

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

CIVIL REVISION APPLICATION NO. 219 OF 2007

Kokan Mercantile Cooperative
Bank Ltd, Chiplun Branch,
Ratnagiri.

..Applicant

Vs

Shri Hanif Ismail Memon

.. Respondent

Mr.Vikas Singh, i/b Lambay & Co., Advocate for Applicant.
Ms. Deepti N. Wadkar, Advocate for Respondent.

**CORAM : R.G.KETKAR,J.
DATE : 01/03/2016**

PC:

1. Heard Mr. Vikas Singh, learned counsel for the applicants and Ms. Deepti Wadkar, learned counsel for the respondent at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') the applicant has challenged the judgment and order dated 12.4.2006 passed by the learned Civil judge, Junior Division, Chiplun, below Exhibit 1 in Regular Darkhast No.4 of 1999. By that order, the learned trial Judge permitted the respondent, hereinafter referred to as 'decree holder', to take steps to recover the amount of Rs.15,682-90 and Rs. 1,00,000/- as prayed for at Sr. No.1 and 5 described in the particulars of amount due from the applicant, hereinafter referred to as 'judgment debtor'.

3. Judgment debtor had advanced loan of Rs.1,20,000/- to the decree holder on 25.8.1981 for purchasing second hand truck. Decree holder agreed to repay the loan amount along with 15 percent interest per annum and also monthly installment of Rs.3000/-. The truck was hypothecated with the judgment debtor. The loan was availed by the decree holder after completing all the formalities and executing requisite documents, such as continuing guarantee etc. The judgment debtor apprehended that the decree holder may dispose of the truck by creating third party interest. On 16.3.1985 the judgment debtor attached the truck. This was followed by notice dated 4.10.1985. The judgment debtor actually took possession of the truck bearing Registration No. MWT 9074 on 15.10.1985. This gave rise to filing of two disputes, one by decree holder and other by judgment debtor. Decree holder instituted case no.67/CC/ITN /85 claiming damages of Rs. 50,000/- and interest thereon at the rate of 18%. It was also prayed that in case the court comes to conclusion that the decree holder is entitled to higher damages than the claim of Rs.50000/- such higher amount as may be determined by the court.
4. Judgment debtor instituted Case No.100/CC/ITN/85 against the decree holder for recovery of amount of Rs.74074.35 . During

pendency of the dispute instituted by judgment debtor, it also took out application seeking permission of the court to sell the truck attached. Judgment debtor, however, did not press that application. Both the disputes were clubbed together and were disposed of by the learned trial Judge, Cooperative Court, Raigad, Ratnagiri on 25.3.1988. Operative order reads thus:

- “1. The opponents no. 1, 2 and 3 in Case No.100/CC/RTN/85 jointly and severally do pay to the disputant Bank a sum of Rs. 74,462-35 being the amount of arrears as on 15.10.1985 with interest at 15% on the principal amount of Rs.58,067.10 from 16.10.1985 till full payment of dues in 20 equal monthly installments, first of such installment to be paid by 20th May, 1988.
2. The Branch Manager Konkan Mercantile Cooperative Bank is appointed as Court Receiver for the Truck No.MWT 9074.
3. The Konkan Mercantile Cooperative Bank shall carry out repairs to Truck No.MWT-9074 so as to make it ready worthy and in a position to transport load of coal and wood. 20% of the cost of repairs should be borne by the borrower member. The repairs should be carried out within 1 month from the date of this order.
4. The borrower member shri Memon shall take permission by 10th of every month after repair of the Truck from the Court Receiver for the use of the Truck for his transport business and pay towards his loan account such amount of the transport fees received by him as may be directed by the Court Receiver.
5. If the opponent in case No.100/CC/RTN/85 default payment of any installment inclusive of adjustments from transport fees, ordered to be paid by the Court Receiver, the Bank shall sell the truck attached and in the custody of the Court Receiver within 1 month from the date of default.”

5. Aggrieved by this decision, Appeals were preferred by judgment debtor as also decree holder before the Maharashtra State Cooperative Appellate Court, Bombay. By judgment and order dated 9.2.1989, both the Appeals were dismissed. It is common ground between the parties that the said order was not challenged by either judgment debtor or decree holder and has attained finality. Operative part of the appellate court's order reads thus:

“ Appeal No.289 of 1988 is allowed.

1. The impugned order dated 25.3.88 passed by the lower Court is set aside. The Respondent Bank shall either get the repairs to the vehicle done, as per the valuation and inspection report of Dambre Surveyors and Co within 8 weeks from the date of this order at the cost of the Bank subject to the limit of Rs.73,700/- and produce a certificate as to the satisfactory completion of the said repairs work, or the Bank give credit to the appellant borrower in his account for a sum of Rs.73,700/- forthwith.

2. On compliance with any of the alternate above noted directions, the respondent-Bank shall return the said vehicle to the appellant on his payment of Rs.58,017.10 shown by the Bank as principal loan amount as on 15.10.85.

3. We do not allow any interest on the principal amount of Rs.58,017.10 from 16.10.85 since the appellant was subjected to suffer the loss of earnings occasioned by the tortuous act of the Bank from the date of attachment of the appellant's vehicle on the road while carrying other goods on hire on 16.2.1985.

4. Appeal No.383 of 1988 and 384 of 1988 are hereby dismissed.

No order as to costs.”

6. In pursuance of the order of the appellate court, decree

holder filed Regular Darkhast No.4 of 1999 for recovery of Rs. 15,682.90 (73700/- – 58017.10) together with interest at the rate of 15 percent per annum on the principal amount of Rs. 58,017-10 from 16.10.1985; for appointment of Court Receiver in respect of truck bearing registration no. MWT 9074; for directing the judgment debtor to carry out repairs. Decree holder also claimed damages of Rs. 1 Lac as the truck was lying idle or stationary for a long period of time on the spot, among other prayers

7. Decree holder examined himself at Exhibit 48. As against this, judgment debtor did not lead any evidence. After considering the material on record, by the impugned order, the learned trial Judge permitted decree holder to take steps to recover amount of Rs. 15,682-90 and Rs. 1,00,000/- as prayed for at Sr. No.1 and 5 described in particular of amount from the judgment debtor at Exh.1 It is against this order, the judgment debtor has instituted the present application.

8. Mr. Singh has taken me through the order passed by Cooperative Court and Cooperative Appellate Court dated 25.3.1988 and 9.2.1989 respectively. He submitted that in the order dated 25.3.1988, the Cooperative Court considered oral evidence of Dambre, surveyor as also report made by Dambre, surveyor indicating that costs of repairs comes to Rs. 82,830/- During the course of evidence it was stated on behalf of Dambre

surveyor that valuation of the truck is to be arrived at by debating 10% depreciation every year of the use of the truck. In the year 1985, the cost of the truck would come to Rs.1,30,000/- In the cross examination it was conceded that on the same day life of the truck would be 10 years and after 5 years valuation of the truck would come to Rs. 50% of the cost.

9. Mr. Singh further submitted that the Executing Court cannot go behind the decree. In other words, he submitted that perusal of the orders passed by Cooperative Court and Cooperative appellate would indicate that either of the courts did not award damages to decree holder. He, therefore, submitted that the learned trial Judge was not justified in awarding claim of Rs. 1 Lac towards damages. Lastly, Mr. Singh submitted that no evidence is produced by the decree holder to substantiate the claim of damages of Rs. 1 Lac despite that the learned trial Judge awarded the said claim. He, therefore, submitted that the impugned order is liable to set aside.

10. On the other hand, Ms Wadkar supported the impugned order. She submitted that it is not disputed that the truck was attached on 16.3.1985 by judgment debtor. Possession of the truck in question was taken by judgment debtor on 15.10.1985. Though the application was made in the Cooperative Court seeking permission to sell truck, that application was not

pressed. In short, she submitted that from 15.10.1985 judgment debtor retained custody of vehicle. Judgment debtor neither sold the truck nor carried out any repairs. Decree holder was prevented from utilizing the truck so as to repay the loan amount. She has also invited my attention to operative part of the appellate court order and submitted that the appellate court gave option to the judgment debtor to either get the vehicle repaired done as per the valuation and inspection report of Dambre Surveyors and Co. within eight weeks from the date of the order at the cost of the judgment debtor subject to the limit of Rs.73,700/- and produce a certificate as to the satisfactory completion of the said repairs or the judgment debtor shall give credit to the decree holder in his account for a sum of Rs.73,700/- forthwith. On compliance of any of the alternative, the judgment debtor was to return the said vehicle to the decree holder on his payment of Rs.58,017.10 shown by the judgment debtor as principal amount as on 15.10.1985.

11. She submitted that, in the present case, the judgment debtor neither carried out the repairs nor returned the vehicle. The judgment debtor ought to have paid Rs. 15,682.90 after adjusting the amount (Rs.73,700/- - 58017.10). The judgment debtor also did not pay Rs.15,682.90. Lastly, she submitted that the learned trial Judge, after considering the evidence on record,

directed the judgment debtor to issue direction to decree holder to take steps for recovery of Rs. 15,682.90 plus damages of Rs. One Lac. She, therefore submitted that no case is made out for invocation of powers under section 115 of C.P.C.

12. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The short question that arises in the present C.R.A. is whether the judgment debtor has made out any case as contemplated by Section 115 for interfering with the impugned order.

13. In the case of *M.L.Sethi Vs. R. P. Kapur, 1972 (2) SCC 427*, the Apex Court has considered the scope of section 115 of C.P.C.

It was observed thus:

".. .. The provisions of Section 115 of the 'Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed, to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of

the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of s. 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court cannot be corrected by the High Court under Section 115."

The Apex Court reiterated that under Section 115 of C.P.C. the High Court has to satisfy itself on three matters - (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction ; and (c) that in exercising jurisdiction, the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity by committing some error of procedure in the course of the trial which is material. If the High Court is satisfied on these three matters, it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law.

14. Applying the tests laid down in the aforesaid case, whether it can be said that the learned trial Judge has committed error as contemplated by clauses (a), (b) and (c) of sub-section (1) of Section 115. Perusal of the paragraph 1 of the impugned order shows that the learned trial Judge has considered evidence of decree holder examined at Exh.48. As against this, the judgment debtor did not lead any evidence. In paragraph 6, the

learned trial Judge noted that depreciate value of the truck is not brought on record by either of the parties and that cost of the repairs was determined at Rs. 73000. The learned trial Judge, therefore, observed that under such facts and circumstances, it can be believed that truck was valued at least 73000/- and that judgment debtor did not offer any independent evidence about valuation of the truck. It was further observed thus:

“The cross examination of the decree holder also reveals that it is not denied by the judgment debtor specifically that the value of the truck was Rs. 1,00,000/-. As such it is revealed from the evidence of decree holder that the value of the truck was atleast Rs.73,000/-, whereas it is not denied that the value was Rs.1,00,000/- on one hand, whereas on the other hand, the decree holder has deposed about the value of the truck and the judgment debtor has not produced any independent evidence. Under such circumstances, it is required to be considered that the damages as prayed for by the decree holder would certainly be equal to loss of the truck as it stood at the time at which it was to be delivered to the decree holder in view of the discussion as herein above, the decree holder has proved that the truck must have been the value at least Rs.73,000/- in the year 1989 as the truck is admittedly not delivered in possession of the decree holder till this date, it can be believed that the truck was decayed in its value by being idle or stationary for such a long period for more than 15 years. Under such circumstances, such proved value of Rs.1,00,000/- of the truck can certainly be considered as the amount of damages of the truck itself.”

I do not find that the learned trial Judge has committed any error in reaching this conclusion. It cannot be said that the findings recorded by the learned trial Judge are perverse being contrary to evidence on record or that there is no evidence on record for

supporting this finding. Merely because another view is possible that, by itself, is no ground for taking a different view. In view thereof, Application fails and the same is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs.

15. Mr. Wadkar states that at the time of granting stay this court directed the judgment debtor to deposit Rs.1,15,682/- Decree holder may be permitted to withdraw the said amount together with accrued interest, if any. Decree holder is permitted to withdraw Rs.1,15,682/- together with accrued interest, if any. On the other hand, Mr. Singh orally applies for stay of this order for a period of 8 weeks. In view thereof, notwithstanding dismissal of Application., this order shall remain stayed for a period of eight weeks from today. In case the applicant/judgment does not obtain suitable orders from higher court within this period, decree holder is permitted to withdraw the said amount together with accrued interest if any. Order accordingly.

(R.G.KETKAR, J.)