

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

**SECOND APPEAL NO.455 OF 2014
with
CIVIL APPLICATION NO.1062 OF 2014**

Shreepati Namdeo Patil & anr. ... Appellants

Vs.

Sainath Ishwar Mekale & Ors. ... Respondents

Mr.S.D. Dharmadhikari for the Appellants
Mr.S.S. Shah for Respondent Nos.1 & 2

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: MARCH 27, 2018**

P.C. :

1. By consent of the parties, the appeal is taken up for final hearing at the stage of admission itself and heard finally.
2. This Second Appeal is filed by the appellant thereby challenging the judgment and order dated 30.12.2013 passed by the learned District Judge, Solapur dismissing the Regular Civil Appeal No.33 of 2013 thereby confirming the judgment and order dated 23.10.2012 passed by the learned Joint Civil Judge, Senior Division, Solapur in Civil Misc. Application No.51 of 2009. The appellants are the obstructionists / the original applicants in Civil

Miscellaneous Application No.51 of 2009. They have filed this application under Order 21 Rule 97 of the Civil Procedure Code. The plaintiffs had filed Special Civil Suit No.92 of 2006 for possession and declaration of title which was decreed in favour of the respondents/plaintiffs. The father of the appellants/applicants was the sole defendant who is also made a party respondent No.3 in Miscellaneous Civil Application No.51 of 2009.

3. The appellants moved an application as obstructionists in the execution proceedings by raising a plea that there was no legal necessity to respondent No.3 to sell the ancestral property. The learned Executing Court rejected the said application and the said order was confirmed by the first appellate Court and hence, this Second Appeal.

4. The learned Counsel for the appellants has submitted that this application was made under Order 21 Rule 97 of the Civil Procedure Code and so it is to be tried as a suit in view of the procedure laid down under Rules 101, 102, 103 and 104 of Order 21 of the Civil Procedure Code. The learned Counsel has submitted that the Executing Court did not frame issues and tried the application and delivered the judgment without the issues. The

learned Counsel has submitted that as the issues were not framed, the appellants were not aware on which point the appellants had to lead evidence and on whom the burden lied. He submitted that non-framing of issues is a legal error, hence, the judgment of the Executing Court as also the appellate Court need to be set aside. Thus, he submitted that the substantial question of law should be whether non-framing of issues in the application under Order 21 Rule 97 of the Civil Procedure Code will vitiate the entire proceeding and the order passed thereby is illegal. In support of his submissions, he relied on the Full Bench judgment of the Karnataka High Court in the case of **V.K. Rama Setty vs. A. Gopinath**¹.

5. Per contra, the learned Counsel for the respondents has submitted that the appellants have examined a total of 5 witnesses at the time of hearing of the Miscellaneous Civil Application No.51 of 2009 before the Executing Court. The applicants have raised the issue of legal necessity and also tendered evidence on it. He relied on the judgment of the Executing Court and also on the judgment and findings given by the first appellate Court in Regular Civil Appeal No.33 of 2013. He submitted that both the Courts have

1 AIR 1998 KARNATAKA 186

given a concurrent finding that there is no illegality in the judgment and order passed by the Courts below. The learned Counsel has submitted that non-framing of the issues itself will not vitiate the trial. In support thereof, he relied on the judgment of the Supreme Court in **Swamy Atmananda & Ors. vs. Sri Ramakrishna Tapovanam & Others**² and also in the case of **Nedunuri Kameswaramma vs. Sampati Subba Rao**³.

6. Perused the judgment of the Courts below. Admittedly, no issues were framed by the Executing Court, however, after perusal of the order passed by the Executing Court, it is found that the Executing Court has considered the issue of legal necessity raised by the appellants. In para 28 of its judgment, the said point is dealt with by the Executing Court. The appellants were given an opportunity to lead evidence and the said opportunity was fully exploited by the appellants by adducing evidence through 5 witnesses. The purpose of treating the application as suit by the Executing Court is to give full opportunity to the party or the obstructionist to put up his say and to give him sufficient opportunity as the decree is going to be executed.

2 (2005) 10 SCC 51

3 AIR 1963 SC 884

7. In the case of **V.K. Rama Setty vs. A. Gopinath (supra)**, the Full Bench of the Karnataka High Court has held that once the application is filed under Order 21 Rules 97 and 99 of the Civil Procedure Code, then it is mandatory on the part of the Court to dispose of the same in accordance with the provisions contained in Rules 100 and 101 of Order 21 of the Civil Procedure Code.

8. In the case of **Nedunuri Kameswaramma vs. Sampat Subba Rao (supra)**, the Supreme court while dealing with the omission to frame issues under Order 43 Rule 1 of the Civil Procedure Code and the effect of the same, has observed as follows:

“6. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mix-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which we have amply referred already.”

9. In the case of **Swamy Atmananda & Ors. vs. Sri Ramakrishna Tapovanam & Others (supra)**, the Supreme Court was dealing with the exclusion of the jurisdiction of the Civil Court u/s 9 while dealing with the matters of charitable endowments pertaining to recognised private schools and educational institutions under section 53A of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973. While discussing the issue, the Supreme Court has observed in para 39 thus:

“39. If the parties went to the trial knowing fully well the real issues involved and adduced evidence in such a case, without establishing prejudice, it would not be open to a party to raise the question of non-framing of particular issue.”

10. After going through the nature of the evidence, the points raised by the appellants, I am of the view that sufficient opportunity was given. Though the issues were not framed, the parties were aware of their say and accordingly, they have tendered their evidence. No specific case is made out of causing prejudice to the appellants.

11. Under such circumstances, the Second Appeal is rejected. In view of the rejection of the Second Appeal, Civil Application

No.1062 of 2014 also stands rejected.

12. At this stage, the learned Counsel for the appellants seeks stay of this order of 12 weeks, as the appellants want to challenge the order before the Hon'ble Supreme Court. In the circumstances of the case, this order is stayed for 12 weeks from today.

(MRIDULA BHATKAR, J.