

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 848 OF 2013
WITH
CIVIL APPLICATION NO. 2565 OF 2013 IN FA/848/2013**

Mr Omprakash Laxmiprasad
Pande

..Appellant

Vs

Mr Shriprakash Laxmiprasad
Pande

.. Respondent

Shri M.H.A.Sayyed, Advocate for the Appellant.
Shri Girish C Pande , Advocate for the Respondent.

**CORAM : S.V.GANGAPURWALA,J.
DATE : 31/07/2013**

PC:

1. Heard the learned counsel for the appellant and the learned counsel for the respondent.
2. The plaintiff had filed a suit thereby seeking declaration that the decree passed in S.C. Suit No.2836 of 2006 is inexecutable for want of jurisdiction and all orders passed by the executing Court in Execution Application no.151 of 2011 including the orders passed in Writ Petition, are without jurisdiction, null and void, with further declaration that the division and distribution of the suit property under family arrangement is final and conclusive, with further injunction restraining the defendant from executing the decree passed in Suit No.2836 of 2006.

3. It appears that in Suit No.975 of 2001, Consent Terms were filed by the parties and in Suit No.2836 of 2006 the same were agreed to be abided and accepted and in Suit No.2836 of 2006 the following order is passed :

- “1. Suit is decreed in terms of the statement made by the defendant on 1.12.2010, ie after accepting the amount the defendant will hand over the possession of the suit premises as mentioned in previous Consent Terms in Suit No.975 of 2001.
2. Decree be drawn accordingly.”

4. The said decree was put to execution and order under Order XXI Rule 35 of CPC was passed. It appears that the Court had stayed the said order against which the plaintiff approached this Court in Writ Petition No.3337 of 2012 and this Court had passed orders regarding appointment of Commissioner etc. Thereafter, the plaintiff has filed the instant suit challenging the decree as inexecutable so also the execution proceedings is not maintainable as the decree is inexecutable. The trial Court dismissed the suit as not maintainable in view of the bar contained in Section 47 of CPC. The said order is assailed in the present Appeal.

5. The learned counsel for the appellant states that the decree in S.C.Suit No.2836 of 2006 is a nullity, without jurisdiction and inexecutable. Such a decree can always be challenged in a civil suit. The trial Court did not take into

consideration this aspect of the matter. The suit was filed pursuant to the liberty granted by this Court in Writ Petition No.12086 of 2012. As such, it was inappropriate on the part of the trial Court to observe that the suit is not maintainable. The learned counsel further submits that if the Court had come to the conclusion that the suit was not maintainable then it ought not to have dismissed the suit but ought to have considered the same as an objection under section 47.

6. The learned counsel for the respondent supports the order.

7. There cannot be a dispute with regard to the proposition that the question as to the inherent lack of jurisdiction of the court passing the decree can be raised in any proceedings and at any stage. The appellant has a remedy under section 47 of CPC to raise all such disputes. Section 47 of the CPC reads as under :

"Section 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."

(x x x)

(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 I- 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."

8. Perusal of Section 47, it is manifest that all questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree can be decided by the executing court. The provision lays down a mandate that the same shall be decided by the executing court and not by a separate suit.

9. The appellant, vide the instant suit, wants to challenge the decree in S.C.Suit No.2836 of 2006 on the ground that it is without jurisdiction, null and void and inexecutable so also the orders passed in execution.

10. Whether the execution proceedings are maintainable or not, whether the decree passed is executable or not or is without jurisdiction, all these issues can be raised and decided under section 47 of the CPC. The Court was right in observing the same while passing the impugned order. In light of the above, I do not see any error committed by the court in passing the impugned

Judgment. The present appellant is at liberty to file application under section 47 of the CPC raising all contentions as are permissible assailing the decree as inexecutable, without jurisdiction or such other grounds as is permissible under section 47.

11. The First Appeal is accordingly disposed of. The Civil Application also stands disposed of.

12. For a period of 15 days, the decree shall not be executed so as to enable the present appellant to take appropriate steps.

(S.V.GANGAPURWALA, J.)