

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1958 OF 2017
WITH
INTERIM APPLICATION NO. 7845 OF 2023
WITH
INTERIM APPLICATION NO. 7846 OF 2023
IN
WRIT PETITION NO. 1958 OF 2017

Smt. Shantiben Babarbhair Patel and Anr. ...Petitioners

Versus

Smt. Geeta Prabhu Patel and Ors. ...Respondents

WITH

WRIT PETITION NO. 13349 OF 2022

Smt. Geeta Prabhu Patel and Anr. ...Petitioners

Versus

Smt. Shantiben Babarbhair w/o Vasaiya Devaji ...Respondents
Patel and Ors.

Appearances :

Mr. Dilip Shukla for the Petitioner in WP/1958/2017 and for Respondent in WP/13349/2022.

Mr. Pramod Pawar a/w Deepali Kamble for Respondents in WP/1958/2017 and for Petitioners in WP/13349/2022.

Mr. H.S. Venegaonkar with Mr. Manoj Sabale for Respondent No.6 i.e. Mamletdar, UT-Dadra and Nagar Haveli Silvassa.

CORAM : M.M. SATHAYE, J.
RESERVED ON : 20th FEBRUARY, 2024
PRONOUNCED ON : 7th MAY, 2024

JUDGMENT :

1. Rule. Learned counsel for the respective Respondents waive service in both the petitions. Rule made returnable forthwith. Taken up

for final disposal by the consent of parties.

2. These petitions are being heard together since they were directed to be clubbed and placed together for hearing under administrative order dated 16 December 2023.

CASE

3. In Writ Petition No. 1958 of 2017, the Petitioners are the original Plaintiffs, who are challenging the impugned order dated 9 August 2016 passed below Exh.1 in Civil Misc. Application No. 3 of 2013 in Execution Petition No. 1 of 2010 by the Executing Court (Civil Judge, Senior Division, Dadra and Nagar Haveli, Silvassa). Survey No. 13/2/1 admeasuring 1H 6 R, Survey No. 13/2/2 admeasuring 3 R, Survey No. 13/2/3 admeasuring 7 R all situated at village Rakholi Union Territory of Dadra and Nagar Haveli Khata No.71 are the subject matter properties of the present petition and same are collectively referred to as 'the suit properties' for short. By this impugned order, the Executing Court has allowed the application of Respondents thereby granting stay to the decree under execution.

4. Few facts shorn of unnecessary details are as under. The Petitioners are sisters and one Raviyabhai is their brother. After the death of their father Babarabhai in 1987, the names of Petitioners and said Raviyabhai were entered in the records of the suit properties. In the year 2005, the Petitioners filed Regular Civil Suit No. 52 of 2005 for partition and separate possession of the suit properties. On 7.03.2007, an order was passed by which the suit was directed to be heard *ex-parte* because the original defendant Raviyabhai failed to remain present though served. On 01.02.2008, original defendant Raviyabhai expired.

The knowledge of this death of real brother vis-a-vis Petitioners (sisters) is a contentious issue. On 22.04.2009, the Trial Court (Civil Judge, Dadra and Nagar Haveli) decreed the said suit *ex-parte* thereby holding that the Petitioners are entitled to 1/3rd share each along with defendant in the suit properties. On 22.07.2009, the present Respondents, who are legal heirs of the original defendant Raviyabhai, filed Civil Misc. Application No. 6 of 2009 under the provision of Order IX Rule 13 of the Civil Procedure Code, 1908 ('CPC' for short) for setting aside the *ex-parte* decree. In the year 2010, the Petitioners filed Execution Petition No. 1 of 2010 for execution of the *ex-parte* decree. On 13.08.2012, the aforesaid application under Order IX Rule 13 filed by Respondents came to be dismissed on merits, holding that it cannot be proved that deceased Raviyabhai had a sufficient cause to remain absent in the said suit. The Respondents filed Civil Appeal No. 4 of 2012 challenging the said order dated 13.08.2012, however the appeal was also dismissed on 11.01.2013.

5. After the Respondents failed in their attempt to get the *ex-parte* decree set aside, they moved an application on 24.01.2013, being Civil Application No. 3 of 2013 under Section 47 of the CPC seeking declaration that the *ex-parte* decree dated 22.04.2009 is not executable. This application was seriously contested and eventually the Executing Court, by the impugned order, has allowed the application thereby holding that the said *ex-parte* decree is obtained against the dead person and it is stayed. It is in these circumstances, that the Petitioners/original plaintiffs/decreed holders have filed the present petition.

6. One of the legal heirs of the deceased Raviyabhai (Smt. Geeta

Prabhu Patel), who is Respondent No.1 in Writ Petition No. 1958 of 2017 has filed the other Writ Petition No. 13349 of 2022, challenging the order dated 20.06.2022 passed by the Administrator, Union Territory of Dadra and Nagar Haveli in Revenue Appeal No. 4 of 2022. By this order, the appeal of said Smt.Geeta is dismissed, thereby confirming the order of Respondent/Deputy Collector (Silvasa, Dadra and Nagar Haveli) dated 30.09.2021 passed in Revenue Appeal No. 1/2019. By the said order dated 30.09.2021, entry of the names of Petitioners (in Writ Petition No. 1958 of 2017) on the basis of *ex-parte* Decree in the land records of the suit properties, under Order dated 11.12.2012 by Mamlatdar is confirmed. In short, this petition challenges the simultaneous effect on the revenue records of the suit properties, in favour of Petitioner in Writ Petition No. 1958/2017.

7. At the time of hearing of the petitions, the counsel for contesting parties agreed that the challenge to the order passed by the Revenue Authorities would necessarily follow the order passed in the main petition arising out of civil dispute in the Executing Court and as such Writ Petition No. 1958 of 2017 has been argued.

8. Interim Application No. 7845 of 2023 is filed by one of the sisters, for seeking interim relief of injunction not to create third party interest and for appointment of receiver etc. and Interim Application No. 7846 of 2023 is filed by same person for bringing certain subsequent events on record by way of amendment. Perusal of the proposed amendment shows that the Petitioners want to contend that during pendency of the petitions, certain information is received by them showing that Respondents are trying to create third party interest in the suit properties and that they have constructed some shop, hotel, bungalow

and small shanties in the suit properties and the Respondents are trying to induct third parties and therefore it is necessary to grant interim injunction not to create 3rd party interest. Appointment of Court Receiver on Sisters' share in the suit properties is also prayed. Perusal of the record shows that both these applications were not pressed earlier.

RIVAL SUBMISSIONS

9. Heard learned counsel Mr. Shukla for the Petitioners in Writ Petition No. 1958 of 2017 and Mr. Pawar for the Respondents therein. The learned counsel has taken this Court through various documents on record, in support of their case.

10. The submissions of the Petitioners in Writ Petition No. 1958/2017 in short are as under. The Executing Court is not empowered to go behind the decree. The decisions rendered in order passed in Misc. Civil Application No. 6 of 2009 and Appeal filed thereon (considering the application under Order IX Rule 13 for setting aside *ex-parte* decree) have not been properly appreciated by the Executing Court. A decree cannot be questioned by the Executing Court. The Respondents have never urged grounds under Order XXII Rule 4 of the CPC while arguing their case under Order IX Rule 13. The decree put to execution cannot be stayed by the Executing Court under Section 47 of the CPC. The learned counsel for the Petitioners, in support of their case, has relied by the following Judgments :

1. *Bhargirath Mal v/s. Bhagwan Dutt (AIR 1996 RAJASTHAN 27)*
2. *Rahima Khatun v/s. Samser Ali (AIR 1985 GAUHATI 40)*
3. *Pradeep Mehra v/s. Harijivan Jethwa (Civil Appeal No. 6375 of 2023)*

4. *Mata Prasad Mathur v/s. Jwala Prasad Mathur and Ors. (Civil Appeal No. 1457 of 2013)*

11. *Per contra*, the learned counsel for the Respondents in Writ Petition No. 1958/2017 have made following submissions. On the date of the decree, the sole defendant Raviyabhai had already expired and period of limitation contemplated for abatement of suit had already expired. Deceased Raviyabhai expired on 01.02.2008 and the *ex-parte* decree against such a dead person, is passed on 22.04.2009. The Petitioners being sisters of sole defendant Raviyabhai were fully aware of the death of sole defendant as they had attended his funeral rites. The Petitioners were not strangers to sole defendant but were real sisters. Therefore, on the date of *ex-parte* decree, the learned Trial Judge had no jurisdiction to pass the decree as suit already stood abated by operation of law. The Executing Court under Section 47 of CPC can go into all questions arising between the parties of the suit or their representatives relating to execution, discharge or sanctification of the decree and Section 47 specifically bars a separate suit for that. Therefore, the Executing Court was well within its limits to pass the impugned order. The consideration during application under Order IX Rule 13 for setting aside *ex-parte* decree is necessarily about sufficient cause and the consideration of the Executing Court while passing impugned order was totally distinct being whether decree against a dead person can be executed. For all these reasons, the decree under execution passed against the dead person is nullity and hence inexecutable. Learned counsel for the Respondents has relied upon following Judgments in support of his contention :

1. *Rajendra Prasad and Anr. v/s Khirodahr Mahto and Ors. (1994 Supp (3) SCC 314)*

2. *Trikamlal Manilal Patel v/s. Uttar Gujarat Vij Comp Ltd. (2006 2 GLH 519)*

REASONS AND CONCLUSIONS

12. This is indeed a vexed question. What falls for consideration is ‘whether an Executing Court is empowered to refuse/stay execution of a decree, which is *ex-facie* passed against a dead person, in an abated suit?’

13. The operative part of the impugned order reads thus:

- “1. Application is hereby allowed.
2. *The decree as obtained in R.C.S. No. 52/2005 dated 22.04.2009, is obtained against the dead person is stayed.*
3. *Parties to bear their own cost.”*

(Emphasis supplied)

14. It is therefore clear that Executing Court has allowed the application. It is necessary to note the prayers made in the application, which read thus:

“20) Hence the applicant request-

A. To allow this application and to declare the decree in RCS No. 52/2005 as not executable and stop the execution proceeding in E.P No.1 of 2010 in pursuance of the ex-parte decree in the Regular Civil Suit No. 52/2005 dated 22.04.2009, declaring that to be not executable, directing the opponent no. 6 to restore the revenue record as it was prior to this execution proceeding.

B. *Pending hearing of the application, the proceeding pending in E.P No. 1/2010 may kindly be stayed.”*

(Emphasis supplied)

15. Conjoint reading of the main prayer in the application and clause

(1) of the operative part of the impugned order shows that the Executing Court has declared that the decree in Regular Civil Suit No. 52 of 2005 is not executable and therefore, execution proceedings have been stopped. This is further clear from clause (2) of the operative order in which it is held that the decree under execution is obtained against dead person and is therefore, stayed. There is no manner of doubt that the Civil Misc. Application No. 3 of 2013 filed by the Respondent Nos. 1 and 2 under Section 47 of the CPC, is disposed of as allowed.

16. Having concluded as above, it is necessary to examine whether the Executing Court was justified in going into aspect of the decree being executable or not, in the facts of this case.

17. The dates and events as narrated above are really undisputed. As a matter of fact, Raviyabhai (sole defendant) expired on 01.02.2008 and the decree is passed on 22.04.2009. Since, the period of limitation for setting aside abatement and bringing legal heirs on record, had expired, the said suit stood abated sometime in May 2008 itself. It is nobody's case that the Petitioners/Decree holders ever filed any application for bringing legal heirs of deceased Raviyabhai on record. Once this is the undisputed factual position, in law, the date on which the decree is passed, the suit had abated. An abated suit cannot be decreed. This is irrespective of the argument of the legal heirs of the deceased Raviyabhai that the Petitioners/decreed holders being his real sisters, obviously knew about his death and still chose not to file an application for bringing his legal heirs on record. Even if, this Court does not enter into this controversy at all, for whatever reason that the Petitioners did not file the application for bringing legal heirs, fact

remains that the suit was abated by operation of law, on the date of the decree, under mandatory provisions of Order XXII, Rule 4, sub-rule (3) of the CPC, which reads thus :

“Where within the time limited by law, no application is made under sub-rule (1), the suit shall abate as against the deceased defendant”

It is another aspect that this fact was not brought to the notice of the learned Judge who passed the decree. That by itself will not change the factual position that on the date of decree, the suit was no more and stood abated by the operation of law.

18. Now let us consider the argument of the Petitioners that once the finding about sufficient cause to remain absent in the suit is already concluded on due consideration of application under Order IX Rule 13 of the CPC, the same cannot be gone into or considered by the Executing Court. Indeed, this aspect as to satisfying the Court that defendant was prevented by sufficient cause from appearing in the suit (as contemplated under Order IX Rule 13 of the CPC) cannot be gone into by the Executing Court, because that is within the jurisdiction of the Court that passed the *ex-parte* decree on merits (Trial Court). However, that does not take away the jurisdiction of the Executing Court under Section 47 of the CPC to take cognizance of undisputed fact that on the date of the decree, the suit was no more as it stood abated by operation of law.

19. The learned Single Judge of the Gujarat High Court had an occasion of considering this identical fact situation in the matter of *Trikamlal Manilal Patel v/s Uttar Gujrat Vij Company Limited (supra)*, which is relied upon by the Respondents. In that case, the Executing

Court had refused to take cognizance of the fact that the suit is abated for not bringing legal heirs on record on the ground that Executing Court cannot go behind the decree. The learned Single Judge considered this aspect and has taken a categorical view that when the decree is nullity and if it is brought to the notice of Executing Court, such fact cannot simply be brushed aside on the ground that Executing Court cannot travel behind the decree. The learned Single Judge after holding as aforesaid had set aside the order of the Executing Court and remanded the matter to examine whether the execution proceedings are maintainable or not. Paragraph 9 of the said Judgment can be usefully referred to, which reads thus:

“(9) When a decree is a nullity and if the same is brought to the notice of the Court, the executing court cannot simply brush aside the same on the ground that it cannot travel behind the decree. There is no question of going behind the decree in examining whether the decree is against a dead person or not, and if the defendant died during the pendency of the suit, whether his heirs were brought on record. It is not a case where the original defendant died after the hearing of the suit was concluded. In the aforesaid order of the learned Single Judge, it is also observed that there is prima facie evidence on record to suggest that on the first returnable date, the defendant expired. There is nothing on the record to show that the plaintiff had taken any steps to bring heirs of the defendant on record. In fact, the suit could be said to have been abated as the suit cannot be proceeded against a dead person. Therefore, the proceedings in the said suit cannot be said to be a valid proceedings. The learned Judge has committed an apparent error in coming to the conclusion that the executing court cannot go behind the decree. In the present case, there is no such case as the judgment and decree itself is a nullity. The Trial Court ought to have at least appreciated that if in the title the name of the original defendant is mentioned, and the names of the heirs are not mentioned, the execution proceedings cannot go against a person who is not named in the judgment or who is not

brought on record of the case. The only question raised in the application filed by the present applicant was whether the decree is a nullity and the said question was required to be decided by the court and deciding such a question cannot be said to be going behind the decree.”

[Emphasis supplied]

20. Present case is identical. I hasten to add that, this case also is not a case where the defendant has expired after the hearing of the suit was concluded. This is a case, where defendant had expired long ago and no application for bringing his legal heirs on record was made and *ex-parte* decree was secured by the Petitioners/Decree holders without disclosing death of their real brother/sole defendant. In light thereof, I am of the considered view that even if the aspect of whether sole defendant was prevented by sufficient cause from appearing in the suit, has already been concluded between the parties, the Executing Court was justified in taking cognizance of the undisputed fact that on the date of the decree, the sole defendant had expired and the suit was abated and it is a decree against dead person. No fault can be found with the view taken in the impugned Order. During the hearing of application under Order IX Rule 13, by the Trial Court and the Appellate Court both, the fact of death of deceased Raviyabhai on 01.02.2008 was very much on record and the Petitioners had an opportunity of correcting the course of action by filing application for bringing his legal heirs on record. However, the same has not been done. It is not for this Court to comment upon whether the order passed under Order IX Rule 13, which is confirmed in appeal is right or wrong, because the same has attained finality. The same is also not the subject matter of this petition. But scope of that application (u/O. IX, Rule 13 of the CPC) and scope of the present

application (u/s. 47 of the CPC) are totally distinct.

21. Before parting, it is necessary to deal with the case laws relied upon by the Petitioners in support of their case. So far as the Judgment of *Bhargirath Mal v/s. Bhagwan Dutt (supra)* and *Mata Prasad Mathur v/s. Jwala Prasad Mathur and Ors. (supra)* are concerned, both the said judgments are clearly distinguishable on facts, inasmuch as in both these judgments, what was under consideration, was the exercise of jurisdiction under Order XXII Rule 4 of the CPC. In the facts of *Bhargirath Mal v/s. Bhagwan Dutt (supra)*, the learned Judge of the Rajasthan High Court had found that the decree could not have been held as nullity and in the case of *Mata Prasad Mathur v/s. Jwala Prasad Mathur and Ors. (supra)*, the Hon'ble Supreme Court had found that the Court ought to have exercised the power to avoid abatement. In both these cases, the power of the Executing Court u/s. 47 of the CPC was not under consideration. In the case at hand, the power of Executing Court u/s. 47 of the CPC is specifically under consideration and therefore, the present case is clearly distinguishable. In that view of the matter, the said two judgments do not advance the case of the Petitioners.

22. In the case of *Rahima Khatun v/s. Samser Ali (supra)* although the power of Executing Court u/s. 47 of the CPC was under consideration, during hearing of Revision Application, the Court was not informed about the death of the sole Respondent/Samser Ali and it was held that such death will not make the judgment invalid as it was passed in Revision, because the High Court could even *suo moto* call for record and proceedings and dispose it of on examining whether the order of the subordinate Court suffered from any infirmity or not.

Therefore, it was held that validity of the Judgment passed in Revisional Jurisdiction cannot be challenged in Executing Court. In these peculiar facts, it was found by the learned Single Judge of the Gauhati High Court that the decree cannot be held as nullity or not executable for that reason. In the present case, the decree which is put to execution, was passed by the Court of the first instance namely the Trial Court and death has not taken place during the pendency of the revision or any higher Appellate forum. In the present case, admittedly the decree was passed after a long time from the death of sole defendant, when undisputedly the suit was abated by the operation of law and the Plaintiffs/Petitioners have not taken any steps to bring legal heirs of sole defendant Raviyabhai on record. In that view of the matter, the present case is clearly distinguishable. Therefore the judgment of *Rahima Khatun (supra)* also does not advance the case of the Petitioners.

23. The last Judgment relied upon by the Petitioners is in the matter of *Pradeep Mehra v/s. Harijivan Jethwa (supra)*. In this Judgment the Hon'ble Supreme Court has reiterated key features of the exercise of power permissible u/s. 47 of the CPC, relying on the earlier Judgment of the Hon'ble Supreme Court in the case of *Dhurandhar Prasad Singh vs Jai Prakash University And Ors* - (2001) 6 SCC 534. The key features noted by the Hon'ble Supreme Court are that exercise of power u/s. 47 of the CPC lies in very narrow inspection-hole and Executing Court can allow objection under Section 47 of the CPC to the executability of the decree if it is found that the same is *void ab initio* and nullity and also on the ground that the decree is not capable of execution under law either because the same is passed in ignorance of such a provision of law or that law was promulgated making a decree inexecutable after its passing.

24. In view of these key features explained by the Hon'ble Supreme Court, the facts of the present case clearly pass the test and this Judgment in fact helps Respondents, in the considered view of this Court. The date of death of the sole defendant Raviyabhai and the date of decree as obtained by the Petitioners/Decree holders/Plaintiffs are undisputed. It is also undisputed that no application for bringing legal heirs of sole defendant Raviyabhai was ever filed. In such undisputed factual situation, the decree as passed by the Trial Court is passed in an abated suit and therefore, has to be treated as nullity. Having held so, it is difficult to find fault with the impugned order, which has in terms held that the decree is not executable as it is obtained against the dead person.

25. Perusal of the impugned order shows that the Executing Court has considered the aforesaid undisputed facts. In addition, the Executing Court has also considered that the fact of death was mandatorily required to be informed by the Plaintiffs/Petitioners to the Court and for want of such intimation in spite of knowledge, the decree as obtained by the Plaintiffs/ Petitioners will have to be treated as nullity. Therefore, the impugned order cannot be said to be perverse, being based on material available on record. The view taken is probable. There is no error apparent on the face of the record.

26. In the net result, Writ Petition No. 1958 of 2017 is devoid of merits and is accordingly dismissed. Rule is discharged.

27. As a necessary corollary, the companion Writ Petition being Writ Petition No. 13349 of 2022 filed by the daughter of deceased Raviyabhai, succeeds and the impugned order dated 20.06.2022 passed

by the Administrator, Union Territory of Dadra and Nagar Haveli, Diu and Daman in Appeal No. 4 of 2022 and the order dated 30.09.2021 passed in Appeal No. 1 of 2019 by Resident Deputy Collector (S) Dadra and Nagar Haveli, Silvassa and the Order dated 11.12.2012 passed by Mamlatdar, Dadra and Nagar Haveli, Silvassa, all are quashed and set aside. The Mamlatdar, Dadra and Nagar Haveli, Silvassa is directed to pass fresh order on application No. 9424, which stands restored, after hearing both sides, in accordance with law, considering both the facts that the decree is not set aside but found to be in-executable. Rule is made absolute accordingly.

28. In view of disposal of writ petitions, all the pending Interim Applications are also disposed of. No costs.

(M.M. SATHAYE, J.)