

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.13222 OF 2016

Hanumant Raosaheb Kad ... Petitioner  
Vs.  
Sudhakar Laxman Deshpande (decd) through  
LRs Varsha Deshpande and others ... Respondents

Mr. Lahu Sahebrao Gaikwad for Petitioner.

**CORAM : R. G. KETKAR, J.**  
**DATE : DECEMBER 13, 2016**

**P.C. :**

Heard Mr. Gaikwad, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 08.07.2016 passed by the learned 8<sup>th</sup> Joint Civil Judge, Junior Division, Pune below exhibits-104 and 112. By that order, the learned trial Judge allowed applications exhibits 104 and 112 taken out by the decree-holder and directed the decree-holder to carry out the amendment in the Execution Petition within 14 days from the date of the order.

3. Respondent Sudhakar Laxman Deshpande, hereinafter referred to as 'plaintiff', had instituted Regular Civil Suit No.1518 of 2000 against defendant No.1 - Jaspalsingh Ramsingh Sian, defendant No.2 - Hanumant Raosaheb Kad (petitioner herein) and defendant No.3 - Peter John Kad inter alia for declaration, injunction and possession of tenanted premises admeasuring 300 sq.ft. on the ground floor of house No.141, Somwar Peth, Pune (for short 'suit premises'). Plaintiff contended that he was a permanent tenant in the suit premises since 1964. Original landlady was Smt Radhabai Achut Kulkarni. Daughter of plaintiff

Varsha married defendant No.1. Defendants No.2 and 3 were close associates of defendant No.1. Plaintiff contended that both these defendants are of criminal inclination. In the year 1964, plaintiff got tenancy rights of the suit property consisting of two rooms on the ground floor from Radhabai Kulkarni. Tenancy rights of the plaintiff were continued and confirmed by M/s. Sahawas Constructions, an assignee of original landlady who intended to develop the suit property. Plaintiff further contended that defendant No.1 had criminal antecedents. Several criminal cases were pending against him in several Courts. He is absconding. Out of the wedlock of defendant No.1 with plaintiff's daughter, a son by name Tejas was born.

4. Plaintiff alleged that defendant No.1 had dispossessed the plaintiff with the aid of defendants No.2 and 3. Plaintiff further contended that defendant No.1 executed document dated 14.03.2000 in favour of defendants No.2 and 3 illegally. By judgment and decree dated 03.04.2003, the learned trial Judge decreed the Suit. The learned trial Judge declared that the sale deed dated 14.03.2000 executed by defendant No.1 in favour of defendants No.2 and 3 is void ab initio and illegal. The learned trial Judge further declared that possession of defendant No.2 over the suit premises is illegal. Defendant No.2 was directed to handover vacant and peaceful possession of the suit premises to the plaintiff within two months from the date of the order and in case of failure, plaintiff was entitled to file application for appointment of Court Commissioner for getting possession of the suit premises. The learned trial Judge held that plaintiff established that the sale deed dated 14.03.2000 executed by defendant No.1 in favour of defendants No.2 and 3 is void ab initio, illegal and not binding on the plaintiff; plaintiff proved that defendant No.1 forcibly took possession of suit property and illegally dispossessed the plaintiff; plaintiff proved that the possession of

the defendant No.2 over the suit property is illegal; plaintiff was entitled to mandatory injunction directing defendant No.2 to hand over vacant and peaceful possession of the suit property to the plaintiff. Aggrieved by this decision, Civil Appeal No.339 of 2003 was filed by defendant No.2. Defendant No.1 was sued through his legal representatives namely Tejas Jaspalsingh Sian being minor through his mother Varsha J. Sian @ Varsha Sudhakar Deshpande. The appellate Court remitted the matter to decide the limited issue namely, “whether the plaintiff proves that the undated document allegedly executed by the plaintiff in favour of defendant No.1 is ab initio void?”. After remand, by order dated 15.01.2009, the learned trial Judge held that the undated document allegedly executed by the plaintiff in favour of the defendant No.1 is void.

5. After the findings dated 15.01.2009 of the learned trial Judge were transmitted to the District Court, by judgment and decree dated 17.04.2009, the learned District Judge dismissed the appeal and gave three months time to the defendant No.2 (petitioner herein) to vacate the suit premises from the date of the order. Aggrieved by these decisions, defendant No.2 instituted Second Appeal No.378 of 2009 in this Court. On behalf of defendant No.2, permission was sought to withdraw the appeal on the ground that defendant No.2 has taken objection in the execution proceedings. In view thereof, Second Appeal was disposed of as withdrawn. Decree-holder filed Darkhast proceedings for execution of the decree passed by the trial Court. On 17.03.2010, the executing Court framed issue, namely, whether the decree sought to be executed is nullity and both the parties are given opportunity to lead documentary and oral evidence. On 21.08.2009, defendant No.2 filed application under Section 47 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') on the ground that defendant No.1 Jaspalsingh died some time

in April 2001 in Punjab and the Suit was decreed on 03.04.2003. In other words, Suit was decreed against the dead person, and therefore, the decree is a nullity and is inexecutable. By order dated 17.03.2010, the learned trial Judge allowed the application to the extent that it is necessary to enquire into the objections raised by the defendant No.2. After the death of the plaintiff, his daughter Varsha Sudhakar Deshpande is prosecuting Darkhast as a decree-holder. She filed application exhibit-104 under Order VI, Rule 17 of C.P.C. for amendment of the suit property in Darkhast, thereby substituting the suit premises by flat No.12 admeasuring 583 sq.ft. equivalent to 54.16 sq. mtrs. built up area. By the impugned order, the learned trial Judge allowed the application filed by the decree-holder and directed the decree-holder to carry out the amendment in Execution Petition within 14 days from the date of the order subject to payment of costs of Rs.100/- to be credited to legal aid. It is against this order, defendant No.2 has instituted the present Petition.

6. In support of this Petition, Mr. Gaikwad submitted that the Suit was in respect of tenanted premises admeasuring 300 sq.ft. situate on the ground floor. As against this, now the decree-holder has filed application for amending Darkhast so as to claim possession of flat No.12 situate on the 4<sup>th</sup> floor. He submitted that executing Court cannot go beyond the decree. Executing Court cannot alter / amend the decree. Executing Court cannot change the nature of the suit property. He further submitted that defendant No.1 - Jaspalsingh expired in Punjab some time in the year 2001 and the Suit was decreed on 03.04.2003. As the Suit was decreed against the dead person, decree is a nullity and inexecutable.

7. Mr. Gaikwad further submitted that in fact decree is a nullity as also it is inexecutable as plaintiff ought to have instituted Suit in the

Court of Small Causes constituted under the Provincial Small Cause Courts Act, 1887. In other words, the Civil Court has no jurisdiction to entertain and try the Suit which is between the landlord and tenant. He further submitted that landlord was also not made party in the Suit.

8. Mr. Gaikwad has invited my attention to the registered agreement dated 03.05.2014 entered into by and between defendant No.2, his wife Vidya Hanumant Kad and son Vijay Hanumant Kad on one hand and M/s. Kalyani Developers through partners Gautam Manikchand Gelada and Sandip Narayandas Jani on the other. He submitted that defendant No.2 has purchased flat No.12 on payment of Rs.22,50,000/-. It is an out and out sale. It was not in lieu of the suit premises, which was the subject matter of Suit No.1518 of 2000. In other words, the agreement entered into by defendant No.2 with M/s. Kalyani Developers is not connected with the subject matter of the Suit and consequently, decree-holder could not have prayed for substituting the description of the suit premises by incorporating flat No.12. He further submitted that the building where the suit premises was situate was demolished and is not in existence. The tenancy rights of the decree-holder are extinguished. On this ground also, decree is inexecutable.

9. He has also taken me through clause 11 as also conditions No.4 and 5 of the agreement dated 03.05.2014 in support of his submissions that flat No.12 is not the subject matter of the Suit which is purchased by him on ownership basis. Mr. Gaikwad submitted that plaintiff had instituted Suit in respect of the suit premises admeasuring 300 sq.ft. situate on the ground floor in house No.141. By agreement dated 03.05.2014, defendant No.2 has purchased flat No.12 admeasuring 583 sq.ft. equivalent to 54.16 sq. mtrs. built up area situate on the 4<sup>th</sup> floor. He further submitted that perusal of the agreement dated 03.05.2014

shows that M/s. Kalyani Developers amalgamated C.T.S.No.141, Somwar Peth with C.T.S.No.131/B, Somwar Peth. In other words, he submitted that the subject matter of the Suit and the property purchased by the defendant No.2 are totally different. Defendant No.2 has purchased flat No.12 on ownership basis and not in lieu of tenancy rights.

10. I have considered the submissions advanced by Mr. Gaikwad. I have also perused the material on record. As noted earlier, the Suit instituted by the plaintiff was decreed. Perusal of the trial Court's judgment, and in particular paragraph 3 thereof, shows that defendant No.1 Jaspalsingh failed to enter appearance inspite of due service of summons. Defendant No.2 or for that matter, defendant No.3 though filed written statement, did not point out to the trial Court about the death of defendant No.1. This is to be appreciated on the backdrop of the fact that plaintiff came with the specific case that several criminal cases were pending against defendant No.1 and he is absconding.

11. Perusal of the judgment of the trial Court also does not indicate that any argument was advanced on the ground that defendant No.1 had died pending the Suit and his legal representatives were not brought on record.

12. Aggrieved by that decision, defendant No.2 preferred Civil Appeal No.339 of 2003. Cause title of that appeal shows that defendant No.1 Jaspalsingh Sian was represented by his legal representatives. In view thereof, I do not find any merit in the submission of Mr. Gaikwad that decree was passed against dead person. In fact defendant No.2 vaguely stated in the application filed in Darkhast proceedings that defendant No.1 - Jaspalsingh died in April 2001 and it was also

asserted that during the pendency of the Suit or appeal, no inquiry was held in that regard.

13. Mr. Gaikwad submitted that executing Court cannot go beyond the decree. Executing Court cannot alter / amend the decree. Executing Court cannot change the nature of the suit property. As noted earlier, by the impugned order, the learned trial Judge has allowed the application for amendment. It is settled principle of law that by allowing the application for amendment, the Court has not allowed the claim made in the amendment. That apart, while considering the application for amendment, the Court cannot go into the merits of the proposed amendment. It will be open to the defendant No.2 to raise the contentions in that regard at the time of hearing of the Darkhast proceedings. At this stage, it cannot be said that the learned trial Judge committed error in allowing the application for amendment.

14. Mr. Gaikwad further submitted that decree passed by the Civil Court is nullity and is inexecutable as the Civil Court has no jurisdiction to entertain and try the Suit. Perusal of the plaint shows that the Suit was for recovery of possession on the ground that defendants illegally dispossessed the plaintiff. Landlord was also not impleaded as a party in the Suit. In other words, the Suit was not between the landlord and tenant to oust the jurisdiction of the Civil Court. In other words, it cannot be said that the Civil Court had no jurisdiction to entertain and try the Suit.

15. Mr. Gaikwad submitted that registered agreement was entered into by and between defendant No.2, his wife Vidya Hanumant Kad and son Vijay Hanumant Kad on one hand and M/s. Kalyani Developers through partners Gautam Manikchand Gelada and Sandip Narayandas

Jani on the other on 03.05.2014. By that agreement, developers agreed to sell flat No.12 on payment of Rs.22,50,000/- to the defendant No.2. Thus, defendant No.2 agreed to purchase flat No.12 on ownership basis. It is an out and out sale. It was not in lieu of subject matter of Suit No.1518 of 2000.

16. In my opinion, the said contention can be raised by the judgment debtor at the time of execution proceedings. Suffice it to refer to the decision of the Apex Court in the case of ***Shaha Ratansi Khimji Vs. Kumbhar Sons Hotel Private Ltd., (2014) 14 SCC 1***. In view of the inconsistent view taken by the Apex Court in ***Vannattankandy Ibrayi Vs. Kunhabdulla Hajee, (2001) 1 SCC 564*** and ***T. Lakshmipathi Vs. R. Nithyananda Reddy, (2003) 5 SCC 150***, the matter was placed before the Bench of the three learned Judges of the Apex Court. In the case of ***T. Lakshmipathi (supra)***, it was held that once a tenancy is created in respect of a building standing on the land, it is the building and the land which are both components of the subject matter of demise and the destruction of the building alone does not determine the tenancy when the land which is the site of the building continues to exist. In the case of ***Vannattankandy Ibrayi (supra)***, it was held that the rights stand extinguished as on the distinction of the demise, for there is destruction of the superstructure and in its non-existence there is no subject-matter. In paragraph 27, the Apex Court opined that the decision rendered in ***Vannattankandy Ibrayi (supra)*** does not correctly lay down the law and overruled the said decision. Plaintiff came with the case that he was a tenant in respect of the premises situate on the ground floor of house No.141. Merely because the building where the suit premises is situate is not in existence on account of its demolition, it cannot be said that the tenancy rights of the plaintiff stood extinguished. In any case, the trial Court will consider this objection at the time of hearing of Darkhast

proceedings. In view thereof, I do not find that the learned trial Judge has committed any error in allowing the application. Hence, Petition fails and the same is dismissed. Order accordingly.

**(R. G. KETKAR, J.)**

*Minal Parab*