

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.233 OF 2016
WITH
CIVIL APPLICATION NO. 271 OF 2016 IN CRA/233/2016**

Sushil Babubhai Parekh and Anr ..Applicants

Vs

Wallack Patrick Dias and Ors .. Respondents

Mr. P.S.Dani, Senior Advocate with Mr. Rahul J. Gada, Advocate
for Applicants.

Mr. Clifford Martis, Advocate for Respondents no.1 and 2.

**CORAM : R.G.KETKAR,J.
DATE : 04/05/2016**

PC:

1. Heard Mr. P.S.Dani, learned senior counsel for the applicants and Mr. Clifford Martis, learned counsel for respondents no.1 and 2 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908, (for short, C.P.C), the applicants have challenged the Judgment and order dated 2.4.2016 passed by the learned Ad-hoc Judge, City Civil Court, Gr. Bombay in Chamber Summons No. 527 of 2016 in Execution Application No. 459 of 2015 in S.C. Suit No.10194 of 1987. By that order, the learned trial Judge rejected the Chamber Summons taken out by the applicants herein for setting aside the order dated 3.2.2016 whereunder warrant of possession was issued in execution of the

decree dated 24.9.2014 passed in Suit No.10194 of 1987 (High Court Suit No.3414 of 1987).

3. Respondents no.1 and 2 have instituted suit against Babubhai Balubhai Parekh. Despite service, no written statement was filed and the suit was proceeded without written statement. During the pendency of the suit, Babubhai expired and his son Bipin Babubhai Parekh was brought on record. The plaintiffs were directed to file evidence. After considering the evidence on record, the learned trial Judge partly decreed the suit and directed defendant no.1(a) to hand over vacant and peaceful possession of the land admeasuring 545 sq.yards, bearing Survey No. 167, Hissa no.22, situate at Kolkalyan, Santacruz, Mumbai (for short, 'suit property').

4. The plaintiffs thereafter filed Darkhast proceedings. On 3.2.2016, the learned trial Judge appointed City Survey Officer Santacruz, Mumbai as a Court Commissioner for carrying out survey and measurement of the suit property. After demarcating the boundaries of the City Survey, Bailiff was directed to execute the possession warrant as per provisions of Order 21, Rule 35 of C.P.C. The petitioners herein took out Chamber Summons on or about 15.3.2016 for cancelling the possession warrant dated 3.2.2016 issued by Sheriff of Mumbai. In support of this Chamber Summons, the petitioners filed affidavit. By the impugned order,

the learned trial Judge rejected the Chamber Summons on the ground that the petitioners were residing along with defendant no.1(a) in the suit premises. Apart from that, one of the legal representatives of Babubhai represented the estate. It is against this order, the petitioners have instituted the present petition.

5. In support of the petition, Mr. Dani submitted that the plaintiffs have instituted the suit against Babubhai. After his death, only Bipin Babubhai Parekh, one of the legal representatives of Babubhai was brought on record and the petitioners who are legal representatives of Babubhai, were not brought on record. As they were not brought on record, the decree passed on 24.9.2014 is not binding on them and possession warrant deserves to be cancelled.

6. On the other hand, Mr. Martis invited my attention to the letter dated 15.1.2016 addressed by petitioner no.1 Sushil Parekh to Advocate Janathan D'Silva and in particular para 3 thereof. In paragraph 3, it is stated that defendant no.1(a) Bipin and the petitioners are staying together. Defendant no.1(a) Bipin did not inform the petitioners about the suit. In other words, he submitted that the petitioners and defendant no.1(a) were staying together. That apart, estate of Babubhai was represented by defendant no.1(a). He, therefore submitted that no case is made out for interfering with the impugned order.

7. I have considered the rival submissions advanced by learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, despite service in the suit, no written statement was filed and by order dated 4.1.2013 the suit was proceeded without written statement. It is not in dispute that Babubhai died leaving behind defendant no.1(a) and the petitioners as his heirs and legal representatives. Defendant no.1(a) was admittedly brought on record in the suit. Suit was decreed in pursuance thereof, possession warrant was issued on 3.2.2016 in the execution proceedings.

8. The only contention advanced by the petitioners is that decree is not binding on them on the ground that though they are legal representatives of Babubhai, they were not brought on record. It is not possible to accept the submission for more than one reason. In the first place, the suit was proceeded without written statement of original defendant. Secondly, after his death, one of the legal representatives was brought on record. Thus, the estate of the deceased was represented. Thirdly, perusal of the letter dated 15.1.2016 addressed by petitioner no.1 to Advocate Janathan D'Silva shows that the petitioners were staying along with defendant no.1(a) Bipin together. In paragraph 4 of the impugned order, the learned trial Judge has considered this aspect. In view thereof, I do not find that the

learned trial Judge has committed any error in passing the impugned order. Hence, Application fails and same is dismissed.

9. In view of disposal of the Application, Civil Application No.271 of 2016 for staying of decree dated 24.9.2014 does not survive and the same is disposed of. Order accordingly.

(R.G.KETKAR, J.)