
(1998) 06 BOM CK 0040

In the Bombay High Court

Case No : Civil Revision Application No. 1041 of 1997

Damodar Bhagwant Pande, Since Deceased, By Legal
Representatives and Others

APPELLANT

Vs

Narayan Bhagwant Pande, Since Deceased, By Legal
Representatives and Others

RESPONDENT

Date of Decision : 25-06-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 141
Constitution of India, 1950 — Article 226

Citation : (1999) 1 ALLMR 591 : (1999) 101 BOMLR 396 : (1999) 1 CivCC 479 :
(1999) 1 MhLj 187

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.D. Sinha, J.

This civil revision application was listed before this Court for final hearing on 16.6.1998. The Counsel for the applicants made his submissions. However, since the Counsel for the non-applicants was absent, the matter was kept part heard and adjourned to 22.6.1998 as part heard. The matter could not be heard on 22nd, 23rd and 24th June, 1998 since it did not reach for hearing on those days and it remained part heard on all those days. When the matter is called out today for hearing, the Counsel for the non-applicants is absent. Hence, the matter is proceeded further on merits.

2. Shri Khamborkar, the learned Counsel for the applicants, submitted that the present non-applicants filed Regular Civil Suit No. 32/70 for setting aside partition and re-determination of share of Narayan Bhagwant Pande. It is further submitted that the Trial Court decreed the suit on 4.5.1972. The learned Counsel submitted that original defendant Damodar Bhagwant Pande being aggrieved by the said judgment and decree passed by the Trial Court, preferred first appeal.

However, same came to be dismissed. Thereafter, second appeal bearing No. 215/75 was preferred, which also came to be dismissed by this Court on 18.3.1991. The learned Counsel contended that during the course of above referred proceedings, original plaintiff, i.e. non-applicant No. 1 and original defendant, i.e. applicant No. 1 died and present applicants and non-applicants are the legal representatives of original judgment debtor and decree holder.

3. The learned Counsel further submitted that the aforesaid decree was sought to be executed by filing Regular Darkhast No. 227/92. An objection was raised by the present applicants in the execution proceedings on the ground that the same are barred by limitation. The learned Counsel contended that 4th Joint Civil Judge, Senior Division, Amravati vide order dated 18.6.1996 upheld the objection raised by the applicants on the ground of limitation and execution proceedings came to be dismissed. The learned Counsel further submitted that the said order dated 18.6.1996 passed in Regular Darkhast No. 227/92 was not challenged by the non-applicants nor the same has been set aside by any competent Civil Court till this date. The learned Counsel submitted that, therefore, the said order dated 18.6.1996 has attained finality.

4. The learned Counsel further submitted that the non-applicants again filed execution proceedings by way of Regular Darkhast No. 329/96 for the purposes of getting the decree dated 4.5.1972 passed in Regular Civil Suit No. 32/70 executed. It is the contention of the applicants that they filed objections in the said execution proceedings on two grounds:

(1) that execution proceedings instituted by way of Regular Darkhast No. 329/96 are barred by limitation; and

(2) that earlier order dated 18.6.1996 passed by 4th Joint Civil Judge, Senior Division, Amravati below Exh. 55 in Regular Darkhast No. 227/92 operates as res judicata.

The 3rd Joint Civil Judge, Junior Division after taking into consideration the facts and circumstances and objections raised by the applicants, vide order dated 12.9.1997 rejected the objections raised by the applicants. Hence, the present civil revision application came to be filed by the applicants in this Court challenging legality and validity of the order dated 12.9.1997 passed by the 3rd Joint Civil Judge, Junior Division, Amravati.

5. The learned Counsel for the applicants restricted scope of his argument only to the extent of Section 11 of Code of Civil Procedure. The learned Counsel contended that the 3rd Joint Civil Judge, Junior Division ought not to have entertained Regular Darkhast No. 329/96 since earlier order dated 18.6.1996 passed by the 4th Joint Civil Judge, Senior Division below Exh. 55 had attained finality and not yet been rejected and it operates as resjudicata. The learned Counsel contended that the earlier proceedings initiated by the non-applicants by filing Regular Darkhast No. 227/92 and proceedings initiated by Regular Darkhast No. 329/96 are between the same parties and the matter in issue is also directly

and substantially same and in between the same parties. The learned Counsel, therefore, submitted that the 3rd Joint Civil Judge, Junior Division did not properly take into consideration purport of Section 11 of CPC and came to a wrong conclusion that order dated 18.6.1996 did not operate as res judicata.

6. In order to appreciate the contentions raised by the learned Counsel, I have considered the provisions of Section 11 as well as Section 141 of Code of Civil Procedure. The purport of Section 11 is that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. At this stage, it is also necessary to consider the provisions of Section 141 of Code of Civil Procedure, which reads thus:

141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation - In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.

It will be relevant to refer to Explanation VII to Section 11 of the Code of Civil Procedure, which contemplates that the provisions of Section 11 shall apply to the proceedings for execution of a decree.

7. After taking into consideration the above referred provisions of Code of Civil Procedure, I have no hesitation to hold that provisions of Section 11 of CPC shall apply to the proceedings for execution of the decree. In the instant case, it is an admitted position that Regular I Civil Suit No. 32/70 came to be decreed on 4.5.1972. It is also not disputed that the said suit was filed by Narayan Bhagwant Pande against original defendant Damodar Bhagwant Pande and others. It is also an admitted position that Narayan Bhagwant Pande filed Regular Darkhast No. 227/92 for getting decree in Regular Civil Suit No. 32/70 executed and the Court below vide order dated 18.6.1996 dismissed the execution proceedings. It is also not disputed that till today, the order dated 18.6.1996 is not set aside by any competent Civil Court. The proceedings of Regular Civil Suit No. 32/ 70, Regular Darkhast Nos. 227/92 and 329/96 are between the same parties except original plaintiff Narayan Bhagwant Pande, who died during the pendency of aforesaid proceedings and his legal heirs, who are claiming through him were brought on record. Similarly, original defendant Damodar Bhagwant Pande also died during the pendency of the above referred proceedings and his legal representatives, who are claiming through him, were also brought on record. In view of the above referred facts and circumstances, there is no difficulty to come to the conclusion that the issue involved in Regular Darkhast

No. 329/96 was directly and substantially an issue in the former execution proceedings initiated vide Regular Darkhast No. 227/92. The parties to both the execution proceedings were and are the same and the said issue between the parties was finally concluded vide order dated 18.6.1996 passed by the Court below. The execution proceedings initiated by way of Regular Darkhast No. 227/92 came to be dropped. Perusal of the impugned order shows that since there is no specific bar to file second execution proceedings, the order dated 18.6.1996 does not operate as res judicata. In view of the legal position referred above, the finding arrived at by the Court below is not just and proper and same is also not sustainable in law. For the reasons stated above, in my opinion, the order dated 18.6.1996 operates as res judicata and, therefore, execution proceedings initiated by the non-applicants vide Regular Darkhast No. 329/96 are not maintainable.

8. In the result, the revision is allowed. The impugned order dated 12.9.1997 passed by the 3rd Joint Civil Judge, Junior Division, Amravati below Exh. 1 in Regular Darkhast No. 329/96 is hereby set aside. No order as to costs.