

VRJ

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

WRIT PETITION NO.15676 OF 2022

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Achlesh Daga & Anr. ... Petitioners

V/s.

Nikhil Kumar Narsinghdas Daga & Ors. ... Respondents

Mr. Anilkumar K. Patil for the petitioners.

Ms. Sheetal Parkosh i/by B.T. Legal for respondent
No.1.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 4, 2023

P.C.:

1. The petitioners under Article 227 of the Constitution of India are challenging the order passed by the executing Court in exercise of power under section 47 of the Civil Procedure Code, 1908, refusing to entertain objection of the petitioners under section 47 of the Civil Procedure Code, 1908.

2. The respondent No.1 is the original plaintiff who filed summary suit for recovery of amount. The trial Court decreed the said suit.

3. In execution petition the petitioners have raised following objections under section 47 of the Civil Procedure Code:

(i) The petitioners despite being partner of defendant/firm was

not made party to the suit;

(ii) The address of the firm not changed before the filing of the suit, which fact of within knowledge of the plaintiff;

(iii) Though pre-suit notices were served on all partners, the petitioners were not made party to the suit.

4. The parameters of adjudication on an application under section 47 of the Civil Procedure Code, 1908, have been laid down by the Apex Court in the case of **M/S. Brakewel Automotive Components (India) Pvt. Ltd. vs. P.R. Selvam Alagappan** reported in (2017) 5 SCC 371. The supreme Court after considering its judgment in the case of **Dhurandhar Prasad Singh vs. Jai Prakash University and Others** reported in AIR 2001 SC 2552 held that the inquiry under section 47 of the Civil Procedure Code, 1908, is restricted to the decree being nullity or the decree being rendered inexecutable due to either change in law or by conduct of the parties. The decree being nullity is interpreted to mean the decree which is passed in absence of legal representatives or if on the date of passing of decree the defendant was dead. The absence of jurisdiction to confer status of nullity is held to be lack of inherent jurisdiction on ex facie reading of the matter which does not require adjudication on facts or law.

5. It is well settled that the power of Court under section 47 of the Civil Procedure Code, 1908, is microscopic and cannot be analogues with either power of the appellate Court or the revisional Court. Suppression of material fact in the plaint can be said to be fraud on court. However, the events as alleged by the

petitioners namely non-joinder of necessary party or irregularity in service of summons, in my opinion, would not confer executing court power to declare decree as nullity.

6. Learned advocate for the petitioners invited my attention to the order passed by the Supreme Court in Special Leave to Appeal (C) Nos.5630-5631 of 2020 where the Apex Court observed as under:

“Nothing Prevents the petitioner from raising all objections available in the law in the pending execution proceedings, including seeking appropriate interim orders from the Executing Court.”

7. On meaningful reading of the order, it needs to be noted that the said order does not confer right on the petitioner to raise such contentions before the executing Court if such right is otherwise unavailable with the petitioner. It is well settled that mere liberty granted by the Supreme Court would not confer a litigant a power to agitate such grievance if such litigant does not show such power under the provisions of a statute. (See **Life Convict Bengal vs. B.K. Srivastava** reported in 2013 (3) SCC 425).

8. In that view of the matter, the trial Court in exercise of power under section 47 of the Civil Procedure Code, 1908, has rightly refused to accept the objections raised by the executing Court as the objections raised are not in relation to the decree being nullity or decree being inexecutable due to change of law.

9. Therefore, the petition has no merit. The writ petition is, therefore, dismissed. No costs.

10. The petitioners will have liberty to raise all contentions as

are available in law in appropriate proceedings.

(AMIT BORKAR, J.)