

VPH

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (St.) No. 29552 OF 2018
IN
WRIT PETITION No. 8175 OF 2018**

Vimalchand Ghevarchand Jain & ors ... Review Petitioners

Vs.

Farooq Fakruddin Motiwala ... Respondent

Mr. Vimalchand G. Jain Petitioner no.1 appearing-in-person for himself & other review petitioners.

Mr. M. M. Aagavekar for Respondent

CORAM : R. D. DHANUKA, J.

DATE : NOVEMBER 1, 2018

P.C.

1. By this review petition, filed by the original respondent nos.1 to 9, the review petitioners seek to re-call an order dated 1.10.2018 passed by this Court in Writ Petition No. 8175 of 2018 thereby, allowing the said writ petition.

2. Some of the relevant facts relating to the matter of review petition are as under :

(a) The review petitioners have filed a suit in the year 1987

for possession of the suit property. The said suit was dismissed. The said decree was subsequently challenged in this Court. The matter went up to Supreme Court. in the year 2009 and the suit was decreed in favour of the petitioners on 23.3.2009.

(b) The petitioners, thereafter, applied for execution of the said decree. The decree was obstructed by the petitioner who was a third party. The said application filed by the respondent no.1 came to be dismissed by the executing Court on 21.7.2017. An appeal filed by the respondent, against the said order dated 21.7.2017 is still pending. The respondent, thereafter, filed a Writ Petition No. 8175 of 2018 in this Court *inter alia* challenging the order dated 21.7.2017 passed by the executing Court, rejecting the application filed under Order 21 Rule 97 of the Code of Civil Procedure, 1908. By an order dated 1.10.2018 passed by this Court, this Court had set aside the order dated 21.7.2017 passed below application (Exhibit 66) and held that Regular Civil Appeal No. 125 of 2017 filed by the respondent, does not survive. This Court thereafter, directed the executing Court to dispose of the applications filed by the respondent, within a period of six months from the date of the said order.

(c) The petitioners (Original respondent Nos.1 to 9) in Writ Petition No. 8175 of 2018 have filed this Review Petition, for seeking re-call of the order dated 1.10.2018.

3. The Review petitioner No.1 for himself, and for other review petitioners invited my attention to the various documents, annexed to the writ petition filed by the petitioners and also the review petitioners. It is submitted by the review petitioners that the suit was filed by the petitioners in the year 1987 against one Mr. Ramakant Eknath Jajoo. Admittedly, on 19.7.2000 during the pendency of the suit, Mr. Ramakant Jajoo allegedly sold part of the property to the original petitioner and also sold some part of the property to Mrs. Sundari Ganpati Pille out of the property bearing Gat No. 462/2. It is further submitted that admittedly, since Mr. Ramakant Eknath Jajoo against whom the decree was passed sold the property to one Mrs. Sundari Ganpati Pillai, who in turn sold the said property to the respondent No. 1 Faruk Fakruddin Motiwala herein, the said sale was not binding on the review petitioners (the decree holders). It is submitted that all these facts were not brought to the notice of this Court when the writ petition filed by the petitioners, was

for consideration of this Court.

4. It is submitted that since the transfer of the property in favour of the respondent was during the pendency of the suit, the respondent could not have filed any application under Order 21 Rule 97 of the Code of Civil Procedure, 1908 for obstructing the decree passed by the Supreme Court in favour of petitioners. It is submitted that in view of these admitted facts, the application filed by the respondent itself, was not maintainable and was rightly rejected by the executing Court.

5. The review petitioner No.1 has strongly placed reliance on a judgment of the Hon'ble Supreme Court in case of ***Usha Sinha Vs. Dina Ram & Ors*** dated 14.3.2008 passed in Appeal (Civil) No. 1998 of 2018 and in particular paragraphs 18 to 20 and 24 thereof. He also placed reliance on a judgment of the Punjab and Haryana High Court in the case of ***Harjit Kaur Vs. Vinod Kumar***, dated 4.3.2014 in C.R. No. 4622/2013 in support of his submissions. He submitted that in this case, since the respondent was claiming to be the purchaser of the suit property during pendency of the suit, Order 21 Rule 97 and 98 of the Code of Civil Procedure, 1908 was not

applicable. The said application was covered under Order 21 Rule 102 of the Civil Procedure Code, and thus, the said transaction was not binding on the decree-holder.

6. The petitioner also invited my attention to the sale deed executed in favour of the respondent in which it was admitted that one Mr. Ramakant Jajoo sold the same property to Mrs. Sundari Ganpati Pillai. He thus submitted that, there was no question of mis-description of the property. He relied upon several documents including tax receipts and mutation entries, in support of his submission that the property which was the subject matter of the suit filed by the petitioner was sold by the Judgment debtor during the pendency of the suit. It is further submitted that the respondent herein could not produce any document before the Court in support of his application under Order 21 Rule 97 of the Code of Civil Procedure, 1908 to show that he was the purchaser of the property, prior to the date of the suit.

7. Learned Advocate for the respondent on the other hand, strongly raised the issue of maintainability of the review petition on the ground that this Court, while passing the order in the year 2018

in the writ petition had considered all the submissions advanced by both the parties and had directed the Executing Court to dispose of the application filed by the petitioners. The executing Court fixed the matter for hearing on 2.10.2018 and 20.10.2018. The petitioner remained absent before the executing Court. He further submitted that the review petitioners have not made out any case for re-call of the order passed by this Court.

8. The learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Kamlesh Verma VS Mauawato & Ors. : (2013) 8 SCC 320*** and in particular to paragraphs 12, 13 and 14. He has also placed reliance on an unreported judgment of this Court dated 5.10.2017 passed by the Division bench (Coram : S. C. Dharmadhikari and M. S. Sonak, JJ.) in Review Petition (L) No. 5 of 2017, in the case ***Radhakrishna Co-Op. Housing Society Ltd. VS. State OF Maharashtra*** and would submit that the Division Bench of this Court, has adverted to the judgment of the Supreme Court in the case of ***Kamlesh Verma VS Mauawato & Ors. (supra)*** and rejected the review petition filed by the petitioner. It is submitted by the learned counsel that in the review petition, the review petitioner has reiterated the stand taken in the affidavit-in-reply filed in the month

of August, 2018 and thus, cannot be allowed to agitate those issues in the Review Petition once again.

9. The Review petitioner No.1 in his rejoinder, submitted that since the review petitioner was not heard by this Court at the stage of allowing the writ petition and since it is an admitted position in this matter that the respondent had purchased the property during the pendency of the suit, in view of section 52 of Transfer of Property Act, 1882, respondent could not have filed an application under Order 21 Rule 97 of the Code of Civil Procedure, 1908. There is a gross error apparent on the face of record under Order 47 Rule 1 of the Code. These facts were not brought to the notice of this Court.

10. I have heard both parties at great length in this review petition.

11. It is not in dispute that on 1.10.2018 this Court in the writ petition filed by the respondent had disposed of and remanded back the petition to the executing Court for deciding the application filed under Order 21 Rule 97 of the Code and for other reliefs on the principles analogous thereto. The question that arises for consideration of this Court, is whether there is an error apparent on

the face of record of this Court while passing the order dated 1.10.2018. It is undisputed by the respondent that the respondent had purchased the property on 13.10.2006 from one Sundari Ganpati Pillai who had purchased the property from the judgment debtor. The transaction in question in favour of the respondent was admittedly during the pendency of the proceedings filed by the petitioners. The judgment debtor had sold the said property to Mrs. Sundari Ganpati Pillai who in turn, sold the same to the respondent.

12. The question that arises for consideration of this Court is whether the transferee *pendente lite* is entitled to obstruct the decree? A perusal of the record indicates that it is an admitted position that the respondent had purchased the suit property from Mrs. Sundari Ganpati Pillai, by a registered sale deed dated 13.10.2006. While the said sale deed was admittedly executed in favour of the original petitioner, the litigation between him and the judgment debtor was also pending before the trial Court. The said Sundari Ganpati Pillai had admitted in her evidence that she had purchased the said property from the judgment-debtor and the said property was sold in favour of the respondent.

13. It is the case of the respondent that the property which was subject matter of the suit filed by the review petitioners herein and the property purchased by the respondent are different properties. Though, it is the case of the respondent that the property purchased by the respondent was the property bearing Gat No. 462/2, whereas the decree obtained from the judgment of the Supreme Court was in respect of Survey No. 462, this case of the original petitioner is contrary to the evidence on record.

14. It is undisputed that during the pendency of the suit, the original petitioner had purchased the property during the pendency of the suit filed by the review petitioners. Mr. Ramakant Jajoo who was the original judgment-debtor in the documents entered with Mrs. Sundari Ganpati Pillai had admitted that the said property was already the subject matter of the suit filed by the petitioner. In my view, there is no confusion in respect of the suit and the property purchased by the original petitioner. Both the properties were the same. The Hon'ble Supreme Court in case of *Usha Sinha (supra)* has considered the provision of section 52 of the Transfer of Property Act and under Order 21 Rule 102 of the Code and has held that the

transferee cannot obstruct the decree-holder and cannot seek the benefit under Order 21 Rule 98 of the Code of civil Procedure, 1908. The executing Court has held that the original petitioner was not allowed to obstruct the decree. In this case, it is an admitted position, that original petitioner had purchased the suit property from Sundari Ganpati Pillai, who had purchased the property from the judgment debtor during the pendency of the suit, filed by the petitioner, the principles of law laid down by the Supreme Court in *Usha Sinha (supra)* squarely applies to the facts of this case. The respondent thus, cannot get benefit of right under Order 21 Rule 98 of the Code. The Punjab and Haryana High Court also adverted to the judgment of the Supreme Court in case of *Usha Sinha (supra)*. I am in agreement with the views expressed by the Punjab & Haryana High Court.

15. In so far as the judgment of the Hon'ble Supreme Court in case of *Kamlesh Verma (supra)* on the scope of review under Order 47, Rule 1 of the Code of Civil Procedure is considered, a perusal of the said judgment indicates that the Supreme Court has held that the review petition can be entertained only when there is an error apparent on the face of record. In my view, the judgment of the

Supreme Court relied upon by the learned advocate for the respondent would assist the case of the petitioner and not the case of the respondent. It is an admitted position that the respondent was *transferee pendente lite* and thus, was not entitled to the benefit under Order 21 Rule 98 of the Code of Civil Procedure 1908. These facts were not brought to the notice of this Court in the writ petition when heard by this Court. The view taken by the Supreme Court in case of *Kamlesh Verma* (supra) if would have been pointed out by the learned advocate for the original petitioner, or the parties appearing in person, this Court would not have passed the order allowing the writ petition filed by the original petitioner. In my view, there is an error apparent on the face of record and the order passed on 1.10.2018 can be re-called by applying the principles of judgment as laid down by the Hon'ble Supreme Court in case of *Kamlesh Verma* (supra).

16. The petitioner No.1 appearing in person and on behalf of other persons, has rightly brought to the notice of this Court the correct position and has rightly agitated the issue that the issue of *transferee pendente lite* was not brought to the notice of the Court which led this Court committing an error on the face of record in

passing the order dated 1.10.2018. In my view, since the original petitioner has purchased the property with full knowledge of the pending proceedings cannot be allowed to obstruct the decree which has been passed by the Supreme Court in favour of the petitioners, which decree the petitioners are unable to execute in view of a frivolous application filed by the original petitioner under Order 21 Rule 97 of the Code of Civil Procedure. No case is made out by the original petitioner for interfering with the impugned order passed by the learned executing court.

17. I am therefore, inclined to hold that the review petitioners have made out a case for re-call of the order passed by this Court as there is an error apparent on the face of the record. I, therefore pass the following order :

ORDER

- (i) Order dated 1.10.2018 passed in Writ Petition No.8175 of 2018 is re-called.
- (ii) Writ Petition no.8175 of 2018 filed by the respondent is dismissed.
- (iii) There shall be no order as to costs.
- (iv) At the request of the learned counsel for the respondent the

review petitioners shall not execute the decree for a period of four weeks from today.

- (v) During this period, the original petitioners shall not create any third party rights and shall not hand over possession to any person. If the respondent prefers Special Leave Petition against this order, he shall serve a copy thereof on the review petitioners in advance.

Sd/-
[R. D. DHANUKA, J.]

Vinayak Halemath