

VRJ

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

CIVIL REVISION APPLICATION NO.130 OF 2023

VAIBHAV
RAMESH
JADHAV
Digitally signed by
VAIBHAV RAMESH
JADHAV
Date: 2023.09.14
19:13:56 +0530

Sunanda Rajendra Nahar & Anr.

... Applicants

V/s.

Bharat Uttamchand Nahar & Anr.

... Respondents

Mr. S. C. Wakankar for the applicants.

Mr. Chaitanya B. Nikte with Mr. Prajit Sahane & Mr.
Hitanshu Jain for the respondent No.1.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 14, 2023

P.C.:

1. By this application under section 115 of the Civil Procedure Code, 1908 (hereafter, "the CPC", for short), the judgment debtor is challenging the rejection of the application under section 47 of the CPC, raising an objection about the executability of decree on the ground of nullity.

2. Darkhast No.85 of 2021 was filed for executing a decree passed in Special Civil Suit No.1533 of 2008 dated 23rd March 2020. The applicants in the execution petition filed an objection under section 47 of the CPC, contending that the original plaintiff died on 16 February 2019. After 90 days, the suit is abated; the decree passed in such suit is nullity. Even the order allowing the application under Order 22 Rule 6 of the CPC is without

jurisdiction. The second objection is that the defendant's status in the suit was that of a gratuitous licensee, and, therefore, the Civil Court has no jurisdiction to pass the decree. The Trial Court rejected the application under section 47 of the CPC by the impugned order dated 9 December 2022.

3. Learned advocate for the applicants submitted that the original plaintiff died on 16 February 2019. Therefore, the decree passed on 23 March 2020 without bringing legal representatives of the plaintiff on record is a nullity and is without jurisdiction. The suit stands abated after the lapse of 90 days. No order of the Court declaring the suit abated is required. He submitted that the Civil Court had no jurisdiction to entertain a dispute between the owners and gratuitous licensee as only the Small Causes Court can decide such a suit. In support of his contentions, he relied on the following judgments:

- a) **N.P. Thirugnanam (dead) By Lrs. vs. Dr. R. Jagan Mohan Rao And Others** reported in (1995) 5 SCC 115.
- b) **Narhari S/o Shrawan Moon (now deceased) through L.Rs. And Others. vs. Silas S/o Kannobaji Punwatkar And Others** reported in 2022(3) Mh.L.J. 788.
- c) **Raniya Bai W/o Madhav Rathore vs. Tekmani Rathore S/o Dasru Rathore & Others** in Second Appeal No.1171 of 2014 decided on 17th April 2023 (Madhya Pradesh High Court at Jabalpur).
- d) **Gurnam Singh (Dead) Through Legal Representatives And Others vs. Gurbachan Kaur (Dead)**

By Legal Representatives reported in (2017) 13 SCC 414.

e) **Golla Krishna Murthy vs. Golla Yellaih (Dead) his L.Rs. & Ors.** reported in 2001 (2) A.P.L.J. 405 (HC).

f) **Vishvanath Dnyanoba vs. Lallu Kabla** reported in (1909) Bom.L.R. 1070 [Vol. XI.]

g) **Sunita Laxmanrao Shinde And Ors vs. Ashwini Co-operative Housing Society Ltd. Pune and Ors.** reported in 2007(4) Mh.L.J. 866.

4. Per contra, learned advocate for the decree-holder submitted that the applicants have filed an appeal, which is pending. In the said appeal, the applicants applied for a stay to delivery of possession. The Appellate Court granted conditional stay subject to the applicants depositing Rs.1,00,000/- per month. The petition against said the applicants withdrew conditional order. He submitted that considering the microscopic scope of section 47 of the CPC, such objection is not maintainable as the Trial Court, before passing the decree, has passed an order under the provisions of Order 22 Rule 6 of the CPC. The challenge to such an order can be raised only before the Superior Court and not before the executing Court.

5. He also submitted that the objection regarding the jurisdiction of the Civil Court to entertain a dispute between the owner and gratuitous licensee was raised during the pendency of the suit. This Court, by reasoned order dated 19 March 2018 in Civil Revision Application No.353 of 2016, negated the challenge, holding that the Civil Court alone had jurisdiction to

decide the suit. In support of his contention, he relied on the Apex Court's judgment in the **Dhurandhar Prasad Singh vs. Jai Prakash University And Others** reported in (2001) 6 SCC 534.

6. I have heard learned counsel for the parties and scrutinized the material. Since the application arises out of the rejection of an application under section 47 of the CPC, it is necessary to consider the parameters laid down by the Apex Court regarding the scope of section 47 of the CPC. In the case of **Dhurandhar Prasad Singh** (supra), the Apex Court, in paragraph 24, has laid down as follows:

“24. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing.
.....”

7. In the light of parameters laid down by the Apex Court, the scope of powers to be exercised by the executing Court is limited to ascertaining whether the decree sought to be executed is a nullity or void ab initio or incapable of execution.

8. The undisputed facts necessary for adjudication of the issue involved are as follows:

- (i) On 16 February 2019, the plaintiff died;
- (ii) On 1 March 2019, legal representatives of the plaintiff applied to bring themselves on record;
- (iii) On 12 June 2019, the application under Order 22 Rule 6 of the CPC was filed by legal representatives of the deceased plaintiff;
- (iv) On 10 January 2020, the Trial Court allowed the application under Order 22 Rule 6 of the CPC, holding that since the plaintiff died after the completion of evidence and final arguments, there is no need to bring legal representatives of the deceased plaintiff on record;
- (v) On 10 January 2020, the Trial Court rejected the application under Order 22 Rule 3 of the CPC filed by the legal representatives of the plaintiff, holding that there is no need to allow the application as the application under Order 22 Rule 6 of the CPC is allowed;
- (vi) On 23 March 2020, the decree in question was passed by the Trial Court;

9. Considering the facts narrated above, it appears that the Trial Court, before passing the decree on 10 January 2020 passed two orders.

- (i) Rejecting the application under Order 22 Rule 3 of the CPC filed by the legal representatives of the plaintiff;
- (ii) Allowing the application under Order 22 Rule 6 of the

CPC filed by the plaintiff's legal representatives.

10. While passing the aforesaid order, the Trial Court recorded a satisfaction that there is no need to bring legal representatives of the plaintiff on record in view of order 22 rule 6 of CPC. The trial court thereafter passed a decree on merits. Therefore, the only remedy available to a person against whom a decree is passed is to raise a challenge to such order passed under Order 22 Rule 6 of the CPC. The validity of such an order allowing application under Order 22 Rule 6 of the CPC cannot be questioned before the executing Court. Whether the Court passing a decree based on such order passed under Order 22 Rule 6 of the CPC had exercised its jurisdiction illegally or contrary to law is a question to be decided by the superior Court and not by the executing Court. The decree passed by the Court based on such order passed under Order 22 Rule 6 of the CPC holding that it is not necessary for the legal representatives of the plaintiff to bring themselves on record, assuming it to be based on an illegal exercise of powers; such challenge cannot be raised before the executing Court.

11. In the case of **Gurnam Singh And Another** (supra), the Supreme Court was considering a situation where a party to an appeal died before the conclusion of arguments in the appeal. In such a situation, the Supreme Court held that the decree passed in such an appeal is without jurisdiction as the appeal abates after a period of 90 days. However, the passing of an order by the Trial Court under Order 22 Rule 6 of the CPC, in the facts of the present case, distinguishes the judgment of **Gurnam Singh** from the present case.

12. In so far as the rest of the judgments relied upon by the applicants are concerned, there can be no quarrel on the proposition of law laid down by the court. However, in none of the cases, the Trial Court, before passing the decree, passed an order under Order 22 Rule 6 of the CPC, holding that there is no need to bring legal representatives on record, as according to the Trial Court, the hearing was concluded. Whether the hearing was concluded or not, that factor needs to be adjudicated by the Appellate Court and not by the executing Court.

13. Passing an order applying incorrect provisions of law is the most illegal order. However, such an order is neither nullity nor the decree passed on such satisfaction under Order 22 Rule 6 of the CPC, which can be termed nullity in the eyes of the law by the executing Court. Therefore, in my opinion, the executing Court was justified in rejecting the application under section 47 of the CPC. No interference under section 115 of the CPC is called for.

14. The civil revision application is, therefore, rejected.

15. All contentions raised by the parties are kept expressly open, and the appeal shall be decided on its own merit in accordance with law.

16. At this stage, the learned advocate for the applicants prays for the continuation of ad-interim relief. As pointed out by the learned advocate for the respondents, the Appellate Court granted a conditional stay to the order of possession, which order has been confirmed by this Court. In the absence of a deposit of such amount or part of such amount, the ad-interim relief granted

cannot be extended as the applicants are not ready to deposit even 50% of the arrears and are ready to deposit Rs.1,00,000/- only. Hence, the application for continuation of ad-interim relief is rejected.

(AMIT BORKAR, J.)