

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

WRIT PETITION NO.11745 OF 2018

Kumar Kallappa Awalekar

..... Petitioner

Vs.

Mukesh Tarachand Zanwr and Ors.

..... Respondents

Mr. Surel S. Shah for the Petitioner.

Mr. Nitin B. Patil for Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 22nd JUNE 2023.

P. C.

1. The petitioner questions the order dated 6/2/2017 passed in Special Darkhast No.1 of 2014 rejecting the petitioner's application under section 47 read with Order 21, Rule 90 of C.P.C. seeking setting aside of the registered Sale Deed which was executed by respondent Nos. 2 and 3 in favour of respondent No.1 as well as the order dated 3/9/2018 passed in Civil Misc. Application No.31/2018 rejecting the Application Exhibit 5 for condonation of delay and permission to file appeal.

2. The submission of learned counsel appearing for the

petitioner is that by the impugned order, the petitioner has been rendered remedy less in as much as execution application has been dismissed by holding that remedy of the petitioner is to claim compensation from the judgment debtor and no right accrue to the petitioner to seek relief to set aside the Sale Deed under Order 21 Rule 90 of C.P.C. and the Civil Misc. Application below Exh.5 has been rejected by stating that relief of the petitioner is to seek declaration and appeal against the judgment and decree passed in Special C. S. No.64/2010 is invalid.

3. The factual matrix appears to be that the registered Sale Deed came to be executed between respondent Nos.2 and 3 in favour of respondent No.1 on 4/1/2010 and, subsequently, in respect of the same property another Sale Deed in 2011 came to be executed between the petitioner and Respondent Nos.2 and 3.

4. In Special Civil Suit No.64/2010, specific performance of the contract was sought by respondent No.1 which came to be decreed and under execution proceedings filed by the respondent for executing decree of specific performance, the

petitioner's application was filed under Section 47 and Order 21 Rule 90 of C.P.C. It is required to be noted that in the said application, relief which was sought by the petitioner was for setting aside the registered Sale Deed. The petitioner was not party to the proceeding. The provisions of Order 21 Rule 90 of C.P.C. entitles the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, whose interests are affected by the sale to apply to the Court to set aside the sale on the ground of a material irregularity or fraud. The finding of the executing Court that under section 47 objection can be filed only by the parties to the Suit and as such no right accrued to the petitioner to file application under Order 21 Rule 90 of C.P.C. seeking relief of setting aside registered Sale Deed warrants no interference and as such I do not find any reason to interfere with the order dated 6/2/2017.

5. As regards the application being Civil Misc. Application No.31/2018 instituted by the petitioner seeking leave to file appeal is concerned, the said application has been rejected by the Appellate Court on the ground that for the purpose of

establishing the title the remedy of the petitioner is to file a suit seeking declaration that the judgment and decree passed in Special C. S. No.64/2010 is invalid.

6. Learned counsel appearing for respondents submits that the suit is already filed by the petitioner. Be that as it may. The issue which require determination is whether the petitioner, not being a party to the proceedings, is entitled to challenge the decree which was passed in Special C. S. No.64/2010. The provisions of Rule 96 to 99 of C.P.C which are contained in Part VII of CPC pertains to appeal from original decree. The provisions of section 96 to section 99 of CPC do not provide that appeal from the original decree can be preferred only by the party who was party to the proceedings. It is not demonstrated to this Court that the appeal filed by third party, aggrieved by the decree, is required to be thrown out at the threshold without hearing the Appeal on merits. The Appellate Court has refused permission to file appeal for the reason that the petitioner is not party to Spl. C. S. No.64/2010 and as such the right to establish his title will have to be agitated in an independent suit seeking declaration that the

judgment and decree passed in Special C. S. No.64/2010 is invalid.

7. Considering the factual matrix, the petitioner is definitely aggrieved by the judgment and decree which has been passed in Special C. S. No.64/2010 and as such is entitled to challenge the decree under appellate proceedings. It appears that without going into the merits of the case the petitioner has been restrained at the threshold by holding that the petitioner not being party to the proceedings do not have any right to file appeal. That being so, the impugned order dated 3/9/2018 is unsustainable and is quashed and set aside and Civil Misc. Application No.31/2018 (Exh.5) is restored to file.

8. As grievance is made by learned counsel for respondent No.1 that decree is not executed against the petitioner due to pendency of these proceedings, the appellate Court is requested to decide the Civil Misc. Application No.31/2018 within a period of 4 weeks from the date of this order.

9. Learned counsel appearing for the parties assures that

the parties would appear before the Appellate Court on 27/6/2023.

10. In view of the assurances given that the parties will cooperate in disposing of Civil Misc. Application No.31/2018 within a period of 4 weeks, ad-interim relief which is granted *vide* order dated 17/10/2018 is continued for a further period of 4 weeks.

11. All parties to act on authenticated copy of this order.

12. The writ petition stands allowed.

SHARMILA U. DESHMUKH, J.