
(1993) 07 BOM CK 0022

In the Bombay High Court

Case No : Civil Revision Application No. 466 of 1993

Madhavrao Keshavrao Surwase and Another

APPELLANT

Vs

Jankabai Mane and Others

RESPONDENT

Date of Decision : 20-07-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 38, 47
Hindu Succession Act, 1956 — Section 23

Citation : (1994) 1 BomCR 541

Hon'ble Judges : N.P. Chapalgaonker, J

Bench : Single Bench

Advocate : C.G. Solshe, for the Appellant; G.N. Chincholikar and S.G. Chincholikar for respondent Nos. 2A(i), (ii), (iii), 2B, 2C, 2D, 2E and 5, for the Respondent

Final Decision : Dismissed

Judgement

N.P. Chapalgaonker, J.—This revision application raises an important question whether an objection that the decree violates section 23 of the Hindu Succession Act, 1956 raised for the first time in execution proceeding can be entertained and whether such a decree is a nullity.

2. Keshavrao, who left behind him some property, was survived by two sons namely; Madhavrao and Nivrutti, wife Harnabai and two daughters Serubai and Jankabai. Jankabai filed a suit for partition and possession of her share from joint family property which included agricultural lands and five dwelling houses. In defence to the said suit, it was pleaded by the defendants that partition had already taken place during the life time of Keshavrao and Jankabai was given Rs. 2500/- and two buffaloes as her share in the family property and over and above, Keshavrao had given a sum of Rs. 10,000/- as token of his love and affection to Jankabai to enable her to purchase a new house. Jankabai is married and has purchased a separate house out of this sum and since the partition has taken place, the suit deserves to be dismissed. This suit came to be decreed and

the learned Judge was pleased to award share to Jankabai both in the agricultural lands as well as in dwelling houses. An appeal came to be filed against this decree but it was also disposed of and the decree passed by the trial Court was upheld. In the execution petition filed by Jankabai, now an objection is raised by the judgement debtors that the decree violates terms of section 23 of the Hindu Succession Act, 1956 and, therefore, it is a nullity. The learned Executing Judge rejected said objection and directed the execution to proceed and this order has been challenged in this revision application.

3. Shri C.G. Solshe, learned Counsel appearing on behalf of the petitioner, submitted that section 23 of the Hindu Succession Act, 1956 is mandatory in nature and unless male heirs choose to divide the family dwelling house, female heir would not be entitled to have share in the dwelling-house. He further contended that though defendants-judgment debtors had pleaded that partition was already there, Court has recorded a finding that there was no partition and hence, Jankabai being female heir, is not entitled to a share in the dwelling house unless male heirs choose to have partition of the said dwelling-house.

4. Shri Deshpande, learned Counsel appearing on behalf of the plaintiff - decree-holder, supported the impugned order and contended that there was already a partition in the family and it is acted upon as per the defendant's own say, some male heirs have sold shares allotted to them and thus, section 23 would have no application.

5. Section 23 of the Hindu Succession Act, 1956 reads as under-

23. Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein;

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

The object of the rule laid down by this section is to prevent fragmentation and disintegration of the family dwelling house at the instance of a female heir. The purpose of the section is not to nullify the right of female heir which is granted by her inclusion in Class I heirs in Schedule appended to the Hindu Succession Act, 1956. The specific object in the mind of the legislators appears to be that if dwelling is commonly shared by male heirs also, it should not to be disintegrated at the behest of a female heir who is likely to induct a stranger in portion of the property and create difficulties. A dwelling house to be covered by this restriction should be occupied wholly by the members of the family of the male or female who died intestate and the right is postponed till male heirs choose to divide

their shares. If it is found that the house or houses are no occupied wholly by the members of his or her family, then section 23 does not apply. To emphasize the proposition that the restriction imposed by section 23 is mandatory in nature and the Court would not have any jurisdiction to grant relief which is barred by section 23, Shri Solshe relied on a judgment of the Madras High Court in Janabai Ammal Vs. T.A.S. Palani Mudaliar, , and judgment of this Court in the case of Manohar Deshpande Vs. Menkabai (Smt.) Brahmin and Others, . Explaining the principles underlying the rule laid down by section 23, learned Judges of the Division Bench of Madras High Court were pleased to observe:

"We are of the opinion that the Parliament" while enacting this section, should have felt that the dwelling house of a Hindu joint family should be regarded as an impartible asset treasured by the ancient Hindu tenants and as such the dwelling house should be allowed to be preserved by the family until the male heir or male heirs, as the case may be, mentioned in Class I of the Schedule, opted for dividing the same and to that extent the Parliament wanted to recognise the tradition and sentiments so cherished by the ancient Hindu families from time immemorial. If the male members choose to divide the family house among themselves, or if a single male member chooses to divide it among the respective shares or alienates his share to a stranger, then it would mean that the contingency has arisen whereby the male members are no longer capable of preserving the dwelling house. That is why the Parliament has, under the section, allowed the female members to claim partition in case the male members choose to divide their respective shares in the house. At this juncture, we may point out that the Parliament has not in any way restricted the right of the female member to claim partition in the other properties left by the intestate. In our opinion so long as the male members do not choose to divide their respective shares in the dwelling house, the dwelling house is in a way excluded from division , subject to the right of the female members to a share therein and the right of residence of the unmarried female members etc., while doing so, the Parliament should have taken into account the fact that the female members after their marriage naturally live with their husbands in their houses. If at the instance of any such female members, the dwelling house is allowed to be partitioned against the wishes of the male heir, he may be put to great hardship and he compelled to alienate the house if it is incapable of division. Therefore it was but just that the family dwelling house should be allowed to be kept by the male members till they chose to divide it, and the female members should not be the persons responsible for the disintegration and fragmentation of the dwelling house. In fact, section 23 has been introduced as a special provision respecting dwelling houses, as clearly seen from the heading of the section itself, thereby laying emphasis on the preservation of the dwelling house."

6. There can be no doubt that the proposition that the legislative mandate contained in section 23 will have to be obeyed and a female member could not be allowed to disintegrate the family dwelling house until male members choose to divide. Question required to be dealt with in the instant case is not whether

section 23 is mandatory or not. If the male members plead that the partition has already taken place and also act on the alleged partition by selling some of the dwelling houses to the strangers to the family, in such a case, even if the Court comes to the conclusion that the partition has not taken place, should the female heir be deprived from her share in the dwelling houses. The words appearing in section 23 "until male heirs choose to divide their respective shares therein" do not indicate that there should be actual partition. It merely signifies intention of the male members to have partition and when such intention is clear by pleadings or by acts of such male members, the requirement of this clause is complete. Therefore, in a suit filed by female member claiming her share in the family property including dwelling house if the male members give consent to the partition of the dwelling house also or plead that partition has already taken place, the female member shall be entitled for her share in the dwelling houses. Pleading or the acts of the male members in such a case would amount to "choosing to have partition" even if the finding of fact recorded by the Court is otherwise. In the instant case, it is admitted that out of 5 houses left by intestate, 3 houses are occupied by different male members of the family and two houses have been sold by the male members which were allotted to them in a partition which was alleged by them in their pleading. Purpose of section 23 is to prevent the disintegration of the family dwelling houses at the instance of the female heir. But if the male members divide the property between themselves, act on it, sell some portion of the dwelling house or some of the dwelling houses, then the right of the female member to claim partition in the dwelling house is not postponed. The disintegration of the family dwelling house or houses is already there and the restriction imposed by section 23 will not apply. The words "wholly occupied" indicate that dwelling house or houses should not have been partitioned or allotted to different shareholders and they should not have introduced strangers into it. It has come on record that the judgment-debtors have sold house No. 2/137-240. Southern portion is sold to minor son of one Shri Subhash Shinde and the northern portion is sold to the married daughter of judgment-debtor Madhav. They have also sold house No. 3/27-991 to Jayashree Gore and only 3 of the 5 dwelling houses remained in possession of the defendants. It is necessary to note that the pleading of the defendants judgment-debtors contains that there was partition of all the family property including the dwelling houses and it is not their case that the dwelling houses are kept joint. They plead that plaintiff was paid Rs. 2500/- and was given two buffaloes towards her share in the suit property. Though the learned Civil Judge while passing the decree found the theory of partition advanced by the defendants - judgment-debtors incredible and granted decree for partition in favour of Jankabai, the requirement of section 23 was complete by the pleadings of the defendants judgment-debtors that the partition has taken place and by their act in selling the portion allotted to them in the alleged partition, male members have chosen to divide the family dwelling house, and therefore, sine qua non to grant female heir her share in the dwelling house was already there.

7. Even assuming that the decree so far as it grants share to Jankabai in the dwelling houses is against the provisions of section 23, whether the judgment-debtors would be entitled to raise this objection in the execution petition for the first time, when they do not do so while contesting the suit or by challenge to the decree in the appellate Court. Whether executing Court shall have power to entertain such an objection u/s 38 or section 47 of the Code of Civil Procedure, is a question to be decided. Whether a decree is capable of execution would be a question to be determined u/s 47 since it relates to the execution. But the executing Court would not be justified in going behind the decree and finding faults with it or even deciding whether it is a valid decree. u/s 38, the executing Court is duty bound to execute any decree if it is not a nullity for lack of inherent jurisdiction or was obtained by fraud.

8. A Division Bench of this Court in the case of Rana Harkishandas Lallubhai and Others Vs. Rana Gulabdas Kalyandas and Another, was pleased to consider the question as to what pleas can be entertained u/s 38 of the Code of Civil Procedure. Gajendragadkar, J., speaking for the Court, was pleased to observe:

"In determining the jurisdiction of the executing Court to entertain pleas u/s 38 it is always necessary to make a distinction between pleas that tend to show that the decree in question is a nullity and pleas that merely challenge the validity or the property of the decree on the ground that it is contrary to the provisions of law. If the plea is that the decree is a nullity and so cannot be executed, it would be open to the executing Court to entertain the plea.

On the other hand, if the plea is that the decree is contrary to law in the sense that in passing the said decree certain provisions of the law have been ignored or contravened, that would not necessarily make the decree a nullity and allegations about the impropriety or the illegality of the decree cannot be entertained in execution proceedings."

9. In Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, , Supreme Court considered the question of ambit of the power of the executing Court regarding the inquiry as to the validity of a decree. It was pleased to observe:

"A Court executing a decree cannot go behind the decree; between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate Court in appeal or revision, a decree even if it be erroneous is still binding between the parties.

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives 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 or which could have not been raised, the executing Court will 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."

10. What decree would be a nullity on the ground of want of jurisdiction is a vexed question. The jurisdiction of a Court is firstly to be examined at the commencement of the proceedings and if the jurisdiction is properly assumed, non-consideration of a fact or provision of law will not make the order or decree without jurisdiction. Shri Solshe made a reference to the judgment of the Supreme Court in the case of Shri M.L. Sethi Vs. Shri R.P. Kapur, and referred to paragraph 10 of the said judgment. Mathew, J., speaking for the Court, explained amplitude of the question of "jurisdictions" which, to quote him, is "a verbal cast of many colours". Quoting Judgment of the House of Lords, he was pleased to observe that the lack of jurisdiction may arise even subsequent to the commencement of the proceedings. Though he was pleased to observe that the judgment of the House of Lords reduced difference between jurisdictional error and error of law within jurisdiction almost to a vanishing point, the judgment does not lay down a ratio that every legal error would amount a jurisdictional error. Mathew, J., himself observed:

"It is difficult to understand how an erroneous decision on a question of limitation of res judicata would oust the jurisdiction of the Court in the primitive sense of the term and tender the decision or a decree embodying the decision a nullity, liable to collateral attack."

The matter would be simple in case the Court had no jurisdiction to deal with the question at all. For instance, if a Civil Court deals with the question of tenancy and grants declaration that the plaintiff is or is not a tenant of agricultural land when the law creates Special Tribunals for deciding the issue and excludes expressly the jurisdiction of the Civil Court, the decree of the Civil Court granting this relief would be a nullity. But wrong consideration of the legal provision or overlooking certain legal provisions would not by itself render the decree a nullity. If the basic facts required to be considered are within the jurisdiction of the Court, non-consideration of a legal provision would not bring the decree out of the ambit of the jurisdiction. In the instant case, Court had jurisdiction to deal with the property, it had jurisdiction to pass a decree for partition. It had also jurisdiction to find out whether there was partition. It had jurisdiction to consider whether the plaintiff is entitled for share in the suit property. Therefore, merely because the implication of section 23, since they were not pleaded in defence, were not considered by the Judge, the decree will not be a nullity. The provisions of law sometime impose a restriction on praying a particular relief. Such restraints tend to protect a party and if that party does not plead or point out

that restraint, it would not be open for that party to challenge the decree in the execution proceeding urging that the decree is a nullity. A suit by an unregistered partnership firm would not be maintainable by virtue of provisions of section 69 of the Partnership Act. But if the objection is not raised and the decree is passed and has become final, the execution of such a decree cannot be resisted on the ground that the decree is a nullity. See *Jalal Mohammed Ibrahim (Died) and Others Vs. Kakka Mohammed Ghouse Sahib and Another*, . The learned Judges of the Division Bench of the Madras High Court were further pleased to observe :

"We are of the view of the maintainability of a suit is a plea that will have to be taken by the defendant in the suit and if such plea had not been taken, it will not be open to him to raise that plea on any ground in a separate suit."

11. Shri Solshe relied on a judgment of this Court in *Shriram Sardarmal Didwani Vs. Gourishankar alias Rameshwar Joharmal*, and also on the judgment in the case of *Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others*, to contend that section 69 of the Partnership Act is mandatory. There can hardly be any dispute over the proposition. Section 69 is mandatory in character and considering this position, Supreme Court which was hearing an appeal arising out of the suit which was filed by an unregistered partnership firm, was pleased to dismiss the suit. But neither of these authorities lay down a proposition that the decree passed in such a suit would be a nullity. Therefore, judgment of Madras High Court in *Jalal Mohmmmed Ibrahim's*, case is still a good law.

12. A useful reference can be made to the judgment of the Supreme Court in *Ittavira Mathai Vs. Varkey Varkey and Another*, . A question was raised about the executing Court's power to execute a decree which was passed in a suit barred by limitation. The learned Judges of the Supreme Court were pleased to hold:

"It is true that section 3 of the Limitation Act is pre-emptory and that it is the duty of the Court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. Even so it cannot be said that where the Court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."

Shri Solshe further relied on a judgment of the Supreme Court in the case of *Bahadur Singh and Another Vs. Muni Subrat Dass and Another*, , to fortify his submission that if the statute forbids the ground of relief and the Court passes a decree granting it, the decree would be a nullity in the eye of law. In this case, two main objections were raised before the executing Court. Those were :

(i) the award was beyond the scope of the reference and was invalid and the decree based on the invalid award was void;

(ii) the decree was passed in contravention of the Delhi and Ajmer Rent Control Act, 1952 and was void.

In respect of first objection, that the award was in excess of the authority of the arbitrators or was otherwise invalid, the Supreme Court was pleased to observe:

"The award was filed in Court u/s 14 of the Arbitration Act and on notice to the tenants and in their presence a decree was passed according to the award u/s 17. It is not open to the tenants now to take the objection that the award was in excess of the authority of the arbitrators or was otherwise invalid. Having regard to the scheme of sections 14 to 17 and 31 to 33 all questions regarding the validity of the award had to be determined by the Court in which the award was filed and by no other Court. An award which is invalid on any ground can be set aside u/s 30. After a decree is passed on the award it is not open to the parties to the reference to raise any objection as to the validity of the award. As between them the decree conclusively determines that the award is valid. Nor can the decree be pronounced to be a nullity on the ground that the award was invalid."

In respect of the second objection, Supreme Court was pleased to hold that a compromise effected by the parties and the decree passed on the basis of the sale would not be valid so far as it grants a relief of possession in proceedings under Delhi and Ajmer Rent Control Act, 1952 in the absence of a finding that the circumstance entitling the eviction of tenant were in existence. The Court was pleased to note that section 13(1) of the said Act prohibited the Court from passing a decree or order for recovery of possession of any premises in favour of the landlord against a tenant except in such a suit or proceeding and unless the Court was satisfied that a ground of eviction existed. On the plain wording of section 13(1), the Court was forbidden to pass the decree. The decree is a nullity and cannot be enforced in execution.

13. Therefore, legal position appears to be that if there is lack of inherent jurisdiction to entertain the dispute, the decree passed by such a Court would be without jurisdiction. But if the Court had inherent jurisdiction, and a decree was passed without consideration of some facts, the consideration of which would have disentitled party to the relief granted, such a decree would be erroneous but would not be a nullity in the eye of law and no objection by any of the parties to the decree could be raised in execution. When a female heir has a share in the property of intestate, grant of it in a suit overlooking whether male members have chosen to divide will be erroneous but such a decree is not nullity. If there is total prohibition to entertain the dispute at all, the Court would not be entitled to decide the dispute and decree passed in such circumstances would be a nullity. But merely because the female heir was granted a share in the dwelling house when the male heirs had not chosen to divide, the decree would not be a nullity and the male heirs who had not taken objection in the suit or their successor-in-title will not be entitled to raise objection in the execution on the ground that decree is a nullity.

14. In the result, Revision Application fails and it is dismissed. However, in the circumstances, there be no order as to the costs.

15. At this stage, Shri Solshe makes a prayer that the interim relief granted by this Court be continued for a period of two months to enable the petitioner to approach to the Apex Court. Prayer granted.