

BDP-SPS

Bharat
D. Pandit

Digitally signed by
Bharat D. Pandit
Date: 2021.01.12
15:48:56 +0530

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8475 OF 2018**

Mr. Pradeep Mehra

.... Petitioner.

V/s

Mr. Harijivan J. Jethwa

(Since deceased through LRs)

1 (a) Vimal S/o. Harijivan Jethwa

and Others

..... Respondents.

Mr. Mehul Shah for the Petitioner.

Ms. Savita Pattni for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 08, 2021

P.C.:-

1] This Petition is by decree holder in RAE Suit No.1115/998 of 2004. The decree holder took out Misc. Notice No.152 of 2006 for execution of the consent decree and the Small Causes Court granted the said Notice with an observation that Defendant Nos. 1 and 2 i.e. Respondents herein have failed to pay monthly compensation for two months as was agreed. As such, prayer for execution of decree came to be allowed vide order dated 12/2/2013 passed in Misc. Notice No.152 of 2006.

2] As a consequence of above, Execution Application No.605 of

2015 seeking execution of consent decree passed in RAE Suit No.1115/998 of 2004 came to be moved. In the said proceedings, Application-Exhibit-19 came to be moved by decree holder objecting Application-Exhibit-18 which was taken out by the Respondents-judgment debtors for setting aside the order dated 12/2/2013.

3] The Application-Exhibit-19 moved by the decree holder came to be allowed by the Trial Court by order dated 28/09/2017 in which it is ordered that Application-Exhibit-18 filed by the Respondents-judgment debtors for setting aside the order dated 12/02/2013 is not maintainable.

4] The Respondents-judgment debtors feeling aggrieved preferred Revision Application No. 290 of 2017 before the Appellate Bench of the Small Causes Court, Mumbai. The Appellate Bench of the Small Causes Court allowed the said application and set aside the order dated 28/09/2017 passed below Exhibit-19 by its order dated 22/12/2017 whereby directions are issued to hear Exhibits-18 and 19 together in the light of the observations made in the said order.

5] The submissions of the learned Counsel for the Petitioner are, the principle of *res judicata* is applicable even to the execution proceedings. By drawing support from the observations made in paras 9, 10, 11 and 12 of the Judgment of the Apex Court in the matter of *Barkat Ali and Anr. vs. Bandrinarain (Dead) by LRs* reported in (2008) 4 SCC 615 and such other judgments, he would urge that once the executing court has permitted to proceed with the execution proceedings, Application-Exhibit-18 is not maintainable as the order passed by the executing court permitting execution of decree on 12/02/2013 will operate *res judicata*. Paras 9, 10, 11 and 12 of the said judgment in *Barkat Ali* cited supra read thus:-

“9. Order 21 Rule 22 CPC culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under Order 21 Rule 23 can only be taken if the executing court either finds that after issuing notice under Order 21 Rule 21 (sic Rule 22) the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing court. Sub-rule (1) as well as sub-rule (2) under Order 21 Rule 22, operate simultaneously in the same field. Sub-rule (1) operates when no objection is filed. Then the court proceeds and clears the way for going to the next

stage of the proceedings, namely, attachment of the property and if the court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled.”

“10. Whether the order is made under sub-rule (1) or sub-rule (2), it has the effect of determining the preliminary stage before the attachment process is set in motion. In this background, the order of the court to proceed with attachment on finding that no objection has been raised also operates as an order deciding the preliminary stage of the execution proceedings and operates as if the judgment-debtor has no objection to file. If thereafter, the judgment-debtor wants to raise an objection in the same proceedings in the absence of any modification of order passed under Order 21 Rule 22 sub-rule (1) or (2), he has to take recourse to get rid of the order by way of appeal.”

“11. There is no dispute and it has not been agitated that the order for proceeding by the judgment under Order 21 Rule 22 amounts to a decree under Section 47 CPC and it is appealable as a decree i.e. to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order. It means that at the different stages of the execution, orders passed by the executing court having attained finality unless they are set aside by way of appeal before the higher forum. Otherwise they bind the parties at the subsequent stage of the execution

proceedings so that smooth progress of execution is not jeopardised and the stage which reached the finality by dint of various orders of Order 21, operates as res judicata for the subsequent stage of the proceedings. Since the order passed at different stages itself operates as a decree and is appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under Order 21 Rule 22 does not amount to appeal against order at initial stage, but amounts to a decree finally determining the question. That is why no appeal against orders made under Order 21 has been provided under Order 43.”

“12. In this background, where a judgment-debtor has an opportunity to raise an objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under Order 21 Rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of preliminary stage which amounts to a decree is appealed against and order is set aside or modified.”

6] While countering the aforesaid submissions, learned Counsel for the Respondents would invite attention of this Court to the provisions of Section 47 of the Code of Civil Procedure so also provisions of

Order XXI Rule 97 so as to claim that it is always open for the executing court to deal with the issue of maintainability of the execution proceedings even if Misc. Notice No.152 of 2006 was allowed.

7] Considered rival submissions.

8] At the outset, it is required to be observed that Petition is preferred by the decree holder against the order of remand passed by the Appellate Bench of the Small Causes Court which order is impugned in the Petition. The Appellate Bench appears to be sensitive to the scheme of Section 47 and having noticed that scheme of Section 47 is not looked into by the executing court, has directed to decide the Applications-Exhibit-18 and 19 afresh.

9] The fact remains that when Exhibit-18 or Exhibit 19 was dealt with by the executing court, the issue of operation of principle of *res judicata* was not at all addressed by either of the parties and even the executing court so also Appellate Bench has no occasion to deal with the said issue. True it is the issue of question of law can be raised at

any stage. However, that by itself will not call for exercising extraordinary jurisdiction in the present matter when aforesaid issue was not addressed before the courts below.

10] In that view of the matter, in my opinion, Petition deserves to be disposed of with the observation that the issue of *res judicata* as is raised by the Petitioner be also looked into while dealing with the issue raised in Applications-Exhibits-18 and 19.

11] Petition, as such, stands disposed of in the aforesaid terms.

(NITIN W. SAMBRE, J.)