



Order below Exh.86 in R.D.No. 53/2017

This is an application made by J.D.No.2 under Section 47 of the Code of Civil Procedure. It is contended that the execution petition is filed against present J.D. on the ground of disobeying decree of perpetual injunction. However, he was not party to the suit wherein, the decree of perpetual injunction is passed. Even, he is not party in appeal preferred against the said decree. In such circumstances, the D.H. has included present J.D. illegally in present execution petition. The concerned official of Court ought to have verified and put objection note accordingly at the time of presentation of execution petition itself. However, he has not done so. As such, the D.H. has included present J.D.No.2 in execution petition illegally and obtained orders of the Court against him. Therefore, question need to be determined in this regard.

02. As J.D.No.2 was no party to main suit, he does not come within the definition of J.D. Therefore, the Court cannot pass any order against him. The order of arrest warrant obtained against J.D.No.2 is void ab initio. Hence, liable to be cancelled. The execution petition cannot be proceeded against J.D.No.2. Hence, it is necessary to delete his name from present execution petition. If his name ordered to be deleted from original petition, no loss would be caused to the D.H. On the contrary, if name of J.D.No.2 is not deleted, he will be entangled in legal procedure

and would suffer mental and economic loss. Ultimately, J.D.No.2 sought order of deletion of his name from present execution petition with compensatory costs of Rs.25,000/-.

03. The D.H. has filed say at Exh.88 and averred that in present execution petition, all the procedure is followed in accordance with rules and after due verification of every aspect. The contentions of J.D.No.2 are against the provisions of Section 47 of the Code of Civil Procedure. Hence, those cannot be considered. The present application is filed by J.D.No.2 only to avoid execution of decree and mislead the Court. On these grounds, the D.H. urged to reject the application with compensatory costs of Rs.50,000/-.

04. Heard both sides. Present application is made under provisions of Section 47 of the Code of Civil Procedure by J.D.No.2 for deleting his name from execution petition on the ground that he was not party to original suit. In this context, it is necessary to have regard to provisions under Section 47 of the Code which reads as: **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 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.

05. Thus, to make applicable the provisions of Section 47 of the Code, following conditions must be fulfilled:

(i) the question must be one arising between the parties to the suit in which the decree was passed, or their representatives, and (ii) it must relate to the execution, discharge or satisfaction of the decree. As such, both these conditions must be satisfied simultaneously.

06. Now, considering objection of present J.D.No.2, on perusal of entire record of the proceeding it appears that a decree in R.C.S.No.96/1985 is passed on 21-02-2009 restraining defendant No.1 Gajanan Mahadeo Kadam or person on his behalf from obstructing peaceful possession of the plaintiff (present D.H.) over the suit property. After passing decree, the D.H. filed present execution petition in the Court alleging that J.D.No. 1(A) to 1(E) who are legal representatives of deceased Gajanan Kadam tried to sell the suit property to present J.D.No.2 to 4 in collusion with them. Accordingly, on 19-02-2016 J.D.No.1(A), 1(B) and 2 to 4 illegally entered upon the suit property and tried to cultivate it with the aid of tractor. As such, said J.Ds. wilfully failed to obey the decree passed against them.

07. After filing execution petition, notices were issued to all J.Ds. by R.P.A.D. but some of the J.Ds. including J.D.No.2 refused to accept the notices. Therefore, the execution petition proceeded ex-parte against J.D.No.2 and other J.Ds. by passing order below Exh.1 on 01-04-2016. Thereafter, in view of order passed below application Exh.47, show cause notice was issued against J.D.No.2 asking him as to why he should not be kept in Civil prison. The said notice (Exh.49) was served on him in a manner provided under Order V Rule 20 of the Code. However, he did not remain present in the Court. Therefore, my learned predecessor has passed order below Exh. 47 on 29-11-2016 for issuance of arrest warrant against J.D.No.2 and 1(B). Accordingly, arrest warrant is issued against J.D.No.2 time and again. It further appears that on 16-02-2019 J.D.No.2 was present in the court and the court has called his say below application Exh.71. Accordingly, J.D.No.2 filed say on overleaf of said application stating that he was present in the court merely for getting information of the matter. Therefore, he sought time to file V.P. and say. Thus, it can be said that J.D.No.2 had knowledge about the proceeding at the time of initial notice issued under Order XXI Rule 22, notice issued under Order XXI Rule 37 of the Code and also on 16-02-2019 when he was personally present in the matter. However, he did not raise any objection at relevant time either for inclusion of his name as J.D. in the execution petition or arrest warrant issued against him.

08. It also appears that after transfer of matter from Panhala Court to this Court, my learned predecessor has passed order below Exh.64 directing the D.H. to file an affidavit in

support of Exh.1 stating exactly what type of breach is committed by J.D. As per said directions, the D.H. has filed affidavit along with pursis Exh.65. The D.H. also filed his affidavit of examination-in-chief at Exh.67 and closed his evidence vide pursis Exh.70. The J.Ds. failed to conduct cross-examination of D.H. Hence, order of no cross examination is passed against them below Exh.67 on 06-04-2017. Thus, J.D. No.2 had an opportunity to wash out allegations made against him in present execution petition, by conducting cross examination of D.H. However, failed to do so.

09. Furthermore, the order passed below Exh.47 by my learned predecessor in respect of issuance of arrest warrant against J.D.No.2 is not challenged by him before the appellate Court. Thus, said order is still intact and executable against J.D.No.2. Though, J.D.No. 2 has raised objection that he was not party to the suit bearing R.C.S.No. 96/1985, he has not appeared in this matter when he refused initial notice issued against him under Order XXI Rule 22 of the Code. Thereafter, also before issuing arrest warrant against him opportunity was given to him vide notice under Order XXI Rule 37 of the Code. However, again he did not turn up and put forth any objection in the matter. Thus, much opportunies availed by J.D.No.2 to put forth his objection and resist execution petition but he failed to raise objection if any, at relevant time.

10. At present also there is no stay of the Hon'ble appellate Court to the execution of decree passed in R.C.S.No.96/1985. Hence, order passed by my learned predecessor below application Exh.47 in respect of arrest warrant

against J.D.No.2, is still enforceable. The D.H. along with list Exh.96 has filed copy of order in Civil Misc.Application No. 28/2021. On perusal of said order it appears that prayer of applicants namely, Chandrakant Kadam and others (present J.Ds.) to stay the effect and execution of decree ex-parte is rejected on 11-02-2021 by the Hon'ble Ad-hoc District Judge-1, Kolhapur. It is significant to mention here that the said application was presented by present J.D.No.2 who is power of attorney of J.D.No.1 (B) Chandrakant Kadam. In the said application, it is clearly mentioned that in execution petition bearing R.D.No. 53/2017, the D.H. has included persons other than parties in R.C.S.No. 96/1985 and obtained orders of arrest warrant against those persons. As such, present J.D.No.2 already raised objection before the Hon'ble Appellate Court in respect of order of arrest warrant passed in present execution petition. However, no relief is granted to the applicants by the Hon'ble Ad-hoc District Judge-1, Kolhapur in Civil Misc.Application No. 28/2021.

11. As contemplated under Section 47 of the Code, questions arising between the parties to the suit in which decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the executing Court. However, as a matter of fact, J.D.No.2 was neither party to the suit bearing R.C.S.No.96/1985 in which decree was passed nor he is representative of any of the party to that suit. In such circumstances, it cannot be said that the question/objection raised by J.D.No.2 through present application is between the parties to said suit and himself relating to execution, discharge or satisfaction of the decree which shall be

determined by this executing Court. Thus, question or objection raised by J.D.No.2, does not come within the ambit of provisions of Section 47 of the Code. Ultimately, on the basis of above discussion, it is held that present application is devoid of merits. Hence, following order.

ORDER

1. The application is rejected.
2. No order as to costs.

Kale-Kheriwade.
Date :20/09/2021.

(V. V. Khulape)
Civil judge Junior Division,
Kale-Kheriwade.