IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 623 OF 2016

Shri Ramvilas Gangabishan Heda, ..Petitioners.
since deceased, through L.Rs;
1.Smt. Rukmabai Ramvilas Heda and
Ors.

Vs

Shri Rikabchand Achaldas Oswal .. Respondents
and Ors.

Mr.A.A.Kumbhakoni, Senior Advocate a/w Akshay Shinde, Advocate for Petitioners.

Mr. N.V.Walawalkar, Senior Advocate a/w S.M.Sabrad, Advocate for Respondent no.1.

Mr. P.R. Banavalikar a/w Mr. Chetan G. Patil, Advocate for Respondents no. 2 and 7.

CORAM : R.G.KETKAR,J.
DATE : 15/02/2017

PC:

1. Heard Mr.A.A.Kumbhakoni, learned Senior Counsel for the petitioners, Mr.N.V.Walawalkar, learned Senior Counsel for respondent no.1 and Mr.P.R.Banavalikar, learned counsel for respondents no.2 and 7 at length. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing. Notice on rest of the respondents is dispensed with as basically respondent no.1, hereinafter referred to as 'judgment debtor no.1' is only contesting respondent.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'decree holders', have challenged the Judgment and order dated 28.7.2015 passed by the learned Jt.Civil Judge, Jr.Dn., Kolhapur below Exhibit-296 in Final Decree No.21 of 1975. By that order, the learned trial Judge rejected the application made by the decree holders under Order XXII, Rule 4(4) of C.P.C for exempting them from bringing legal representatives of judgment debtors no.2,3,4 and 7 on record.

3. Ramvilas Gangakisan Heda, since deceased, had instituted Special Civil Suit No.78 of 1969 against Achaldas Durgaji Oswal, since deceased, through his legal representatives, for declaration that he is not liable to pay amount on the basis of registered Mortgage Deed dated 21/23rd December, 1947 and for possession of the suit property. In the alternative, the plaintiffs prayed for redemption of mortgage. The suit was decreed on 18.1.1972 only against defendant no.1. The suit proceeded exparte against defendants no. 2 to 8. On 19.7.1975, preliminary decree was drawn. On that basis, the decree holders filed Final Decree Application No.21 of 1975. On 17.10.1980, the learned trial Judge dismissed the application on the ground that it is barred by limitation. Initially, decree holders instituted Appeal from Order No.150 of 1981 in this Court which was converted into Civil Revision Application in the year 1998. Civil Revision

Application No.310 of 1998 was allowed on 9.11.2001 and the order of the trial Court dated 17.10.1980 was set aside and the matter was remitted to the trial Court with direction to dispose of the same on merits. Aggrieved by that decision, legal representatives of judgment debtor no.1 approached the Apex Court. By order dated 15.1.2003, the Apex Court dismissed the Appeal.

4. During the pendency of the final decree proceedings, judgment debtor no.1 filed application at Exhibit-130 on 11.6.2003 setting out therein that judgment debtors no.2,3 and 7 have expired and their legal representatives are not brought on record. Prayer was, therefore, made for issuing direction to the decree holders to bring on record legal representatives of judgment debtors no.2,3 and 7 within the stipulated period. It was further prayed that in the event of the failure of the decree holders to obey orders, final decree proceedings may be dismissed. On 19.7.2003, the decree holders filed application at Exhibit 139 for bringing legal representatives of judgment debtor no.7 on record. Decree holders also filed application at Exhibit-169 on 29.7.2004 setting out therein that application at Exhibit 139 is already filed on record for bringing legal representatives of judgment debtor no.7. Some of the legal representatives have appeared after service of notice. Request was, therefore, made for permitting the decree holders to amend Final Decree

Application Exhibit-1 for bringing on record legal representatives of judgment debtor no.7. On 29.7.2004, decree holders filed application at Exhibit-170 for bringing legal representatives of judgment debtors no 2 and 3 on record. On 26.9.2008, judgment debtor no.1 filed application at Exhibit 213 for disposing of the Final Decree Application as abated as the decree holders failed to take steps for bringing legal representatives on record. On 14.10.2008, the decree holders filed application Exhibit-214 for bringing legal representatives of judgment debtor no.2 on record.

5. On 26.4.2012, decree holders filed purshis at Exhibit 256 setting out therein that they have filed amended final decree proceedings. On 26.3.2013, judgment debtor no.1 filed application at Exhibit 268 for removing amended final Darkhast Application at Exhibit-1 along with purshis at Exhibit 256. By order dated 10.7.2013, the learned trial Judge rejected the application. While rejecting the application, by clause (2) of the operative part of the order, the learned trial Judge directed the decree holders to take steps within 20 days from the date of the order for bringing legal representatives of judgment debtors no.2,3, and 7 on record and for carrying out necessary amendment in Exhibit-1.

6. Aggrieved by that order, judgment debtor no.1 instituted Civil Revision Application No.660 of 2013 in this Court. During the course of hearing, the learned senior counsel appearing on

behalf of the decree holders stated that he will withdraw application Exhibit 256 and annextures thereto, being amended copy of Exhibit-1. In view of the statement, the Court did not think it necessary to consider the impugned order on merits and it was accordingly set aside. The learned senior counsel appearing on behalf of judgment debtor no.1 was agreeable to the said course of action being adopted and that he had no objection for deciding the applications Exhibits 130,139,213, and 214 which are pending in the final decree application being considered on merits and in accordance with law. This Court, therefore, directed the executing court to consider those applications on their own merits and in accordance with law. In view of withdrawal of the application Exhibit 256 and amended copy of Exh.1 appended thereto, the parties were relegated back to original Exhibit.1 and accordingly C.R.A. was disposed of.

7. On 24.2.2015, the decree holders made submissions on applications Exhibit 139, 213 and 214 and the matter was adjourned to 4.3.2015 for arguments of judgment debtor no.1. On 13.3.2015 decree holders filed application at Exh.296 under Order XXII, Rule 4(4) of C.P.C. for exempting them to bring on record legal representatives of judgment debtors no.2,3,4 and 7. Judgment debtor no.1 filed reply at Exhibit 298 opposing that application. By the impugned order, the learned trial Judge has rejected that application. It is against this order, the decree

holders have instituted the present petition.

8. In support of this petition, Mr. Kumbhakoni submitted that Suit being Spl. Civil Suit No. 78 of 1969 was contested only by judgment debtor no.1 by filing written statements at Exhibits 26 and 46. Judgment debtors no. 2 to 8 were proceeded exparte. On 18.1.1972, the learned trial Judge decreed the suit only against judgment debtor no.1. In paragraph 6 of the impugned order, apart from noting this fact, it was also observed that only judgment debtor no.1 is contesting final decree proceedings and other judgment debtors have not appeared. He submitted that Order XXII, Rule 4(4) lays down that the court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing. He submitted that in the present case, judgment debtors no.2 to 8 have neither filed written statement nor participated in the trial. The suit proceeded exparte against them. He, therefore, submitted that the learned trial Judge ought to have allowed the application Exhibit 296 thereby granting exemption to the decree holders to bring on record legal representatives of judgment debtors no. 2,3,4 and 7. He also relied upon the decision of the Apex Court in the case of Mata Prasad Mathur Vs Jwala Prasad Mathur, (2013) 14 SCC 722.

9. On the other hand, Mr. Walawalkar strenuously contended that the learned trial Judge, having regard to conduct of the decree holders, was fully justified in rejecting the application. He invited my attention to the application at Exhibit-130 filed by judgment debtor no.1 on 11.6.2003. By that application, judgment debtor no.1 sought direction against the decree holders to bring on record legal representatives of judgment debtors no. 2,3 and 7 within the stipulated time failing which the final decree proceedings may be dismissed. Decree holders also filed applications Exhibits-139 and 169 for bringing legal representatives of judgment debtor no.7 on record. They also filed application Exhibit-170 for bringing legal representatives of judgment debtors no.2 and 3 on record. He submitted that judgment debtor no.1 also filed application at Exh.213 on 26.9.2008 for disposing of application Exhibit-1 on the ground of abatement as the decree holders did not take any steps for bringing legal representatives of judgment debtors no.2,3,4 and 7. In fact, decree holders filed application at Exhibit 214 for bringing legal representatives of judgment debtor no.2 on record. On 24.2.2015, learned trial Judge heard arguments of decree holders on Exhibits 139, 213 and 214 and posted matter on 4.3.2015 for argument of judgment debtor no.1. Not only that, before this Court in Civil Revision Application No. 660 of 2013 the decree holders withdrew application Exh.256 and

amended copy of Exhibit-1 and agreed for disposal of applications Exhibits 130, 139, 213 and 214 pending in the final decree application. He submitted that, therefore, it is not open to the decree holders to file application Exhibit 296 seeking exemption for bringing legal representatives of judgment debtors no.2,34 and 7 on record. Mr. Walawalkar relied upon decision of this Court in Reliance Consultancy Services Ltd Vs. Metro Palutan Investment, 2007 (5) Bom. C.R. 475 and in particular paragraphs 9 and 10 thereof.

10. Mr. Walawalkar further submitted that judgment debtor no.2 expired on 27.2.1986. Judgment debtor no.3 expired on 24.5.1995. Judgment debtor no.4 expired on 6.10.2013. Judgment debtor no.7 expired on 27.11.2002. The present application under Order XXII, Rule 4(4) is made on 13.3.2015 which is clearly barred by limitation. In support of this proposition he relied upon Article 137 of the Limitation Act, 1963.

11. Mr. Walawalkar further submitted that as the decree holders withdrew application Exhibit 256 as also amended copy of Exhibit-1 and agreed for disposal of the applications Exhibits-130, 139, 213 and 214 by executing court, judgment debtors may be permitted to revive the proceedings of Civil Revision Application No. 660 of 2013.

12. Mr.Banavalikar appearing on behalf of legal representatives of respondents no. 2 and 7 submitted that Schedule under the

Limitation Act is divided in three Divisions. First Division deals with Part I to X consisting of Articles 1 to 113 relating to Suits. Second Division deals with Appeals consisting of Articles 114 to 117 and Third Division deals with Applications and is divided into two Parts. Part I deals with applications in specified cases and consists of Articles 118 to 136 and Part II deals with other applications and is a residuary Article 137. Article 137 prescribes three years period for filing any other applications for which no period of limitation is provided elsewhere in the Third Division, and i.e. three years when the right to apply accrues. In the present case, he submitted that excepting judgment debtor no.4, application-Exhibit 296 filed on 13.3.2015 is hopelessly barred by limitation. In support of his submission, he relied upon the decision of the Apex Court in The Kerala State Electricity Baord, Trivandrum V. T.P. Kunhaliumma, AIR 1977 SC 282. He submitted that section 2(b) defines the expression 'application' which includes a petition. Section 3 lays down that subject to provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred and applications made after the prescribed period shall be dismissed although limitation has not been set up as a defence. He, therefore, submitted that basically the application being barred by limitation, no fault can be found with the impugned order.

13. I have considered the rival submissions advanced by the

learned counsel appearing for the parties. I have also perused the material on record. Before I consider the submissions on merits, it is necessary to note some of the undisputed facts in the present case.

1. Decree holders had instituted Special Civil Suit No.78 of 1969 for redemption of mortgage among other prayers.

2. Judgment debtor no.1 alone contested the suit by filing written statements at Exhibits 26 and 46. That suit proceeded exparte against judgment debtors no.2 to 8. They did not participate in the trial Court. In other words, judgment debtors 2 to 8 did not contest the suit. The suit was decreed on 18.1.1972 and preliminary decree was drawn only against judgment debtor no.1.

3. In paragraph 6 of the impugned order, the learned trial Judge also observed that preliminary decree was passed only against defendant no.1. Only Judgment debtor no.1 is contesting the final decree proceedings and other judgment debtors have not appeared.

14. It is, therefore, in the context of these undisputed facts, one has to consider whether the decree holders have made out a case for granting exemption for bringing legal representatives of judgment debtors 2, 3, 4 and 7 as per Order XXII, Rule 4(4) of C.P.C. Order XX, Rule 4(4) reads thus:

> "4. **Procedure in case of death of one of several defendants or of sole defendant**.-

> (4)The court **whenever it thinks fit**, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."
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> (emphasis supplied)

In the present case, judgment debtors 2 to 8 did not file written statement. They also failed to appear and contest the suit. That apart, preliminary decree was passed only against judgment debtor no.1.

15. In the case of Mata Prasad Mathur (supra), the respondent-plaintiffs had instituted suit for declaration, partition and injunction against the appellants. The plaintiffs failed to file application for substitution of legal representatives of Virendra Kumar, one of the defendants. The plaintiffs filed application before the trial Court for deletion of the name of deceased and setting aside abatement. The learned trial Judge held that suit abated in toto and accordingly dismissed the same. In appeal preferred by the plaintiffs, the First Appellate Court held that the learned trial Judge did not properly consider the issue in the light of the nature of the averments made in the plaint and the relief sought by the plaintiffs. The First Appellate court held that failure of the plaintiffs to bring his legal Representatives on

record did not affect the maintainability of the suit. The High Court of Madhya Pradesh affirmed that order.

16. The Apex Court traced the history of the amendment of Order XXII, Rule 4 for the purpose of highlighting the purpose underlying the same. It was observed thus;

> "... ... In the 27th Report of the Law Commission of India, on the amendment to the Code of Civil Procedure, 1908, the Commission noted at pp.162-63:
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> > "Order XXII, Rule 4 - relaxation of
> >
> > The question whether the court should have power to grant exemption in respect of the requirement of substitution in a proper case has been considered. Local amendments giving such power have been made by the High Courts of Calcutta, Madras, Orissa, etc., in respect of a Defendant who has failed to appear and contest the suit. It is, however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments have not, therefore, been adopted."
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> 6. In the 54th Report of the Law Commission, the matter was once more taken up for consideration by the Commission. The Report notes in Chapter 22 at pp.182-83:,
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> Order 22, Rule 4 - power to relax - whether should be given
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> 22.2. The first point concerns Order 22, Rule 4, under which non-substitution of a legal representative leads to abatement of the suit. The question whether the Court should, in a proper case, have power to grant exemption in respect of the requirement of substitution of the legal representative was considered in the earlier Report. The Commission noted that local amendments giving such power had been made by the High Courts of Calcutta, Madras, Orissa, etc., in respect of a Defendant who has failed to appear and contest the suit. It however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments

were not therefore, adopted.

22.3. We considered the matter further. At one stage we were inclined to add Sub-rule (4) in Order 22, Rule 4 as follows:

'(4) The Court, whenever it seems fit, may exempt the Plaintiff from the necessity to substitute the legal representative of any Defendant against whom the case has been allowed to proceed ex parte or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing, and the judgment in such a case may be pronounced against such Defendant notwithstanding the death of such Defendant, and shall have the same force and effect as if it had been pronounced before the death took place.'

22.4. We have however, come to the conclusion that any such amendment would amount to passing a decree against a dead man and would be wrong in principle. Hence no change is recommended."

7. Interestingly, the Amendment that followed the 54th Law Commission Report of 1973, substantially introduced Order XXII Rule 4(4) to the Code of Civil Procedure, vide Section 73(i) of Act 104 of 1976. It is noteworthy that in the original Bill, the provision of Order XXII Rule 4(4) was not included. The Bill was then referred to the Joint Committee and a recommendation made for the inclusion of a provision akin to Rule 4(4). The Joint Committee noted:

"55. Clause 73 (Original Clause 76) - (i) The Committee were informed during the course of evidence by various witnesses that delay in the substitution of the legal representatives of the deceased Defendant was one of the causes of delay in the disposal of suits. The Committee were also informed that, as a remedial measure, the Calcutta, Madras, Karnataka and Orissa High Courts had inserted a new sub-rule in Rule 4 of Order XXII to the effect that substitution of the legal representatives of a non-contesting Defendant would not be necessary and the judgment delivered in the case would be as effective as it would have been if it had been passed when the Defendant was alive.

The Committee are, therefore, of the view that in order to avoid delay in the substitution of the legal representatives of the deceased Defendant and consequent delay in the disposal of suits, similar provision may be made in the Code itself. New Sub-rule 3A in Rule 4 of Order XXII has been inserted accordingly.”

8. The Joint Committee, accordingly, inserted the following provision in the Amendment Bill, which was later incorporated through the Amendment.

“73. In the First Schedule, in Order XXII,-

(i) in Rule 4, after Sub-rule (3), the following sub-rules shall be inserted, namely:

'(4) The Court whenever it thinks fit, may exempt the Plaintiff from the necessity of substituting the legal representatives of any such Defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said Defendant and shall have the same force and effect as if it has been pronounced before death took place'. “

9. It would appear from the above that the Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the L.Rs of non-contesting Defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the Plaintiff from the necessity of substituting the legal representative of the deceased Defendant-Virendra Kumar. We have no manner of doubt that the view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4(4) CPC.”

17. In the present case, Mr. Walawalkar submitted that there are compelling reasons for not exempting the plaintiff from bringing legal representatives of judgment debtors no.2,3 , 4 and 7 on record. I have already dealt with the submissions of Mr. Walawalkar as regards (1) filing of applications Exhibits 139,169

by decree holders for bringing on record legal representatives of Judgment debtor no.7; filing of application Exhibit 170 by decree holders for bringing on record legal representtives of Judgment debtors no. 2 and 3; (2) pendency of applications Exhibits 130,139,213 and 214 as also the fact that arguments of decree holders on applications Exhibits 139,213 and 214 were heard on 24.2.2015 and the matter was posted for argument of judgment debtor no.1 on 4.3.2015. Apart from that decree holders also withdrew purshis Exhibit 256 along with amended Exhibit-1 and agreed for hearing of applications Exhibits 130,139,213 and 214. I do not find these as compelling reasons at all. Nothing prevents and precludes the decree holders from filing application under Order XX, Rule 4(4) seeking exemption to bring on record legal representatives of these judgment debtors. The undisputed fact is that only judgment debtor no.1 contested the proceedings right upto the Apex Court. Preliminary decree was also drawn against judgment debtor no.1. In fact, in paragraph 6, the learned trial Judge also observed that judgment debtor no.1 is the only contesting final decree proceedings. Other judgment debtors have also not appeared before the executing court. In view thereof, in my opinion, the learned trial Judge was not justified in rejecting the application.

18. Mr. Walawalkar and Mr. Banavalikar submitted that judgment debtor no.2 expired on 27.2.1986, judgment debtor

no.3 expired on 24.5.1995, judgment debtor no.4 expired on 6.10.2013, judgment debtor no.7 expired on 27.11.2002. The application under Order XXII Rule 4(4) at Exhibit 296 is made on 13.3.2015 and is, therefore, clearly barred by limitation. Reliance was also placed upon decision of the Apex Court in Kerala State Electricity Baord, Trivandrum (supra). Article 120 of the Limitation Act prescribes period of 90 days from the date of death of the plaintiff, appellant, defendant or respondent, as the case may be, to have their legal representatives, made a party .

19. I do not find any merit in this submission. I have already extracted Order XXII, Rule 4(4) which empowers the court **whenever it thinks fit**, to exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing. It, therefore, cannot be said that the application made by decree holders for exemption is barred by limitation. Reliance placed on the decision of Kerala State Electricity Board, Trivandrum (supra) does not advance the case of judgment debtors.

20. Mr. Walawalkar further submitted that as the decree holders withdrew application Exhibit 256 as also amended copy of Exhibit-1 and agreed for disposal of the applications Exhibits-130, 139, 213 and 214 by executing court, judgment debtors

may be permitted to revive the proceedings of Civil Revision Application No. 660 of 2013. Judgment debtor no.1 is permitted to revive proceedings of C.R.A.No.660 of 2013, if permissible in law. All contentions of the parties in that regard are expressly kept open.

21. In view thereof, impugned order is set aside and application Exhibit-296 stands allowed. Rule is made absolute in the aforesaid terms with no order as to costs.

22. At this stage, Mr. Sabrad orally applies stay of this order for a period of 12 weeks. Having regard to the fact that preliminary decree was drawn on 19.1.1975 for redemption of mortgage and till date final decree proceedings are pending, in my opinion, this is not a fit case for granting stay. Hence, oral application made by Mr Sabrad is rejected.

(R.G. Ketkar,J.)