

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

**WRIT PETITION NO.822 OF 2017
WITH
CIVIL APPLICATION NO.3173 OF 2017
IN
WRIT PETITION NO.822 OF 2017**

1. Jaibunissa d/o Abdul Rehman
Age : 74 years, Occu: Pensioner,
R/o. Khadkeshwar, Aurangabad.
C/o. House No. 9-10-A, Pensionpura,
Cantonment, Aurangabad.
2. Abdul Hamid Khan s/o. Nawaz Khan,
Age : 70 years, Occu: Pensioner,
R/o. Khadkeshwar, Aurangabad.
C/o. House No.4-15-83, Azad Ali Shah Masjid,
Khadkeshwar, Aurangabad.

... PETITIONERS

VERSUS

1. Sajid Khan s/o. Salimuddin Khan,
Age : 50 years, Occu: Service,
R/o. House No.2-3-5, Khadkeshwar,
Aurangabad.
2. Majid Khan s/o. Salimuddin Khan,
Age : 48 years, Occu: Business,
R/o. House No.2-3-5, Khadkeshwar,
Aurangabad.

... RESPONDENTS

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Advocate for Petitioners : Mr. P.S. Paranjape
Advocate for respondent : Mr. P.F. Patni
Advocate for intervenor : Mr. Amit S. Savale

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CORAM : MANGESH S. PATIL, J.
Reserved on : 30.11.2021
Pronounced on : 08.12.2021

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. The learned advocate Mr. P.F. Patni waives service for both the respondents. I have also heard the learned advocate Mr. A.S. Savale for the intervenor in CA No.3173/2017. At the request of the parties, the matter is heard finally

at the stage of admission.

2. The long and short of the matter in controversy can be summarized in following words:

- i) One Salimuiddin had inducted the petitioners in the demised premises on a long lease. The respondents claiming to be his heirs and on the ground that his whereabouts were not known for more than 7 years filed a Regular Civil Suit No.387/1989 seeking declaration of his civil death. The Suit was decreed on 02.02.1990. The respondents then terminated the lease and sought eviction by filing Regular Civil Suit N.945/1997 against the petitioners. The Suit was decreed and the decision was confirmed and reached finality.
- ii) The respondents then filed execution being Regular Darkhast No.112/2008 for executing decree for eviction. The petitioners filed an application (Exhibit-31) under Section 47 read with Section 151 and Order XXI Rule 29 of the Civil Procedure Code. They contended that though Salimuiddin was alive, the respondents had obtained the decree regarding his civil death. It was an *ex parte* decision. They were not the party to that suit. They have subsequently challenged that decision by preferring an appeal. Therefore, they claimed stay to the execution of the decree under Order XXI Rule 29. They also raised few other disputes like though they admitted the initial lease, according to them they had

subsequently purchased the demised premises under a sale deed dated 13.02.1974 from Salimuiddin and his mother but the documents relating to it were not produced during the suit for eviction inadvertently. They also claimed that Salimuiddin during his life time had also filed a written statement in Regular Civil Suit No.1220/1994 which was filed by one Rahman Ali Ahmed Ali. He also filed an affidavit on 20.10.1994 specifically alleging about the respondents and their mother Surraya Begum having obtained the decree regarding his civil death behind his back and without the knowledge of his eldest son Kalimuddin.

- iii) The respondents opposed that application by filing their say contending that the issues that was being cropped up by the petitioner were beyond the purview of the powers of the executing court. The issues were already raised by the petitioners not only before the trial court in the eviction proceeding but even in the appeal before the District Court and in the Second Appeal decided by this Court. It was after finding them to be the heirs of Salimuiddin that eviction decree was passed and was confirmed. Therefore, no such objections could have been raised in the execution proceeding.
- iv) The respondents also contended that the application was filed merely to protract the execution . There is no authenticity of the documents purportedly filed/executed by Salimuiddin.

3. The learned advocate Mr. Paranjape for the petitioners, in tune with their stand vehemently submitted that the decree obtained by the respondents regarding civil death of Salimuddin was obtained fraudulently. The contention can legally be raised even in a collateral proceeding. Fraud vitiates every solemn act and a fair opportunity deserved to be extended to petitioners to prove the contentions.

4. Mr. Paranjape would further submit that the executing court has even refused to entertain the objection. Since the petitioners were the parties to the suit for eviction, they had no alternative but to raise the objection under Section 47 of the Civil Procedure Code and it ought to have been decided on merits by extending sufficient opportunity to them to substantiate their stand/objection. Observations of the executing court that it could not have gone beyond the decree is illegal in the facts and circumstances of the case. In support of his submission Mr. Paranjape would cite the decision in the matter of **A.V. Papayya Sastry and Ors. Vs. Government of A.P. and Ors.; AIR 2007 SC 1546.**

5. The Learned advocate Mr. Patni for the respondents submitted that the petition presented yet another instance to demonstrates as to how and to what extent a tenant facing eviction decree can make the execution as difficult as possible. At the out set, he would submit that all the objections which the petitioners are now seeking to rake up were available to them during pendency of the eviction suit. They did raise such pleas and could not succeed even in the Second Appeal before this Court. Therefore,

for this reason alone, the objections of the petitioners to the execution of the decree are liable to be dismissed with cost. He would submit that having noticed such a history the executing court while passing the impugned order has taken a correct view and has rightly rejected the application being illegal.

6. The learned advocate Mr. Patni would then submit that though some photocopies of the documents purportedly signed/executed by Salimuddin have been produced on the record, there is no authenticity to it. Assuming that Salimuddin had filed a written statement in Regular Civil Suit No.1220/1994 from the file of Civil Judge, at Aurangabad, it was filed in the year January 1995. He would further submit that even the affidavit is stated to have been sworn by him before some notary from Hyderabad and it is also a photocopy. Besides it was executed on 20.10.1994. Though it reads about the respondents having obtained the decree regarding his civil death *ex parte* and without his knowledge, he never challenged the decree which he could have and therefore even for this reason, the petitioners are not entitled to raise the issue regarding validity of that decree.

7. Mr. Patni would submit that accepting the allegations and the objections of the petitioners, the respondents at the most can be called as joint owners or co-owners or may be tenants in common being the heirs of Salimuddin and it is trite that even a co-owner can maintain a suit for eviction of a tenant without impleading the other co-owners. In support of his submission he would place reliance on the decisions in **Ram Pasricha Vs.**

Jagannath and Ors.; (1977) 1 SCR 395 and Dhannalal Vs. Kalawatibai and Ors.; (2002) SUPP 1 SCR 19.

8. Mr. Patni, lastly, submitted that the executing court cannot go behind the decree and can only allow such obstructions if the Court which had passed the decree was lacking inherent jurisdiction or that the decree under execution was a nullity. Such being not the case, as laid down in the case of **M/s. Brakewel Automotive Components (India) Pvt. Ltd. Vs. PR. Selvam Alagappan; AIR 2017 Supreme Court 1577**, the order of the executing court is unassailable.

9. To begin with, regarding scope of an objection under Section 47 of the Civil Procedure Code is concerned, as laid down in the matter of **M/s. Brakewel Automotive** (supra) it is only if the Court passing the decree is lacking inherent jurisdiction or that the decree under execution is a nullity that an executing court can step in and entertain objection under Section 47. Accepting the allegations of the petitioners, neither of these grounds can be substantiated. Even co-owners can maintain a suit for eviction of tenant without including the other co-owners as laid down in the case of **Ram Pasricha and Dhannalal** (supra). It is not in dispute that the respondents are the heirs of Salimuddin who was the original landlord, albeit it is the stand of the petitioners that there are other heirs of Salimuddin as well.

10. Faced with the situation, Mr. Pranjape sought to salvage some ground by referring to the decision of the Supreme Court in the matter of **India Umbrella Manufacturing Co. and Ors. Vs. Bhagabandei Agarwalla**

(dead) by Lrs. and Ors. AIR (2004) SC 1321. He would submit that though co-owners can maintain a suit for eviction against the tenant, it admits of an exception where the other co-owners are not agreeable to the ejectment of the tenant and the suit is filed in spite of their disagreement.

11. It is trite that as laid down in the case of **Ram Pasricha** and **Dhannalal** (supra) based on the doctrine of agency only some of the co-owners can file a suit for eviction of a tenant. It is equally trite that in the matter of **India Umbrella** (supra) an exception to such principle has been carved out. It is applicable to a situation where the other co-owners are not agreeable to such ejectment and still the other co-owners file a suit for eviction. It is in that eventuality that the suit would not be maintainable at the instance of only some of them.

12. Admittedly, none of the persons claiming to be the other heirs of Salimuddin including the present intervenors who have filed Civil Application No.3173/2017 raised any such issue from the date the suit for eviction was filed by the respondents against the petitioners albeit the matter had reached up to this Court.

13. In the absence of any such objection having been raised by the persons claiming to be the co-owners of the demised premises, it would not lie in the mouth of the petitioners to raise any such issue at this stage of the litigation.

14. Besides, there would be a serious question of *locus standi* for the petitioners to raise any such issue during the execution of the decree.

Even for this reason, submission of the learned advocate Mr. Pranjape on this count is not legally tenable.

15. Again, the petitioners had raised an issue regarding non-joinder of the other co-owners as a party to the suit for eviction in the trial court as also the appellate courts. It was specifically turned down and once having reached such a conclusion, it would be an additional ground to refute the submission of learned advocate Mr. Pranjape.

16. Now turning to the other ground sought to be agitated by the petitioners to object execution, according to them the respondents have fraudulently obtained a decree regarding declaration of civil death of Salimuddin. According to them during his life time they had obtained such declaration. To substantiate their such ground they have produced on record photocopies of the written statement purportedly filed by Salimuddin in the year 1995 in Regular Civil Suit No.1220/1994 and also a photocopy of an affidavit purportedly sworn in by him dated 20.10.1994.

17. At the threshold these documents are liable to be discarded being merely photocopies and unattested documents. Besides, even if these documents are presumed to have been executed by Salimuddin, conspicuously the contents thereof would indicate that he was alive to the fact that the respondents had obtained the decree regarding his civil death. That decree was passed on 02.02.1990 whereas this written statement was filed in January 1995 whereas the affidavit was sworn in on 20.10.1994. Admittedly, he died on 08.05.1996 as can be seen from his Death Certificate

produced by the petitioners themselves. Meaning thereby that though he was alive for more than 6 years after passing of such a decree regarding declaration of his civil death and in spite of his having the knowledge of such a decree he had never made any attempt to seek any declaration about its nullity.

18. Though it is trite that fraud vitiates every solemn act, in view of this clinching circumstance there is a serious doubt as to if such a decree regarding his civil death can be said to have been obtained by fraud, when he was aware about it and had chosen not to challenge it even though he was not agreeable with the conduct of the respondents. It cannot be said that the decree obtained by the respondents was obtained fraudulently, unless, of course, it is also alleged that he was one of the conspirators in perpetrating such fraud, which is not the case of the petitioners.

19. Assuming for the sake of arguments that the decree for declaration regarding civil death of Salimuddin was obtained by the respondents fraudulently, the circumstance would seldom have any effect on the validity of the decree of eviction passed against the petitioners. There cannot be any dispute now that the respondents are the legal heirs of Salimuddin and being the co-owners had a right to file a suit for eviction of the petitioners even without including the other co-owners. It is not that by obtaining a decree regarding civil death such a right was created in them. Salimuddin during his life neither questioned the decree regarding his civil death nor had he ever opposed the present suit for eviction against the

petitioners. It is, therefore, the circumstance as to whether the respondents have obtained the decree regarding Salimuddin's civil death fraudulently or otherwise is clearly inconsequential. If that be so, even the petitioners are not entitled to derive any benefit from this circumstance.

20. Though a faint attempt has been made to take recourse to the provisions of Order XXI Rule 29 of the Civil Procedure Code, which enables the executing court to grant stay to the execution or part thereof subject to such terms and conditions until a suit between the decree-holder and judgment debtor is decided, accept a bald statement in the petition no record is produced to substantiate that any such suit is pending between the parties. However, conspicuously, even according to paragraph No.7 of the Application (Exhibit - 31) filed by the petitioners before the executing court, such other suit is stated to have been lodged by them against the respondents in respect of a declaration that the decree obtained by the latter in Regular Civil Suit No.387/1989 regarding civil death of Salimuddin. At the cost of repetition, as is discussed herein above that circumstance was irrelevant for the decision of the civil suit and therefore the petitioners are not entitled to take recourse to this provision.

21. The upshot of the above discussion, the petitioners' objection under Section 47 raised before the executing court was utterly not tenable and has rightly been rejected by the executing court.

22. So far as the Civil Application by the intervenor is concerned she claims to be the daughter of Salimuddin from another wife and

therefore even she was his legal representative. Suffice for the purpose to observe that according to her she has filed an objection before the executing court independently asserting her right. Assuming that she has done so, the present petition arises out of the order rejecting the objection of the original defendants tenants. She cannot be said to be a necessary party for the decision of this Writ Petition albeit she can prosecute her own cause independently. Therefore her Civil Application seeking intervention is liable to be dismissed.

23. Considering the fact that the petitioners are hellbent to protract execution and have even succeeded in doing so for more than 7 years is indeed a circumstance which, in my considered view, needs to be strongly deprecated. They have raised untenable objections even raising the issues which have been answered in the litigation leading up to the passing of the eviction decree and therefore the Writ Petition is liable to be dismissed with heavy costs.

24. The Writ Petition is dismissed with a cost of Rs.25,000/- to be deposited by the petitioners in this Court within four weeks. The respondents would be entitled to receive it.

25. The Civil Application is rejected. The Rule is discharge.

(MANGESH S. PATIL, J.)

26. After pronouncement of the Judgment, Mr. P.S. Paranjape the learned advocate for the petitioners submits that they intended to challenge

this order and the interim relief operating in their favour till date may be extended for a period of two months. Learned advocate Mr. Patni for respondent Nos. 1 and 2 strongly opposes the request.

27. Since it is a matter pertaining to eviction and as the interim relief is in operation till date, the same shall continue for a period of four weeks, however, subject to the petitioners depositing the amount of costs in this Court as ordered.

(MANGESH S. PATIL, J.)

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