

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

**WRIT PETITION NO.5648 OF 2000
with
CIVIL APPLICATION NO.1366 OF 2003**

Life Insurance Corporation of India ... Petitioner

Vs.

Narayan Gopal Upadhyay & Ors. ... Respondents

Dr.(Ms.) Poornima Advani for the Petitioner
None present for Respondents

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JUNE 16, 2017**

P.C. :

1. This petition under Articles 226 and 227 of the Constitution of India, is directed against the order dated 13.9.2000 passed by the learned Joint Civil Judge Senior Division, Solapur, below exhibit 21 in Special Darkhast No.358 of 1998. The petitioner is the decreeholder and the respondent No.1 is a Judgement Debtor in the said Darkhast. He has filed the application for restitution of the possession of the suit property as the High Court by its order dated 12.7.1999 has set aside the order of the trial Court dated 19.12.1998 granting warrant of possession in favour of the petitioner.

2. A short question involved in this case is whether the order passed by the High Court dated 12.7.1999 amounts to reversal or setting aside or clarification of the order of the trial Court of issuing the warrant of possession? If so, then, whether the said application requires a judicial enquiry as contemplated under Chapter XIX of the Civil Manual or the said application is to be treated as the miscellaneous application not requiring judicial enquiry under Chapter XX of the Civil Manual?

3. Nobody appears for the respondents. On 8th June, 2016, the matter was adjourned to 15th June, 2016 as Mr.Dhakephalkar, Senior Counsel, appeared and he made a statement that respondent No.1 used to be his client several years ago, however, there are no instructions from him and he has returned the brief. Yet, he tried to contact him telephonically and thereafter, the son of Respondent No.1 also. He had submitted that he would argue the matter on the next day if at all instructions are received. But when the matter was called out yesterday, he was not present. Today, also he is not present. Thus, it appears that the Respondent No.1 is not interested in pursuing the matter as neither the learned Counsel is instructed nor is any other lawyer present on behalf of

the respondents.

4. The learned Counsel for the petitioner – Life Insurance Corporation has argued that respondent No.1 has filed a suit for specific performance in respect of some land on the basis of an unregistered agreement of sale being Regular Civil Suit No.896 of 1997 and the said suit was dismissed for default and the said order was confirmed upto the Supreme Court on 15.6.2005. The learned Counsel has further informed that the petitioner had in fact purchased the same suit land from the owner i.e., respondent No.2, by registered sale deed on 19.9.1996 and he is a full fledged owner as on today. On this background, the Court has to deal with a short issue of clarifying the legal position.

5. After obtaining the order from the High Court dated 12.7.1999 by setting aside the order dated 19.12.1998, the respondent No.1 filed application for restoration of possession on 5.8.1999. In that application, a preliminary issue was raised by the petitioner on the ground of maintainability and calling for judicial enquiry. The said application dated 5.8.1999 under Chapter XIX of the Civil Manual was made necessarily under section 144 of the Civil Procedure Code as there is no other provision in the Code to

move such application for restitution before the executing Court.

Section 144 of the Civil Procedure Code reads thus:

"144. (1) Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified, and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

6. The order of the executing Court was set aside by the High Court and, therefore, the executing Court ought to have treated that application under section 144 of the Civil Procedure Code. The learned Counsel for the petitioner has rightly pointed out the list given under section 337 of Chapter XIX of the Civil Manual that the proceedings under section 144 of the CPC for restitution, etc. require judicial enquiry. Chapter XX of the Civil Manual deals with the miscellaneous applications not requiring judicial enquiry. On perusal of the impugned order dated 13.9.2000, it is found that the learned Civil Judge, Senior Division, Solapur, has grossly erred in holding that the order was not varied or reversed. The learned

Judge ought to have taken into the effect of the orders passed by this Court dated 12.7.1999 when it was specifically mentioned in the order of the High Court that the order of the executing Court dated 19.12.1998 is set aside.

7. Under such circumstances, the petition succeeds. The order dated 13.9.2000 is hereby set aside as illegal.

8. It is to be noted that the learned Counsel for the petitioner submits that the petitioner / Life Insurance Corporation has become the owner of the land in 1996 and is in possession of the said piece of land from 1998. Due to the subsequent developments, the trial Court is hereby directed to take up the matter and expedite and dispose of the same within two months, preferably, on or before 31.8.2017. The parties shall appear before the trial Court on 1st July, 2017.

9. Writ Petition is disposed of accordingly.

10. In view of the disposal of the Writ Petition itself, Civil Application No.1366 of 2003 also stands disposed of.

(MRIDULA BHATKAR, J.)