karande relied upon the decision of this Court in the case of ***Laxman Bala Surve and others v. M/s. Posh Builders, Bombay and another, 1996(2) Mh.L.J. 858*** to contend that the executing court cannot go behind the decree.

Objections under Order 21 Rule 22 and Section 47 of C.P.C. are as regards executability of the decree and not with regard to the validity of the decree. He, therefore, submitted that the learned trial Judge committed serious error in directing framing of issue in respect of validity of the decree. He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr.Pandya supported the impugned order.

7. I have considered rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record.

8. It is no doubt true that while passing the order dated 3.3.2016, the learned trial Judge directed framing of issue in respect of validity of the decree. In view of the decision of this Court in the case of ***Laxman Surve*** (supra), certainly the executing court cannot go behind the decree as also cannot examine the validity of the decree. Nonetheless, the objections as regards executability of the decree can be gone into in view of Section 47 of C.P.C.. Perusal of the issues framed by learned

trial Judge on 4.3.2016 shows that the learned trial Judge has framed issues as to (1) whether the decree passed in T.E. & R. Suit No.5/6 of 2011 is nullity and (2) whether the decree is executable. In other words, the learned trial Judge has not framed the issue in respect of validity of the decree. In view thereof, I do not find that any case is made out for interfering with the impugned order. Hence, the Petition fails and the same is dismissed.

9. It is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C..

(R. G. KETKAR, J.)

Deshmane (PS)