

SA Pathan

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

WRIT PETITION NO.8397 OF 2023

Ramchandra	Krishnaji	Kharat	
(Deceased)			
Through Legal Heirs		...	Petitioners
V/s.			
Balasaheb Vishnu Kharat (Deceased)			
Through Legal Heirs & Ors		...	Respondents

Mr. Nachiket Khaladkar, for petitioner.

Mr. Tejas Deshmukh a/w Mr. H. D. Chavan, for
respondent No.1A to 1D.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 19, 2023

P.C.:

1. Challenge in this writ petition is to the orders passed by the Executing Court dated 15 April 2023 directing delivery of possession and rejection of objection raised by the petitioner under Section 47 of the Code of Civil Procedure, 1908.
2. It appears that respondent/decreed holder filed Special Civil Suit No.1266 of 2006 before the Civil Court. The Trial Court by judgment and order dated 8 January 2008 passed decree of possession. The Civil Appeal No.126 of 2008 filed by the petitioner was dismissed by the Appellate Court on 16 December 2010.
3. This Court dismissed Second Appeal No.584 of 2012 arising

out of Civil Appeal No.126 of 2008 on 27 January 2014.

4. The decree holder in the meantime filed Execution Petition bearing Regular Darkhast No.76 of 2011.

5. The petitioner on 1 April 2022 filed an application under Section 47 of the Code of Civil Procedure, 1908. The petitioner *inter alia* raised two objections: first, the suit as was filed was not maintainable in absence of relief of declaration; second objection is in relation to non joinder of necessary parties.

6. The Executing Court by impugned order rejected the application. Hence, the petitioner has filed present writ petition.

7. Learned Advocate for the petitioner submitted that the impugned order is passed without giving opportunity of hearing to the petitioner. According to him, the objection of maintainability of suit gives to the root of the matter; hence, the decree is unexecuted.

8. On perusal of the order dated 15 April 2023, it appears that on 15 April 2023, the Executing Court rejected adjournment application of the judgment debtor as on earlier occasion, the judgment debtor was granted last chance. In my opinion, once in Execution proceeding, the Executing Court while adjudicating application under Section 47 of the Code of Civil Procedure, 1908 grants last chance to the judgment debtor, the adjudication on objection under Section 47 of the Code of Civil Procedure, 1908 cannot be termed as decision without giving sufficient opportunity of hearing to the petitioner. Ultimately, in Execution Petition, it is the duty to the Executing Court to execute the decree as

expeditiously as possible. What is contemplated is reasonable opportunity of hearing to the judgment debtor in the context of objection under Section 47 of the Code of Civil Procedure, 1908, once the Executing Court grants last chance to the judgment debtor, it is obligatory on the judgment debtor to remain present and make oral submissions.

9. Therefore, passing of order without hearing to the petitioner cannot be said to be an order in breach of principles of natural justice. Even otherwise also the Apex Court in the case of **M/s Dharampal Satyapal Ltd Versus Deputy Commissioner of Central Excise & Ors** reported in 2015(8) SCC 519 has held that mere breach of principles of natural justice is no ground to interfere that the impugned order. Unless the petitioner's shows legal prejudice is caused to him. To adjudicate as to whether legal prejudice is caused to the petitioner, I have considered the objection raised by the petitioner on merits. According to him, the suit has filed was not maintainable in absence of declaration of ownership.

10. Therefore, there is no legal prejudice cause to the petitioner.

11. The Apex Court in the case of **Dhurandhar Prasad Singh Versus Jai Prakash University And Ors.**, reported in 2001 (6) SCC 534 has held the power of Executing Court while entertaining application under Section 47 is microscopic. The decree becomes inexecutable, the decree is void or had been passed by the Court which lack inherent jurisdiction to entertain the suit.

12. In the facts of the case, the decree passed by the Court cannot be said to be passed by a Court which lack inherent

jurisdiction; therefore, the decree can neither be termed as void or pass by a Court which lack inherent jurisdiction. Learned Advocate for the petitioner raised objection that the Civil Court had no jurisdiction and it is only Small Causes Court which could have entertained the suit. However, the Appellate Court in paragraph 32 has decided the said objection. This Court in Second Appeal No.584 of 2012 has confirmed the judgment of the Appellate Court; therefore, the Appellate Court's judgment merge judgment of this Court. Hence, the Executing Court has no power to adjudicate the issue which the superior Court had adjudicated in a substantive appeal arising out of suit. Hence, there is no substance in the objection.

13. This Court on occasion to consider effect of passing of order whereby the Court had granted last chance. This Court in **Dhanraj Lilaram Motwani And Ors. Versus Rajendra Kumar Dayachand Jain And Ors.**, reported in AIR 1996 Bom. 3, held that once the Court grants last chance, it is not advisable to grant adjournment in the matter. The same principle is applicable in full force in execution matters, while deciding application under Section 47 of the Code of Civil Procedure, 1908. Hence, in my opinion, there is no error of jurisdiction committed by the Trial Court while passing impugned order.

14. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)