

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9981 OF 2017

Sharad Shankar Garge and Ors.

.. Petitioners

Versus

Nirmal Vilas Pawar and Anr.

.. Respondents

-
- Mr. Nikhil Pujari i/by Mr. P.N. Joshi for Petitioners
 - Mr. Shivshankar D. Patil for Respondent Nos. 1 and 2
-

CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 25, 2023.

P.C.:

1. Heard Mr. Pujari, learned Advocate for Petitioners and Mr. Patil, learned Advocate for Respondents at length.
2. On 04.01.2023 this Court has passed the following order:

- “1. Heard Mr. Pujari, learned Advocate for Petitioners.
2. Record clearly indicates that since 2019 Respondents are not appearing in the matter or remaining absent.
3. In view of the above, the present Petition cannot be protracted any further and has to be taken up for hearing. The order impugned in the present Petition is dated 02.05.2017 passed on application filed below Exhibit-26 under Order 21 Rule 97 of the Code of Civil Procedure, 1908 by one of the Judgment Debtor, inter alia, praying that the decree passed in R.C.S. No. 34 of 1998 and R.C.S. No. 748 of 1997 be declared as ineffective.
4. Record of the case would indicate that by a separate judgment dated 31.03.2001 both the suits were comprehensively dismissed and decree was directed to be drawn in favour of the Petitioners. The Judgment Debtors i.e. Respondents filed First Appeal before the Appellate Court and by a common order dated 13.01.2003 the Appellate Court upheld the Judgment of the learned Trial Court and dismissed the First Appeal. The Second Appeal filed by the Respondents (Judgment Debtors) also came to be dismissed by order dated 18.04.2007. This order is not annexed to the Petition but Mr. Pujari submitted that the said order passed by this Court in Second Appeal was challenged before the Supreme Court by the Judgment

Debtors and by order dated 04.02.2008 the Supreme Court dismissed the S.L.P.

5. Thus, it is seen that decree holders have succeeded and Judgment Debtors have failed all throughout. Perusal of the record clearly shows that the fresh application now taken out by one of the Judgment Debtor under Order 21 Rule 97 is primarily to frustrate the decree. All that the learned Trial Court in the impugned order states is that there is substance in the objections of the Judgment Debtor without giving any reasons whatsoever as to what is the real nature of substance in the objections raised by the Judgment Debtor in the background of the aforementioned judgments and orders. Save and except this, the learned Trial Court has now by the impugned order allowed the Judgment Debtor to lead evidence in support of its contention raised as an obstructionist in the application filed under Order 21 Rule 97.

*6. Considering that the Respondents are represented by Advocate, to give them one last chance, stand over to **18th January, 2023**. To be placed under the caption 'For orders'."*

3. Today Mr. Patil has appeared to oppose the Writ Petition and submitted that originally the Petitioner No.1 was not a party to the proceedings before the executing Court, however record indicates that subsequently Petitioner No.1 was added in the proceedings below Exhibit-26. He submitted that in the event if an application under Order 21 Rule 97 of the Code of Civil Procedure, 1908 is made by any party, then it is the duty of the executing Court to consider the said Application and effectively pass an appropriate order under Order 21 Rule 97 irrespective of the facts and circumstances of the case. He further submitted that, this is precisely done by the learned executing Court and it has allowed the Respondents to lead fresh evidence in execution.

4. I am not in agreement with the submissions made by Mr. Patil for the simple reason that in the present case the Respondents have lost all along upto the Supreme Court in each and every

proceedings pertaining to their entitlement to the suit property. Respondents cannot be allowed to be heard to be given a second opportunity at leading evidence which is sought to be given by the learned Trial Court by virtue of the impugned order.

5. The learned Trial Court has given the finding that the Petitioner Nos. 2 to 4 cannot seek execution of the decree passed in R.C.S. 738 of 1997 and R.C.S. No. 34 of 1998 in their favour in view of the application made by the Judgment Debtor under Order 21 Rule 97. It needs to be mentioned here that the Judgment Debtor has now made a fresh application for allowing her to lead evidence which the learned Trial Court has allowed by allowing the application of the Judgment Debtor. In effect the sum and substance of allowing such an application is that the decree passed in R.C.S. 738 of 1997 and R.C.S. No. 34 of 1998 after a comprehensive trial as also the judgment of the learned Appellate Court in C.A. 367 of 2001 and C.A. 368 of 2001 and the proceedings subsequent thereto in this Court as well as the Supreme Court would all be rendered infructuous. This cannot be permitted in the present case without giving any reasoned findings and merely on the basis of filing of the application.

6. As observed in the order dated 04.01.2023 the tenor of the application dated 21.11.2016 as filed by the Judgment Debtor is merely to frustrate the decree passed by the learned Trial Court.

7. Considering the definition of legal representative under

Section 2(11) of the CPC there is no doubt that the Petitioner No.1 has stepped into the shoes of the Petitioner Nos. 2 to 4.

8. In that view of the matter, the submission of Mr. Patil that unless and until the decree has been transferred from Petitioner No. 1 to Petitioner Nos. 2 to 4, no rights in the property are transferred deserves to be rejected.

9. In view of the above observations, the impugned order is not sustainable and deserves to be set aside.

10. Writ Petition is allowed in terms of prayer clause (a) which reads thus:

“(a) Issue an appropriate Writ / Order for quashing and setting aside Judgment and Order dated 02.05.2017 passed on Application Exhibit-34 in Regular Darkhast No. 67/2014 passed by the learned 5th Joint Civil Judge, Senior Division, Nashik.”

[MILIND N. JADHAV, J.]

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by SONALI
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