



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10242 OF 2022

Syed Shafiyoddin s/o Syed Bashiroddin
age 50 years, occ. Agriculture
r/o Saigaon, Tq. Ambajogai
Dist. Beed

.. Petitioner

versus

1. Syed Taheroddin s/o Syed Gaus Modiyoddin
age 60 years, occ. Agriculture,
r/o Saigaon, Tq. Ambajogai
Dist. Beed.
2. The State of Maharashtra
Through the Collector
Collector Office, Beed
Tq. & Dist. Beed
3. The Tahsildar
Tahsil Office, Ambajogai
Tq. Ambajogai, Dist. Beed.
4. Gram Panchayat Office
Village Saigaon
Through Gramsevak &
village Development Officer
Gram Panchayat, Saigaon
Tq. Ambajogai, Dist. Beed.
5. Syed Naimoddin s/o Syed Bashiroddin
age 50 years, occ. Agriculture
r/o Saigaon, Tq. Ambajogai
Dist. Beed.

.. Respondents

Mr. R. R. Deshpande, Advocate holding for Mr. P. R. Deshpande,
Advocate for the Petitioner.

Mrs. A. S. Mantri, AGP for the State.

Mr. V. V. Bhavthankar, Advocate for Respondent No. 1.

CORAM : R. M. JOSHI, J.

DATE : 26th NOVEMBER, 2024.

JUDGMENT :

1. Rule. Rule made returnable forthwith.
2. By consent of parties, heard finally at admission stage.
3. Petitioner is original Defendant in Regular Civil Suit No. 157/2013 and Judgment Debtor in Regular Darkhast No. 2/2020. Being aggrieved by order passed below Exhibit 1 in the said Darkhast on 06.09.2022, holding that the Execution Court has jurisdiction to entertain the execution application, Petitioner has preferred this petition.
4. In order to appreciate the contentions sought to be raised before this Court, it would be relevant to consider the backdrop in which the impugned order came to be passed.
5. Respondent Syed Taheroddin filed suit bearing Regular Civil Suit No. 157/2013 against Syed Shafiyoddin and Syed Naimoddin along with State of Maharashtra and other state

authorities for seeking declaration in respect of the suit property being 2 R land from Gat No. 100 situated at Saigaon, Tq. Ambajogai Dist. Beed and further injunction against Defendant Nos. 4 and 5. It is the case of the Plaintiff that the suit property is purchased by him under registered sale-deed No. 4228/2011 and on the basis of this, he became owner of the suit property. There is further averment with regard to the obstruction caused by Defendant Nos. 4 and 5 into his possession of the suit property and hence, injunction is also sought against them.

6. Defendant Nos. 4 and 5 resisted the suit by filing written statement vide Exhibit 28. It is denied by these Defendants that the Plaintiff has purchased the suit property under registered sale-deed and got his name mutated in the revenue record. Allegations in respect of alleged obstruction are also denied and it is contended that there is no cause of action for filing suit. Additional written statement was also filed by these Defendants contending that Defendant No. 4 has purchased the property bearing Block No. 46 under registered sale-deed dated 30.10.1986 from the brother of the Plaintiff and that he is in possession of the said property. Defendant Nos. 1 to 3 though caused appearance did not resist the suit by filing

written statement. The suit was heard on merit, parties were given opportunity of leading evidence and hearing and, by judgment and decree dated 24.07.2015, suit came to be decreed. It is declared that the Plaintiff is lawful owner of the suit property and injunction was clamped against Defendant Nos. 4 and 5 directing them to remove construction raised by them over the suit property and deliver vacant possession of the suit property to the Plaintiff within two months from the date of the order.

7. This judgment and decree came to be challenged in Regular Civil Appeal No. 257/2015 unsuccessfully as the said appeal came to be dismissed on 25.08.2016. Second appeal filed before this Court was also dismissed. So also the judgment and decree has attained finality. This decree was put for execution in Regular Darkhast No. 2/2016.

8. Petitioner Syed Shafiyoddin (original Defendant No. 4) resisted execution on the ground that the Trial Court has inadvertently failed to frame issue as to whether the Court has jurisdiction to try and entertain the suit. It is alleged that the Trial Court has passed the judgment exceeding its jurisdiction. In this

regard, reference is made to paragraph No. 4 of the plaint. On this count, it is claimed that the execution proceeding deserves to be dismissed. It was also averred in the said application that Petitioner/Judgment Debtor has filed Regular Civil Suit No. 79/2018 against Plaintiff/Decree Holder as well as original owner of the suit property. With these averments, dismissal of execution proceedings is sought.

9. It is necessary to note that the earlier order passed in the execution proceeding was assailed before this Court in writ petition wherein this Court has directed Execution Court to frame issue of jurisdiction and after recording evidence to decide the same. Learned Execution Court framed issue with regard to jurisdiction and decided the same against Judgment Debtor.

10. The issue sought to be raised by learned counsel for the Petitioner is as to whether it is open for the Petitioner/original Defendant/Judgment Debtor to raise issue with regard to the jurisdiction of the Trial Court in execution proceeding. It is sought to be argued that in view of judgments of Hon'ble Supreme Court cited before this Court, it is open for present Petitioner/Judgment Debtor

to raise the said issue and it ought to have been decided in favour of the Petitioner.

11. Learned counsel appearing on behalf of the Petitioner/Judgment Debtor submits that the Execution Court has misread the order passed by this Court and has framed issue as to whether the Execution Court has jurisdiction to entertain execution petition instead of the issue as to whether the Trial Court had jurisdiction to entertain the suit. It is his submission that for this reason, the impugned order deserves to be set aside with direction to the Execution Court to decide the same afresh in accordance with law. Without prejudice to this submission, it is his contention that the Execution Court has committed error in rejecting the contention of the Judgment Debtor for the reason that the law on the point of permissibility to raise objection with regard to jurisdiction of the Trial Court even during execution proceeding is fairly settled to say that where Trial Court inherently lacks jurisdiction to entertain the suit, it is open for the Defendant to raise such issue even after the same is not raised at the time of hearing of the suit.

11. By referring to the judgment of the Hon'ble Supreme Court, it is canvassed that the issue of jurisdiction of any Court goes to the root of the matter and even if such issue was not raised during the course of the trial, it is open for the Defendant/Judgment Debtor to raise the issue about jurisdiction of the Court even before the Execution Court. He referred to the following judgments :-

- (i) Gurnam Singh (D) Through Lrs & others vs. Gurbachan Kaur (D) by Lrs. & others
2017 AIR (SC) 2419.
- (ii) Asma Lateef & another vs. Shabbir Ahmad & others
2024 INSC 36.
- (iii) Sunder Dass vs. Ram Parkas
AIR 1977 Supreme Court 1201
- (iv) Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others
(2007) 2 Supreme Court Cases 355
- (v) Shriram Housing Finance & Investment India Ltd. vs. Omesh Mishra Memorial Charitable Trust
Civil Appeal No. 4649/2022
- (vi) Swastik Builders, Nagpur and another vs. Dr. Shobha w/o Bhaskar Kaore & others
2021(4) Mh.L.J. 397
- (vii) State of Haryana and another vs. Kartar Singh
(2001) 04 P&H CK 0070
- (viii) Kanwar Singh Saini vs. High Court of Delhi
2012 (1) ACR 1035 (SC)
- (ix) Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and

others

1970(1) Supreme Court Cases 670

He further argued that in the instant case, the issue before the Court was as to whether the sale of a fragment is permissible in view of the embargo created by Section 7 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "Fragmentation Act") and this issue goes to the root of the case, ousting jurisdiction of Trial Court/Civil Court.

13. At the outset, this Court wishes to deal with the objection raised by learned counsel for the Petitioner/Judgment Debtor that the Execution Court has wrongly framed the issues and therefore, the impugned order deserves to be set aside by relegating the issue back to the Execution Court for decision afresh. Though, it can be said that issue framed is not happily worded, but the submissions made before Executing Court and the discussion made in impugned order, more than sufficiently demonstrate that both parties were conscious of issue involved, so also Court. In this regard, it is pertinent to note that perusal of order impugned clearly indicates that the objection sought to be raised to the execution

proceeding on the ground that the Trial Court had no jurisdiction to decide the issues involved in the suit and therefore, the decree is nullity and as a result of which the same cannot be executed, has been duly considered by the learned Court. It further shows that the contention raised by the Judgment Debtor as well as Decree Holder in this regard is specifically taken into consideration by Executing Court and reasons are recorded for rejecting the contention of the Judgment Debtor in respect of challenge to the judgment and decree on the ground of nullity for want of jurisdiction of the Court. Since the Execution Court has taken into account rival contentions and dealt with the same by recording reasons and as parties were also unambiguously knew issue involved, this Court finds no reason to relegate back the issue to the Execution Court for reconsideration. Hence, said request stands rejected.

14. Perusal of the judgments of the Hon'ble Supreme Court cited supra clearly indicates that it is the position of the law that Judgment Debtor/original Defendant can take exception to the decree on the ground of nullity even in the execution proceeding. It is also held that if the decree passed by the Court is nullity its validity can be questioned in any proceeding including execution

proceeding or even in collateral proceeding whenever such decree is sought to be enforced by the Decree Holder. It is elaborated that the reason for this is that the defect of this nature affects the authority of the Court in passing such decree and goes to the root of the cause. This Court is bound by the observations of the Hon'ble Supreme Court and law laid down in this regard. Thus, there cannot be any dispute in respect of position of law that in case a decree is nullity i.e. passed for lack of jurisdiction of the Trial Court such objection to the decree can be raised at any point including during execution proceeding or even in collateral proceeding.

15. Now, question arises before this Court is as to whether it is open for the Judgment Debtor to raise such objection in all circumstances and that the Court is bound to accept the same. In this regard, it would be relevant to take note of the judgment of the Hon'ble Supreme Court in case of Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman, (1970) 1 SCC 670, wherein the Hon'ble Supreme Court in uncertain terms has held thus :-

“7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to

be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial on which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.”

(emphasis supplied)

From the above observations, it is clear that such objection is not permissible in all circumstances and more particularly in cases where the objection as to the jurisdiction of the Court to pass decree does not appear on the face of record and requires examination of questions raised and decided at the trial or which could have been but have not been raised, Execution Court will have no jurisdiction to entertain the objection as to the validity of the decree even on the ground of absence of jurisdiction.

16. It is thus clear that unless the Judgment Debtor is in a position to show, on the face of it meaning thereby without going into

the determination of facts on the basis of evidence, that the Trial Court did not have jurisdiction and on that count decree passed by the Trial Court is null, only in such circumstances it is permissible for Judgment Debtor to raise the issue of jurisdiction of the Trial Court. In view of dictum of Hon'ble Supreme Court it is held that in a case where on the face of record it does not appear that the Court has no jurisdiction and it requires examination of questions raised and decided at trial and where the same are not raised during trial, there is embargo created for the Execution Court from entertaining such objection as to the validity of the decree even on the ground of jurisdiction.

17. Now, this Court will have to see as to whether the objection as to the jurisdiction of the Trial Court appears on the face of the record and requires no examination of the question raised and to be decided in the trial. Though it is sought to be contended on behalf of the Judgment Debtor that there is a pleading in the plaint with regard to the purchase of the suit property which admeasures 2 R and therefore, in view of the embargo created by Section 7 of the Fragmentation Act, Trial Court has no jurisdiction. It is necessary to

see whether there is total/complete embargo for the sale/transfer of suit property.

18. At this stage, it would be relevant to take note of said provision which reads thus :-

7. (1) No person shall transfer any fragment in respect of which a notice has been given under sub-section (2) of section 6 [except to the owner of] a contiguous survey number or recognised sub-division of a survey number :
[Provided that the holder of such fragment may mortgage or transfer it to the State Government or a land mortgage bank or any other co-operative society as security for any loan advanced to him by the State Government or such bank or society, as the case may be.]

(2) Notwithstanding anything contained in [any law for the time being in force or in any instrument or agreement], no such fragment shall be leased to any person other than a person cultivating any land which is contiguous to the fragment.

Bare perusal of this provision does not state that any transaction of sale of fragment is null and void, but it would be so subject to conditions, stipulated therein. Apart from this, the

provision of the Fragmentation Act does not create complete embargo on transfer/sale of a fragment. There are circumstances in which the transfer of fragment is permissible e.g. Section 10 of the Act enables transfer of the fragment to contiguous owner (adjoining land owner). Thus, for want of complete bar to the transfer/sale of the fragment, it cannot be said that each transfer of fragment is illegal and void abinitio. There must be issue raised before the Court and evidence is led to record any findings thereon.

19. Learned counsel for the Judgment Debtor has sought to place reliance on judgment of this Court in case of Vilas s/o Shivmurti Munde vs. Somnath s/o Santram Kumbhar and others in Second Appeal No. 521/2016 to support his case, wherein this Court has held as under :-

“14. Section 36(B) would come into picture when the plaintiff is claiming right which can be partly granted by the civil court and partly by the competent authority. if claim made by the plaintiff can be granted only by the competent authority under the Act, then Section 36(B) would not be applicable and Section 36A would be applicable. Considering the nature of dispute raised by the plaintiff, I find that, the plaintiff had no civil right to claim as to right of transfer of the fragments to himself in

view of the vicinage and, therefore, in absence of civil right, the civil suit itself was not maintainable. The suit was barred by Section 36A of the Fragmentation Act. He could have approached the competent authority by way of application u/s 10 of Fragmentation Act. Similarly, other contiguous owners could have also approached the competent authority u/s 10, then the competent authority was bound to consider whether lands sold by defendants No. 1 and 2 were fragments or not. If these findings would have been in the affirmative, then the competent authority could have taken subsequent action as contemplated under the law.”

As far as said judgment is concerned, the facts involved therein clearly indicate that the issue of jurisdiction was specifically raised before the said Court and the same was framed and answered by the Trial Court. A clear distinction therefore will have to be drawn in respect of cases where objection to the jurisdiction is raised at the stage of trial and where it was not raised. In considered view of this Court, said judgment therefore, would not help the Petitioner's case in any manner whatsoever to support his contention.

20. When the Hon'ble Supreme Court has held that where objection as to jurisdiction of Court to pass a decree does not appear

on the face of the record, it means that Court has to exercise the powers akin to Order VII Rule 11 of Code of Civil Procedure. Order VII Rule 11 provides for rejection of plaint if the same is barred by any law etc. While deciding such issue, the Court is precluded from looking into any other evidence but for the contention of the Plaintiff in the plaint. Similarly, if there is bar created by law and which does not require determination of the question on the basis of facts or evidence, in such case only, the objection can be said to be appearing on the face of record and can be allowed to be raised for the first time in execution proceeding but not otherwise.

21. Reverting back to the present case, the contention of Plaintiff in the plaint does not go to show that any issue as contemplated by Fragmentation Act is sought to be determined in the said suit. Apart from this, it is relevant to note that the objection to the said transaction of sale on the part of the Defendant was in the form of denial and not on ground of validity of transaction. In the written statement, Judgment Debtor has denied any sale-deed being executed by the owner of the suit property in favour of the Plaintiff. Apart from this, the Judgment Debtor does not claim that for all the reasons the sale-deed executed in favour of the Plaintiff is illegal,

invalid and void abinitio. As observed above, there is no complete embargo for transfer/sale of a fragment and, therefore, unless specific plea is raised in this regard and the same is decided during the trial, it does not become an objection to the jurisdiction of Trial Court, sustainable on the face of the record.

22. This Court, in view of the judgment of Hon'ble Supreme Court in case of Vasudev Modi (supra), finds that for want of any apparent objection to the jurisdiction of the Trial Court, the Judgment Debtor is precluded from raising so also the Execution Court is prevented from entertaining such objection at the stage of execution of decree. Even otherwise, the suit filed is for declaration and injunction in respect of the suit property. There cannot be any dispute with regard to the position of law that the Civil Court is only competent Court to issue declaration and injunction. Thus, it cannot be said that there is inherent lack of jurisdiction with the Trial Court. It is also pertinent to note that the judgments of the Hon'ble Supreme Court (cited supra) were dealing with the issue like lack of inherent jurisdiction to entertain the suit or a decree being passed against a dead person. In respectful view of this Court, the said judgments do not apply to the facts of the present case.

23. At this stage, it would be relevant to take note of judgment of Hon'ble Supreme Court in case of Asma Lateef (supra) wherein in paragraph No. 35 it is held thus :-

“35. The essence really is that a court must not only have the jurisdiction in respect of the subject matter of dispute for the purpose of entertaining and trying the claim but also the jurisdiction grant relief that is sought for. Once it is conceded that the jurisdiction on both counts is available, it is immaterial if jurisdiction is exercised erroneously. An erroneous decision cannot be labelled as having been passed ‘without jurisdiction’. It is, therefore, imperative that the distinction between a decision lacking in inherent jurisdiction and a decision which suffers from an error committed in the exercise of jurisdiction is borne in mind.

In the facts of the present case, only Trial Court being Civil Court would have jurisdiction to decide issue of declaration and injunction and is entitled to pass decree.

24. By relying upon judgment of Gurnam Singh (supra), it is contended on behalf of Petitioner that it is fundamental principle that decree passed by Court without jurisdiction is nullity. It is observed therein defect of jurisdiction whether pecuniary or territorial or

subject matter/action, strikes authority of Court to pass decree and such defect cannot be cured even by consent of parties. There cannot be two opinions about the said preposition, however, facts involved in this case, unequivocally entrust jurisdiction to the Trial Court territorial, pecuniary as well as subject matter wise, to entertain the suit and pass decree. The said judgment, therefore, does not come to aid of Petitioner to support this Petition.

25. The impugned order passed by the learned Trial Court, therefore, is not perverse to cause any interference therein.

26. In view of the above discussion, Petition stands dismissed since it sans merit. Rule discharged.

(R. M. JOSHI)
Judge

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