

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9256 OF 2024

Mr. Momin Zulfikar Kasam,

Age : 55 yrs, Occ : Business, Add

:B-704, Aliabad CHS Ltd., Jogeshwari

(W), Mulund-400 102

}Petitioner

: Versus :

1. Ajay Balkrishna Durve.

Age : 66 years, Occ : Retired, Ad: E/4,

Ground Floor Hoechst Marion, Roussel Staff

Quarters, Dargah Road, Now Guru Tegh

Bahadur Road, Opp. Amar Nagar, Mulund

Colony, Mulund (W), Mumbai-400 082.

2. Aventis Pharma Limited,

A Company incorporated under the Companies

Act, 1956 having office at Aventis House,

54/A, Sir Mathuradas Vasanji Road,

Andheri (E), Mumbai-400 093.

}Respondents

Mr. Pradeep Thorat i/by. Ms. Aditi Naikare, *for the Petitioner.*

Mr. Pranil Sonawane with Mr. Deepak H. i/by. KLS Legal, *for Respondent No.1.*

Ms. Nikita Vardhan with Ms. Bhoomika Shah i/by. Kanga & Co. *for Respondent No.2.*

CORAM : SANDEEP V. MARNE, J.

Judgment Reserved on : 4 July 2024.

Judgment Pronounced on : 9 July 2024.

JUDGMENT :-

1) **Rule.** Rule is made returnable forthwith. With the consent of learned counsel appearing for rival parties, petition is taken up final hearing and disposal.

2) This petition is filed challenging Order dated 6 May 2024 passed by the Appellate Bench of the Small Causes Court at Mumbai allowing the Revision Application filed by Respondent No.1 and setting aside the order dated 23 April 2024 passed by the learned Judge of the Small Causes Court, Mumbai. The Appellate Bench has directed the Executing Court to decide the objection of Respondent No.1/Judgment Debtor about assignment and about maintainability of the execution

proceedings filed by the transferee (Petitioner) under Order XXI Rule 16 or Section 146 of the Code of Civil Procedure, 1908 (**Code**).

3) A quick reference leading to filing of the present petition would be necessary. Flat No. E/4 on ground floor of the building 'Hoechst Marion Roussel Staff Quarters' situated at Dargah Road, Opp. Amar Nagar, Mulund Colony, Mulund (West), Mumbai-400 082 are the suit premises. Respondent No.1 was in employment of the Company, M/s. Hoechst Marion Roussel Ltd.' (Plaintiff) and the suit premises were let out by Plaintiff to Respondent No.1 under an agreement of license. In the year 1999, the operations of Respondent No.2 were apparently shut and voluntary retirement was offered to all the employees. The First Respondent opted for voluntary retirement scheme on 5 February 1999 and retired from service. He however failed to vacate the suit premises. On 19 May 1999, Plaintiff issued notice calling upon Respondent No.1 to vacate the suit premises. Since Respondent No.1 failed to do so, Plaintiff filed Application No. 59 of 2000 before the Competent Authority under Section 24 of the Maharashtra Rent Control Act, 1999 seeking eviction of the First Respondent. An objection was raised about jurisdiction of the Competent Authority. Application No.59 of 2000 was dismissed on 11 January 2005 on the ground that the Competent Authority did not have jurisdiction to decide the same.

4) On 1 April 2006, Plaintiff filed L.E. Suit No. 94/110 of 2006 under Section 41 of the Presidency Small Causes Court, 1888 seeking

eviction of the First Respondent. By decree dated 30 April 2012, the learned Judge of the Small Causes Court decreed the suit directing the First Respondent to handover possession of the suit premises to Plaintiff with further order for conduct of enquiry into mesne profits from the date of filing of the suit till the date of delivery of possession. The First Respondent filed Appeal No. 62 of 2012 before the Appellate Bench of the Small Causes Court, which came to be dismissed by Judgment and Order dated 9 May 2013.

5) It appears that the decree was not put in execution by Plaintiff immediately after the Appeal was dismissed by the Appellate Bench on 9 May 2013. Considering the limited controversy involved in the Petition, it is not necessary to give details of merger/acquisition of Plaintiff- Hoechst into Aventis Pharma Ltd. and thereafter into M/s. Sanofi India Ltd. By Indenture of Conveyance dated 13 April 2023, M/s. Sanofi India Ltd. conveyed various immovable properties owned by it in favour of the Petitioner, which includes various flats in the building, in which the suit premises are located. This is how Petitioner claims to have become owner in respect of the suit property by Deed of Conveyance dated 13 April 2023.

6) Petitioner filed Execution Application No. 322 of 2023 in the Court of Small Causes for execution of the decree for eviction against the First Respondent. Since the execution was sought after two years of decree, the Executing Court issued notice to first Respondent under Order 21 Rule 22 of the Code. The execution proceedings were opposed by the First

Respondent by filing Affidavit-in-Reply dated 3 January 2024, *inter-alia*, questioning the *locus-standi* of the Petitioner to file the execution proceedings as well as non-existence of any documentary evidence of assignment of the Decree.

7) After delay of 3848 days, Respondent No.1 filed Civil Revision Application No. 197/2024 challenging the Appellate Bench's decree dated 9 May 2013 before this Court which came to be dismissed by order dated 20 March 2024 refusing to condone the delay. Special Leave Petition (C) No. 8849 of 2024 filed by the First Respondent before the Supreme Court came to be dismissed by order dated 19 April 2024.

8) The Executing Court passed order dated 19 April 2024 rejecting the objections raised by first Respondent to execution of decree and issued possession warrant under Order 21 Rule 35 of the Code. The First Respondent thereafter filed Objection Petition under Order 47 and Order 21 Rule 23 of the Code raising objection that the decree is not executable as the Small Causes Court did not have jurisdiction to pass the same. In the obstruction petition, the First Respondent filed application at Exhibit-22 seeking stay to the execution of warrant of possession. The said application was rejected by the Small Causes Court by order dated 23 April 2024. Aggrieved by rejection of the said application by the Executing Court, by order dated 23 April 2024, the First Respondent filed Revision Application No. 121 of 2024 before the Appellate Bench. The Appellate Bench has allowed the said Revision Application filed by the First

Respondent holding that mere transfer of property does not amount to assignment of decree and therefore set aside the order dated 23 April 2024 and has directed the Executing Court to decide the objection of the First Respondent relating to non-assignment of decree, as well as maintainability of the execution proceedings under Order XXI Rule 16 or Section 146 of the Code. Aggrieved by the order dated 6 May 2024, passed by the Appellate Bench, the Petitioner has filed the present petition.

9) Mr. Thorat, the learned counsel appearing for Petitioner would submit that the Appellate Bench has erroneously set aside the order of the Small Causes Court without appreciating the provisions of Order 21 Rule 16 of the Code. That the Appellate Bench has committed a grave error in relying on judgment of the Apex Court in **Jugalkishore Saraf Vs. Ram Cotton Co. Ltd.**¹ ignoring the fact that the provisions of Order 21 Rule 16 of the Code have been amended after the said judgment by inserting an Explanation therein vide Amendment Act 104 of 1976 clarifying that transferee of rights in the property is entitled to apply for execution of the decree in absence of separate assignment of the decree. That in **Vaishno Devi Construction V/s. Union of India**², the Apex Court has taken note of change in law after the judgment in **Jugalkishore Saraf** and has held that separate assignment of decree is not necessary and that purchaser of the suit property is entitled to execute the decree passed in favour of the vendor. That The Appellate Bench has erroneously relied upon the

¹ AIR 1955 SC 376

² (2022) 2 SCC 290

judgment in ***Jugalkishore Saraf***, which is no longer good law and was decided in the light of unamended provisions of Order 21 Rule 16 of the Code.

10) Mr. Thorat would further submit that the First Respondent specifically raised objection about non-assignment of the decree as well as *locus-standi* of the Petitioner to file execution application in its Affidavit-in-Reply to the Execution Application. That after considering the said Affidavit-in-Reply, the Executing Court passed order dated 19 April 2024 repelling the said objection and issued possession warrant. That the First Respondent did not challenge the order dated 19 April 2024, which has attained finality. That in Objection Petition subsequently filed on 23 April 2024, the First Respondent is seeking to raise very same grounds which were earlier raised and rejected by order dated 19 April 2024. That the said Objection Petition is clearly hit by the principle of *res-judicata*.

11) Mr. Thorat would further submit that in addition to applicability of principle of *res-judicata* within execution proceedings, the First Respondent is otherwise prohibited from raising the objection about jurisdiction of the Small Causes Court to decide the Suit in execution proceedings. That in his objection petition, the First Respondent has sought to rely upon the provisions of Section 22 of the Maharashtra Rent Control Act, 1999 to contend that only Competent Authority has jurisdiction to direct eviction of a service tenant. Inviting my attention to the Written

Statement filed in L.E. Suit No.94/110 of 2006 filed by the First Respondent, Mr. Thorat would submit that the First Respondent raised a specific plea that he is a statutory tenant while defending the suit. That the First Respondent never questioned jurisdiction of the Small Causes Court by contending that he was a service tenant and that therefore only the Competent Authority has jurisdiction to decide eviction proceedings. That while repelling the defence of statutory tenancy of the First Respondent, Small Causes Court held him to be a mere licensee. That the Small Causes Court held that no relationship of landlord and tenant existed between the parties. That the Appellate Bench has confirmed the finding of the First Respondent's status as a mere licensee rejecting his defence of statutory tenant. That these findings recorded by the Small Causes Court and its Appellate Bench, have attained finality and the First Respondent cannot now be permitted to raise issue that he is not a licensee but a service tenant. Mr. Thorat has relied upon the following judgments:

- i. **Ravinder Kaur Versus. Ashok Kumar and another.**³
- ii. **Rafique Bibi (dead) by Lrs Versus. Sayed Waliuddin (dead) by Lrs. And others.**⁴
- iii. **Chandrashekhar s/o Manohar Tanksale Versus. Pandharinath s/o Vithobaji New Are**⁵

12) Mr. Thorat would accordingly submit that the First Respondent is deliberately attempting to somehow delay execution of the decree by raising baseless contentions. That the Appellate Bench has erred in directing the objections raised by the First Respondent in the objection

³ (2003) 8 SCC 289.

⁴ (2004) 1 SCC 287.

⁵ 2013 SCC OnLine 1076.

petition must be decided before execution of the possession warrant. He would pray for setting aside the impugned order passed by the Appellate Bench on 6 May 2024.

13) *Per-contra*, Mr. Sonawane, the learned counsel appearing for the First Respondent would oppose the petition and support the order passed by the Appellate Bench. He would submit that nature of order passed by the Appellate Bench is such that no interference is warranted by this Court in exercise of writ jurisdiction under Article 227 of the Constitution of India. That the Appellate Bench has merely directed the Executing Court to decide the objections raised by the First Respondent in his objection petition. That Petitioner is yet to file reply opposing the objection petition and it is highly erroneous on the part of the Petitioner to expect that the warrant of possession must be executed before the objections raised by the First Respondent are decided by the Executing Court. That the Appellate Bench by itself, has not ruled out any of the objections raised by the First Respondent but has merely directed the Executing Court to decide the same. That thus no prejudice is caused to the Petitioner by the impugned order passed by the Appellate Bench on 6 May 2024. Mr. Sonawane would therefore contend that there is no reason for this Court to entertain the present petition.

14) Mr. Sonawane would further submit that all the objections raised by the First Respondent to the execution of the decree are valid in law. That Order 21 Rule 16 of the Code requires assignment of the decree

and the Deed of Conveyance relied upon by the Petitioner does not include any covenant seeking to assign the decree. That in absence of assignment of decree, Petitioner is not entitled to apply for execution thereof. That the second objection relating to jurisdiction is also required to be decided before executing the decree. That it was the case of the Plaintiff in the suit that the suit premises were granted to the First Respondent during service tenure thereby containing an implied admission that a service tenancy was created between the parties. That therefore the Small Causes Court did not have jurisdiction to entertain or decide the suit in question. That since the decree is without jurisdiction, it is nullity and cannot be executed. That it is settled law that objection of jurisdiction can be taken by a party at any stage, including execution proceedings. In support of his contention, Mr. Sonawane would rely upon judgment in **Harshad Chiman Lal Modi Vs. DLF Universal Ltd. & Anr.**⁶ Mr. Sonawane would pray for dismissal of the petition.

15) Rival contentions of the parties now fall for my consideration.

16) It must be observed at the very outset that the Appellate Bench has relied upon the judgments of the Apex Court in **Jugalkishore Saraf and Sitabai Rambhau Marathe Vs. Gangadhar Dhanaram Marwadi**⁷ for holding that mere transfer of property does not, by itself, amount to transfer of decree and that a separate assignment of decree is necessary for initiation

⁶ (2005) 7 SCC 791

⁷ AIR 1935 Bom 331

of execution proceedings. The Appellate Bench has reproduced provisions of Order 21 Rule 16 of the Code in its judgment. However, it appears that the Appellate Bench has not taken note of the amended provisions of Order 21 Rule 16 of the Code after delivery of the judgment in ***Jugalkishore Saraf***. Rule 16 of Order 21 as amended by Act 104 of 1976 w.e.f. 1 February 1977 reads thus:

16. Application for execution by transferee of decree.—Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Explanation.—Nothing in this rule shall affect the provisions of section 146, and a transferee of rights in the property, which is the subject matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule.

(emphasis supplied)

17) Explanation has been added to Rule 16 of Order 21 on 1 February 1977 expressly clarifying that nothing in Rule 16 affects the provisions of Section 146 and that a transferee of rights in the property, which is subject matter of the suit, can apply for execution of the decree without a separate assignment of decree as required under Rule 16. Surprisingly, though the Appellate Bench has reproduced Rule 16 of Order 21 in its judgment, it failed to notice that after delivery of judgment in ***Jugalprasad Saraf***, Explanation has been inserted in Rule 16 obviating the

need for separate assignment of decree and enabling transferee of the property to apply for execution of decree.

18) In *Vaishno Devi Constructions* (supra), the Apex Court has taken note of the judgment in *Jugalkishore Saraf* and effect of amendment of Order 21 Rule 16. In para-1 of the judgment, the Apex Court has spelt out the contours of the legal controversy which arose for its consideration as under:

1. The contours of the legal controversy which arise for consideration in the present appeal emanate from the plea of the appellants claim based as an assignee of the decree holder in terms of Order XXI Rule 16 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') in their application filed under Section 47 of the CPC by taking recourse to Section 146 of the CPC read with Section 2(1)(g) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act'). The significant aspect is the addition of the explanation to Order XXI Rule 16 of the CPC, which was added pursuant to the recommendation made by the Law Commission of India in its 54th Report on the CPC in 1973, which in turn was a sequitur to the conflicting views of the High Courts on the matter in issue.

19) The Apex Court thereafter took note of the provisions of Sections 147 and 146 and Rule 16 of Order 21 of the Code as well as its judgment in *Jugalkishore Saraf*. The Apex Court held in paras-13, 15, 17, 24, 25, 27 and 28 as under:

13. It may be observed that the Explanation was inserted by Act 104 of 1976 (hereinafter referred to as the 'Code of Civil Procedure (Amendment) Act, 1976') w.e.f. 01.02.1977 and has a material bearing in the conspectus of the respective arguments. The recourse to Section 47 of the CPC in the application arises from this provision specifying the questions to be determined by the court executing a decree, and it reads as under:

"47. Questions to be determined by the Court executing decree.

—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

* * *

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”\

15. It was, thus, the case of the appellants that their claim raised a question to be determined by an executing court within the parameters of Section 47 of the CPC in the context of the appellants claiming rights under the assignment of Shri S.N. Kanungo (as per Section 146 of the CPC). Section 2(1)(g) of the A&C Act being part of the definition clause reads as under:

“2. **Definitions.**—(1) In this Part, unless the context otherwise requires,

(g) “**legal representative**” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;”

17. In the conspectus of the aforesaid dispute, the common case is that the judgment of this Court in ***Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.*** is of utmost significance. This is so as the failure of the appellants to succeed before the courts below is predicated on the reasoning that this judgment of the Supreme Court covers the case against the appellants. A specific reliance was placed on para 26, as per which Order XXI Rule 16 contemplates the actual transfer of the decree by an assignment in writing executed “*after the decree is passed*”. Thus, while a transfer of or an agreement to transfer a decree that may be passed in the future may, in equity, entitle the intending transferee to claim the beneficial interest in the decree after it is passed, such equitable transfer does not relate back to the prior agreement and does not render the transferee a transferee of the decree by an assignment in writing within the meaning of Order XXI Rule 16 of the CPC.

24. On analysis of the submissions there is little doubt that the impugned judgments would have been completely in accordance with law if the amendments were not made in 1976 and would have been fully covered by the judgment in ***Jugalkishore Saraf***. Thus, the only aspect which we have to consider is whether that amendment made any difference to the legal position as enunciated in the said judgment.

25. It is an admitted position that the explanation was added to Order 21 Rule 16 which did not exist earlier, pursuant to the recommendations made by the Law Commission of India in its 54th Report on the Code of Civil Procedure, 1908. The Explanation was so added due to conflicting High Courts’ decisions on the question, i.e., whether a person who does not have a written assignment of the decree, but who has succeeded to a

decree holders' right, is entitled to such decree under Section 146 of the CPC.

27. In the conspectus of the aforesaid we are of the view that the objective of amending Order XXI Rule 16 of the CPC by adding the Explanation was to deal with the scenario as exists in the present case, to avoid separate suit proceedings being filed therefrom and to that extent removing the distinction between an assignment pre the decree and an assignment post the decree. Thus, what has been discussed even in the judgment in ***Jugalkishore Saraf*** as a view based on the equitable principle was sought to be incorporated in Order XXI Rule 16 of the CPC by adding the Explanation, something which had not been done earlier. **Once the legislative intent is clear, and the law is amended, then the earlier position of law cannot be said to prevail post the amendment and it is not in doubt that the present case is one post the amendment.**

28. We may further add that while considering the divergent views of the High Courts, the Law Commission took note of the fact that two different interpretations of ***Jugalkishore Saraf*** had been adopted. Thus, the Law Commission really sought to clarify the legal position so that the conflicting interpretation of the Supreme Court judgment would not survive. The Explanation clearly stipulates that nothing in Order XXI Rule 16 of the CPC would affect the provisions of Section 146 and the transferee of the right in property which is subject matter of a suit may apply for execution of the decree without separate assignment of the decree as required by law. No doubt the appellants are not parties in the suit proceedings but they claim as assignees of the decree holder.

(emphasis supplied)

20) The Appellate Bench, instead of relying on the judgment of the Apex Court in ***Jugalkishore Saraf*** delivered in the year 1955 and of Division Bench of this Court in ***Sitabai Rambhau Marathe*** delivered in the year 1935, ought to have apprised itself about latter exposition of law by the Apex Court in ***Vaishno Devi Constructions***. I am informed that the judgments in ***Jugalkishore Saraf*** and ***Sitabai Rambhau Marathe*** were not even relied upon before the Appellate Bench by the counsel representing the First Respondent and the Bench, on its own, has relied upon the said judgments. Mr. Thorat is at pains to point out that if the counsel for the Petitioner was to know that the Appellate Bench was to rely upon

Jugalkishore Saraf and ***Sitabai Rambhau Marathe***, he would have apprised the Bench about change in law brought in by insertion of Explanation in Order 21 Rule 16 as well as interpretation of the said Explanation by the Apex Court in recent judgment in ***Vaishno Devi Constructions***.

21) In my view, therefore the Appellate Bench has committed a grave error in holding that assignment of decree was necessary for the purpose of the Petitioner to seek execution thereof. Perusal of the impugned order of the Appellate Bench would indicate that the above erroneous finding is the only reason why the Appellate Bench has set aside the order passed by the Executing Court. This is clear from the following findings recorded in para-14 of the Appellate Bench's order:

14. In view of the above ruling and the discussion, we are of the considered opinion that the objection of the judgment debtor as to assignment of the decree, is required to be decided first. The learned Executing Court has erred in issuing warrant of possession before deciding the objection of the judgment debtor. Therefore, without answering the point it would be proper to direct the executing court to decide the matter afresh. Consequently, the said order is required to be set aside.

22) The entire reasoning adopted by the Appellate Bench thus suffers from the vice of perversity and its order is liable to be set aside. Ordinarily, this judgment would have ended here. However, since the learned counsel appearing for the rival parties have canvassed submissions on the other points of *res-judicata* and on jurisdiction with respect to

provisions of Section 22 of the Maharashtra Rent Control Act, 1999, It would be necessary to quickly deal with the same.

23) The First Respondent has taken objection in the objection petition that the decree is without jurisdiction and therefore incapable of being executed. In the Revision Application filed by Respondent No.1, order dated 23 April 2024 passed by the Executing Court was under challenge, which was passed by the learned Judge on application at Exhibit-22 seeking stay to the execution of warrant of possession. The said application at Exhibit 22 was filed in the Execution Application No. 322 of 2023. As observed above, since the execution proceedings are filed beyond the period of two years from the date of decree, the Executing Court issued notice to Respondent No.1 under Order 21 Rule 22 of the Code. Respondent No.1 appeared after receipt of the said notice and filed his reply dated 3 January 2024 raising various objections to the execution of the decree and prayed for dismissal of the execution proceedings. The objections raised by Respondent No.1 to the execution of the decree in the reply dated 3 January 2024 included *inter-alia* (i) objection as to *locus-standi* of Petitioner on the ground of non-production of any document to substantiate the claim of being transferee of the decree-holder, (ii) purchase of the building comprising the suit premises on ‘*as is where is*’ basis, (iii) non-initiation of steps by M/s. Sanofi India Ltd. to get itself replaced/impleaded in the Appeal despite alleged conversion of M/s. Aventis Pharma Ltd. into M/s. Sanofi India Ltd., (iv) absence of chain of transfer of assets from M/s. Aventis Pharma Ltd. to M/s. Sanofi India Ltd.,

(v) non-entitlement of transferee of property to execute the decree on the basis of mere transfer of subject matter of property in absence of assignment of decree, (vi) Deed of Conveyance executed in favour of the Petitioner being void, (vii) assurance to Respondent No.1 by original Plaintiff-Company for execution of sale-deed in favour of allottees, (viii) non-persuasion of further proceedings by Respondent No.1 on account of such assurance to sell the suit premises to him as was done in the case of 55 other tenants, and (ix) Respondent No.1 intending to challenge the decree of the Appellate Bench before this Court.

24) After taking into consideration, the above objections, the Executing Court passed order dated 19 April 2024 observing as under:

4. Now the applicant is seeking issuance of possession warrant to execute the decree. On perusal of record, it is seen that the suit property has been purchased by the applicant vide the conveyance deed No. 7825 of 2023 on 13/04/2023. **If the property is purchased by applicant by way of conveyance deed, then it will amount to assignment of decree and as per provisions of Order 21 Rule 16 of The Code of Civil Procedure, 1908 the purchaser can execute the decree against the judgment Debtor. The objection taken by the defendant can not be considered under Section 47 of The Code of Civil Procedure, 1908 because registered deed of assignment is on record.** The ground raised by defendant with regard to limitation can not be considered because the execution application has been filed within 12 years from the date of decree passed by the Hon'ble Appellate Bench. Therefore, execution application is filed within limitation. The applicant is entitled to execute the decree. There is no stay to the execution. Hence, as per provisions of Order 21 Rule 35 of the Code of Civil Procedure, 1908, it is necessary to issue possession warrant.

25) Thus, all the objections raised by Respondent No.1 are considered and repelled by the Executing Court by order dated 19 April 2024 and possession warrant under Order 21 Rule 35 of the Code came to be issued. The Executing Court specifically observed that the above objections could not be considered under Section 47 of the Code. The

order dated 19 April 2024 has attained finality as the same has not been challenged by Respondent No.1. The issue is, after rejection of all the objections to the execution of decree after referring to Section 47, whether it is permissible for Respondent No.1 to raise the same or further objections to the execution of decree under Section 47 of the Code. The answer to the question, in my view, appears to be in the negative. If Respondent No.1 was aggrieved by order dated 19 April 2024, he could have challenged the same as all his objections to the execution of the decree are rejected by the Executing Court by making reference to Section 47 of the Code. However, after passing of order dated 19 April 2024, the First Respondent was advised to file Objection Petition on 23 April 2024 under Section 47 and Order 21 Rule 23 of the Code once again raising objections to execution of the decree. Perusal of the said objection would indicate that apart from repeating some of the objections already raised in the reply dated 3 January 2024, the First Respondent has now sought to raise a new ground of lack of jurisdiction of Small Causes Court to pass the decree in view of the provisions of Section 22 of the Maharashtra Rent Control Act. According to Mr. Sonawane, the Executing Court has issued notice in the said objection petition and that the Petitioner is yet to file his reply to the same. Thus, so far, the Objection Petition is not yet decided. I am sure, the Executing Court would decide the same, keeping in view the fact that the objections raised to the execution of the decree by Affidavit-in-Reply dated 3 January 20024 have already been repelled by it by making reference to the provisions of Section 47 of the Code and that the order dated 19 April 2024 has attained finality.

26) The limited issue involved in the present petition is whether the First Respondent could have sought stay on execution of the decree by filing application at Exhibit-22 in the execution proceedings after passing of order dated 19 April 2024. The application at Exhibit-22 has been rejected by the Executing Court by passing following order:

Perused the application. Heard the learned advocate for defendant. He submitted that he has filed the objections as per section 47 of the Code of Civil Procedure and till deciding the objections, the execution of possession warrant may be stayed. It must be noted that the notice under Order 21 Rule 22 of the Code of Civil Procedure was issued to the reply and after hearing the argument of learned advocate for plaintiff, this Court issued the warrant of possession. The execution applications are pending since long. Some of the defendants/occupants had approached before the Hon'ble High Court but they could not succeed. Warrant of possession is already issued. This court being executing Court cannot go behind the decree. The objections can be decided in due course. If the defendant/judgment debtor succeeds, then he would have a remedy of restitution under section 144 of the Code of Civil Procedure. Sufficient time is already granted to the defendants to approach before the Hon'ble Appellate Courts to bring the stay. However, the defendant cannot succeed. This Court now cannot stay the execution of decree under Order 21 rule 26 of the Code of Civil Procedure. Hence, the application for stay of execution of possession warrant is rejected.

27) It is this order dated 23 April 2024 passed on application for stay at Exhibit-22, which became subject matter of Revision before the Appellate Bench, in which the impugned order has been passed on 6 May 2024. I have already held that the reasoning adopted by the learned Appellate Bench for reversing the order dated 23 April 2024, by referring to judgments prior to amendment of Order 21 Rule 16 of the Code, is totally erroneous. There is yet another reason why the Order 23 April 2024 passed by the Executing Court rejecting the application for stay at Exhibit-22 did not warrant any interference at the hands of the Appellate Bench. After issuance of notice under Order 21 Rule 22 of the Code, the

First Respondent appeared before the Executing Court and filed his objections under Order 21 Rule 23. The said objections have been decided by the Executing Court by passing order dated 19 April 2024. Merely because the First Respondent has filed one more Objection Petition, maintainability of which is yet to be decided, the same was not a ground for the Executing Court to stay the warrant of possession. In my view, the process of raising and decision of objections by the Executing Court is already over. In this regard, it would be apposite to refer to the provisions of Rules 22 and 23 of Order 21 which reads thus:

22. Notice to show cause against execution in certain cases.—

(1) Where an application for execution is made—

- (a) more than two years after the date of the decree, or
- (b) against the legal representative of a party to the decree [or where an application is made for execution of a decree filed under the provisions of section 44A, or
- (c) against the assignee or receiver in insolvency, where the party to the decree has been adjudged to be an insolvent,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

23. Procedure after issue of notice.—(1) Where the person to whom notice is issued under [rule 22] does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

(emphasis supplied)

28) Thus, as per sub-rule (2) of Rule 23 of Order 21, the First Respondent raised his objections by reply dated 3 January 2024 and the said objections have been decided by order dated 19 April 2024. Mr. Sonawane has attempted to suggest that the said objections are rejected without hearing the counsel for Respondent No. 1. If that was the case, first Respondent ought to have challenged the said order, instead of filing another Objection Petition. Therefore, maintainability of another application raising objection under Section 47 and Order 21 Rule 23 of the Code becomes questionable. The Objection Petition has been filed by the First Respondent by invoking Section 47 and Order 21 Rule 23(2) of the Code which is clear from para-2 of the said objection petition which reads thus:

2. The Applicant has filed the present application u/s. 47 of Code of Civil Procedure, 1908 r/w. Order 21 Rule 23(2) and raised the objection to the execution of impugned decree passed by this Hon'ble Court in L.E. Suit No.94/110 of 2006 dated 30th April, 2012 on the grounds that the impugned judgment and decree passed by this Hon'ble Court was itself without jurisdiction over the subject matter and hence the impugned decree is nullity, invalid and cannot be executed in the eyes of law.

29) I am sure, the learned Executing Court would keep in mind the fact that the process of raising objections and deciding the same under Order 21 Rule 23(2) is already over while deciding the objections filed by

the First Respondent. The Appellate Bench has erred in not appreciating this position and has erroneously directed that the possession warrant cannot be executed before the objections raised by the First Respondent are decided.

30) What remains now is to deal with judgments cited by the learned counsel for parties. Mr. Sonawane has relied upon the judgment of the Apex Court in ***Harshad Chiman Lal Modi*** (supra) in support of his contention that objection as to jurisdiction of the Court can be taken at any stage of the proceedings and principle of waiver or acquiescence does not apply to such objection. While Mr. Sonawane may not be entirely wrong in contending so, the objections raised by the First Respondent to execution of the decree after receipt of notice under Order 21 Rule 22 have already been rejected by the Executing Court under Order 21 Rule 23(2). It appears that the objections with regard to the decree being nullity on account of provisions of Section 22 of the Code was not raised in the Affidavit-in-Reply dated 3 January 2024. It is now sought to be raised after an order is passed by the Executing Court under Order 21 Rule 23(2) of the Code. The said objection is pending consideration and whether such objection can be raised after passing of order under Rule 23(2) of Order 21 is something which the Executing Court would decide.

31) Mr. Thorat has canvassed submissions about permissibility for the First Respondent to raise objection of jurisdiction with reference to Section 22 of the Maharashtra Rent Control Act, 1999 in execution proceedings. According to Mr. Thorat, the First Respondent failed to raise

the issue of jurisdiction under Section 22 of Maharashtra Rent Control Act before the Small Causes Court at any point of time and on the contrary he consciously elected to raise a plea that he is a statutory tenant for claiming protection of tenancy rights under the Maharashtra Rent Control Act. That once such election is made by the First Respondent by asserting his right as statutory tenant and once he fails in his claim, he cannot now be permitted to take a *volte-face* and contend that he is a statutory tenant. In support of his contention, Mr. Thorat has relied upon the judgments of the Apex Court in ***Ravinder Kaur, Rafiq Bibi*** and of this Court in ***Chandrashekar Manohar Tanksale*** (supra). It appears that the objection of jurisdiction sought to be raised by the First Respondent before the Executing Court with respect to Section 22 of the Maharashtra Rent Control Act requires conduct of factual enquiry about his nature of tenancy. There was debate before the Small Causes Court which continued upto the Apex Court about the status of the First Respondent, who claimed himself to be a statutory tenant and not a licensee. Thus, the debate as to whether the First Respondent was service tenant or not was neither raised nor decided during the course of the trial. The objection of jurisdiction hinges on factual enquiry into the status of the First Respondent as service tenant, which has not taken place on account of he not claiming that status before the Small Causes Court. Though detailed submissions are canvassed by both the sides on the issue of permissibility for the First Respondent to raise objection of jurisdiction with respect to Section 22 of the Maharashtra Rent Control Act before the Executing Court, I am of the view that the Objection Petition in which this objection is raised is still pending

consideration before the Executing Court. As observed above, its maintainability itself is under dispute. In any case, the said objection is yet to be decided by the Executing Court. In that view of the matter, it would not be appropriate for this Court, exercising jurisdiction under Article 227 of the Constitution of India to decide that objection without it being decided at the first instance by the Executing Court. This observation, however would not mean that the Objection Petition filed by the Respondent No.1 is held to be maintainable or that the Executing Court is bound to decide that objection. All that is being observed at this stage is that in view of absence of findings on the said objection, it would not be appropriate for this Court to decide the same at this stage.

32) After considering the overall conspectus of the case, I am of the view that the order dated 6 May 2024 passed by the Appellate Bench is indefensible and is liable to be set aside. The Writ Petition accordingly succeeds. The order dated 6 May 2024 passed by the Appellate Bench of the Small Causes Court in Revision Application No. 121 of 2024 is set aside and the order dated 23 April 2024 passed by the Executing Court on application at Exhibit-22 is confirmed. The Writ Petition is **allowed**. Rule is made absolute. There shall be no order as to costs.

33) After the judgment is pronounced, the learned counsel appearing for Respondent No.1 seeks stay of the judgment for a period of 8 weeks. The request is opposed by the learned counsel appearing for Petitioner. Considering the nature of findings recorded in the judgment, the request for stay is rejected.

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[SANDEEP V. MARNE, J.]