

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.**

925 WRIT PETITION NO.7042 OF 2018

KAVITA @ LAXMI SATISH JADHAV PATIL

... Petitioner

VERSUS

SATISH ATMARAM JADHAV

... Respondent

...

Advocate for Petitioner : Shri V.P. Patil
Advocate for Respondent : Shri N.S. Jaju

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CORAM : P.R. BORA, J.

Dated: July 11, 2019

PER COURT :-

1. The petitioner has challenged the order dtd.03.08.2017 passed below Exh.16 by the 5th Jt. Civil Judge, Senior Division, Jalgaon in Regular Darkhast No.560 of 2016. The aforesaid Reg. Darkhast No.560 of 2016 is filed by the present petitioner for execution of the order passed below Exh.10 by 5th Jt. Civil Judge, Senior Division, Jalgaon on 30.11.2015 in HMP No.448 of 2015. In the execution proceedings, the present respondent i.e. husband of the petitioner filed an application below Exh.16 raising an objection that, the order dated 30.11.2015 was obtained by fraud by the decree holder and as such, the said order was nullity. The Executing Court on the said application has passed the following order:

“O R D E R

1. Considering the objection of the present respondent husband following issues are framed.

1. Whether the interim maintenance order passed on

Exh.10 in H.M.P No.448 of 2015 is obtained by fraud?

2. Whether the above mentioned interim maintenance order is executable ?

3. What order ?”

Aggrieved by, the petitioner has filed the present petition.

2. The only sustainable objection, which has been raised by the petitioner is that, the similar application was filed by the present respondent in HMP proceedings at Exh.58 and the same was rejected by the said Court. The learned counsel appearing for the petitioner submitted that, the order passed below Exh.58 has not been challenged by the present respondent in any higher Court and, thus, has attained the finality. The learned counsel submitted that, since the same objection was raised between the same parties, the executing court could not have dealt with the said issue considering the bar under Section 11 of the Code of Civil Procedure. The learned counsel, in the circumstances, prayed for setting aside the aforesaid order.

3. Shri Jaju learned counsel appearing for the respondent supported the impugned order. The learned counsel submitted that, the order below Exh.58 was passed without giving any opportunity of

hearing to the parties. The learned counsel submitted that, observing the said fact, the Trial Court has allowed the application below Exh.16 in Regular Darkhast No.560 of 2016.

4. I have perused the impugned order as well as the order passed below Exh.58 in HMP No.448 of 2015, which is tendered across the bar today by the learned counsel appearing for the petitioner. On perusal of the contents of both the aforesaid applications, there has remained no doubt that, both the applications were containing similar objections and similar prayer. It is further revealed that, in the order passed below Exh.58 in HMP No.448 of 2015, the Court has specifically observed that, it had heard both the parties. In view of the observations in the aforesaid order, the contention raised by Shri Jaju that the order below Exh.58 in HMP No.448 of 2015 was passed by the said Court without hearing the parties, appears to be without any substance. It is not in dispute that, the order passed below Exh.58 has not been challenged in any higher Court. In fact, when the said order was brought to the notice of the Executing Court, the said Court must not have entertained the application at Exh.16 being barred by the principle of *res judicata*. The Trial Court has committed error in entertaining the said application by discarding the objection of the present petitioner that,

the similar objection has been rejected in HMP No.448 of 2015 out of which the Darkhast proceeding was arising. The impugned order, therefore, deserves to be set aside and is accordingly set aside. The Writ Petition, thus, stands allowed.

(**P.R. BORA, J.**)

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