



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.638 OF 2022**

1. Sameer Vijaykumar Divadkar,
Age 48 years, Occu – Business,
R/o Flat No.6, divadkar Apartment,
6A, Tadiwala road, Pune – 411 001.

2. Varsha Paresh Telang,
Age 50 years, Occu – Service,
R/o C/o Assistant, Dr. Modi N.M.Wadia
Institute of Cardiology, Jahangir (Apollo)
Hospital Compound, 32, Sasoon Road,
Pune – 400 001 ... Appellants

versus

1. Nitin Jayant Divadkar,
Age 56 years, Occu – Service,

2. Rajeshwari Jayant Divadkar,
Age 52 years, Occu – Household,
R/o Rama Pandharinath Niwas,
6A, Tadiwala Road, Pune – 400 001. ... Respondents

WITH
INTERIM APPLICATION NO.13332 OF 2023
IN
SECOND APPEAL NO.638 OF 2022

- Nitin Jayant Divadkar and Anr. ... Applicants
and
Sameer Vijaykumar Divadkar and Anr. ... Appellants
versus
Nitin Jayant Divadkar and Anr. ... Respondents

WITH
INTERIM APPLICATION NO.18352 OF 2022
IN
SECOND APPEAL NO.638 OF 2022

Sameer Vijaykumar Divadkar and Anr. ... Applicants
versus
Nitin Jayant Divadkar and Anr. ... Respondents

Mr. Rubin Vakil with Mr. Amey Nabar, Ms. Aditi Kambli i/by A.S.Dayal and Associates, for Appellants and Applicants in IA 18352 of 2022.
Mr. Nachiket Khaladkar, for Respondents in SA and for Applicants in IA No.13332 of 2023.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 4 MARCH 2026
PRONOUNCED ON : 18 MARCH 2026

JUDGMENT :

1. This Second Appeal is directed against a judgment and order dated 17 August 2022 passed by the learned District Judge, Pune in Regular Civil Appeal No.103 of 2018, whereby the appeal preferred by the Appellants – judgment debtors against a judgment and order dated 15 January 2018 on an application being Civil Misc. Application No.489 of 2017 under the provisions of Order XXI Rule 58 of the Code of Civil Procedure, 1908 (the Code, 1908), thereby rejecting the said application, came to be dismissed.

2. The background facts can be stated as under :

2.1 In the year 1989, a partnership firm under the name and style of M/s. K.P.Divadkar and Brothers, commenced business. Jayant P. Divadkar, predecessor in title of the Plaintiffs – Respondents herein and Vijaykumar, predecessor in title of the Appellants, were the partners of the said firm.

Jayant passed away on 28 August 1990. Thus, the partnership stood dissolved.

2.2 The Respondents instituted a suit being RCS No.611 of 1991 against Vijaykumar for settlement of accounts of the firm, share in goodwill and consequential reliefs.

2.2 On 5 November 2004, a preliminary decree for settlement of accounts of the said firm came to be passed. The Respondents challenged the said decree by filing Civil Appeal No.83 of 2005. Vijaykumar had also challenged the said decree by filing Civil Appeal No.97 of 2005.

2.3 By a judgment and decree dated 10 July 2008, Civil Appeal No.97 of 2005 preferred by Vijaykumar came to be dismissed and Civil Appeal No.83 of 2005 preferred by the Respondents was partly allowed, holding that the Plaintiffs – Respondents herein were entitled to (i) goodwill of the firm and for ½ share in the profits, goodwill and assets of the firm, and, (ii) for determination of the quantum of the share through the Court Commissioner.

2.4 The Appeals preferred against the aforesaid decree were dismissed by this Court and the Supreme Court as well.

2.5 In the meanwhile, on 15 April 2011, Vijaykumar, original Defendant, passed away, leaving behind the Appellants as the legal representatives.

2.6 On 13 June 2011, the Court Commissioner submitted a report valuing the share of the goodwill of the Plaintiffs at Rs.26.62 Lakhs, along with

interest @ 13% p.a. from 28 March 1991.

2.7 The Appellants objected to the aforesaid report of the Court Commissioner. Eventually, the trial Court passed a final decree on 24 August 2015 in Suit No.611 of 1991 by accepting the report of the Court Commissioner. An appeal preferred thereagainst by the Appellants being Civil Appeal No.318 of 2016 is subjudice.

2.8 As the Appellants failed to comply with the condition to furnish security or bank guarantee, the stay to the execution of the decree granted by the learned District Judge in Civil Appeal No.318 of 2016 stood vacated. The Respondents filed Execution Petition No.27 of 2016.

2.9 In the execution proceedings, the Respondents filed an application for attachment of the immovable properties of the judgment debtors. The Appellants resisted the said application by filing objections, inter alia, that the judgment debtors had only $\frac{1}{4}$ share in the properties sought to be attached, and, that the Appellants were not liable for the alleged decretal debt owed by the deceased defendant.

2.10 The Appellants also filed an application (Exh.23) raising objection to the execution of the decree questioning its executability.

2.11 By an order dated 3 February 2017, the executing Court allowed the application for attachment of the properties. Simultaneously, the application (Exh.23) filed by the Appellants raising objection to the executability of the

decree, came to be rejected.

2.12 Being aggrieved, the Appellants preferred Civil Appeal No.143 of 2017 assailing the aforesaid order dated 3 February 2017. The said Appeal was also dismissed by the learned District Judge by an order dated 30 March 2017.

2.13 The Appellants, thereafter, preferred Misc. Application No.489 of 2017 in the execution proceedings purportedly under Order XXI Rule 58 of the Code, 1908, contending, inter alia, that the properties sought to be attached in execution of the decree by the decree holders cannot be attached in their entirety as the deceased judgment debtor had only $\frac{1}{4}$ share in those properties.

2.14 By an order dated 15 January 2018, the executing Court dismissed the said application on the premise that the Appellants had already raised the said objection and it was negatived by the executing Court as well as the Appellate Court.

2.15 Being further aggrieved, the Appellants preferred Regular Civil Appeal No.103 of 2018. Initially, by an order dated 21 April 2018, learned District Judge had stayed the execution and operation of the order passed by the executing Court in Civil Misc. Application No.489 of 2017. However, by the impugned judgment and order dated 17 August 2022, the Appeal came to be dismissed observing that the Appellants did not lead any evidence before the

executing Court to substantiate their contention that the deceased judgment debtor had only $\frac{1}{4}$ share in the subject properties.

2.16 Being still dissatisfied, the Appellants have preferred the instant Appeal.

3. I have heard Mr. Vakil, learned Counsel for the Appellants, and Mr. Khaladkar, the learned Counsel for the Respondents, at some length. With the assistance of the learned Counsel for the parties, I have also perused the material on record, especially the orders passed by the executing Court and the Appellate Court, in multiple round of proceedings, as noted above.

4. Mr. Vakil, learned Counsel for the Appellants, would submit that the executing Court as well as the Appellate Court have completely misconstrued the scope and mandate of the provisions contained in Order XXI Rule 58 of the Code, 1908. The objection to the attachment of the properties raised under Order XXI Rule 58 is required to be determined by the Court like a suit. The objection was, thus, required to be tried as a suit. The Courts below have misconstrued the nature of the objection which was raised by the Appellants at the stage of the attachment of the properties under Order XXI Rule 54. The fact that, at that time, the Court had declined to entertain the challenge does not imply that the Appellants are precluded from raising objection to the attachment of the properties under Order XXI Rule 58 of the Code.

5. Mr. Vakil also made an endeavour to drive home the point that the Appellants were not provided an effective opportunity of hearing. Only on the

basis of the name of late Vijaykumar in the Assessment Lists, the executing Court had drawn an unsustainable inference that the attached properties belonged to the deceased judgment debtor. In fact, while granting interim stay to the order passed by the executing Court, the District Court had correctly recorded that the executing Court was required to frame an issue about the attachability of the subject properties and, thereafter, decide the same as if it was a suit filed by the party raising objection. However, while finally deciding the appeal, the Appellate Court proceeded on the premise that the Appellants did not lead any evidence. As effective opportunity was not provided to the Appellant, such a finding vitiated the order passed by the Appellate Court, submitted Mr. Vakil.

6. In opposition to this, Mr. Khaladkar, learned Counsel for the Respondents, would urge that the multiple rounds of litigation before the District Court and this Court demonstrate that the Appellants have left no stone unturned to delay and defeat the execution of the decree. The self-same objection which was raised before, and negated by, the executing Court and, subsequently, by the Appellate Court also, was again sought to be raised before the executing Court purportedly under the provisions of Order XXI Rule 58 of the Code. No effort was made to lead any evidence to substantiate the claim of the Appellants that the subject properties cannot be attached as the judgment debtors only had $\frac{1}{4}$ share therein, either before the

executing Court or before the Appellate Court. Therefore, in exercise of the Appellate jurisdiction under Section 100 of the Code, 1908, this Court need not interfere with such concurrent findings of fact.

7. Mr. Vakil, learned Counsel for the Appellants fairly submitted that the documents which are now sought to be relied upon by the Appellants were not tendered before the executing Court and the Appellate Court. An attempt was, however, made by Mr. Vakil to drive home the point that the Appellants deserve an opportunity to place those documents on record.

8. The aforesaid submissions are required to be appreciated in the light of the facts which have been noted rather elaborately, on purpose. The aforesaid facts would indicate that a decree for rendition of accounts, share in the goodwill, and the consequential reliefs awaits execution, though the final decree was passed on 24 August 2015 in the suit instituted in the year 1991.

9. The principal submission of Mr. Vakil that, the fact that the Appellants had already raised an objection to the attachment of the subject property and those objections were negated by the executing Court and the Appellate Court in the previous round of litigation, is of no consequence in considering the objection to the attachment under Order XXI Rule 58 of the Code, cannot be countenanced unreservedly.

10. The very objections which were sought to be raised under Order XXI

Rule 58 were raised by the Appellants. Those objections were repelled by the Executing Court by an order dated 3 February 2017. The challenge to the said determination did not succeed before the first Appellate Court. In this backdrop, the Courts below were within their rights in holding that the objections sought to be raised under Order XXI Rule 58 of the Code, were already raised and adjudicated upon by the executing Court and the Appellate Court.

11. The submissions on behalf of the Appellants that the said objections were required to be determined by framing issue and providing an opportunity to adduce evidence, also does not carry much substance. As noted above, no effort was made to produce any of the documents, now sought to be tendered, before the executing Court and the Appellate Court. Before this Court also, an effort was made to tender the documents across the bar. A party cannot be permitted to take advantage of its omission or wrong. At this stage, and in this proceeding, this Court would not be justified in testing legality and correctness of the impugned order on the basis of the material which was never placed before the executing Court and the Appellate Court.

12. It is trite principles of *res-judicata* apply at two stages of the same proceeding. In the case at hand, the self-same objections were raised by the very Appellants at the stage of passing order of attachment of the very same properties. Once those objections were repelled by the executing Court and

the challenge thereto also failed before the Appellate Court, the Appellants cannot be permitted to re-agitate the same issue post the order of attachment. The public interest in having finality to litigation would be jeopardised if the parties are permitted to raise the very same issues which have attained finality.

13. Moreover, it is not an immutable rule of law that, whenever objection to the execution of the decree or attachment of the property is raised, the objector must be permitted to lead evidence. The Supreme Court has cautioned against permitting the person who raises an objection / obstruction from leading evidence in the execution proceedings as a matter of course.

14. In the case of **Silverline Forum Pvt Ltd Vs Rajiv Trust And Anr**,¹ a three Judge Bench of the Supreme Court enunciated that the words, “all questions arising between the parties to a proceeding on an application under Rule 97” would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the obstructionist raised it. The executing Court can decide whether the resister or obstructionist is a person bound by the decree and he refused to vacate the property. That question squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. The adjudication enumerated therein need not necessarily

1 (1998) 3 SCC 723.

involve a detailed enquiry or collection of evidence. The Court can make the adjudication on admitted facts or even on the averments made by resister. Of course the Court can direct the parties to adduce evidence for such determination, if the Court deems it necessary.

15. In the case of **Rahul S Shah Vs Jinendra Kumar Gandhi & Ors,**² another three Judge Bench of the Supreme Court, after highlighting the travails of the decree holder in not being able to enjoy fruits of litigation on account of inordinate delay caused during the process of execution of decree, emphasized that the claims under Order 21 Rule 97 or Rule 99 must be dealt strictly and be considered/entertained rarely.

16. The Supreme Court issued mandatory directions to all the Courts in dealing with the execution proceedings. The directions in Clauses 10, 11 and 12 are material and hence extracted below:

“42.

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10. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during

2 AIR 2021 SC 2161.

adjudication of suit if due diligence was exercised by the applicant.

11. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

12. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.”

(emphasis supplied)

17. As the Appellants did not venture to lead any evidence before the executing Court, the contention sought to be canvassed by Mr. Vakil premised on the propriety and correctness of the procedure adopted by the executing Court is unworthy of acceptance, especially in the backdrop of the multitude of the proceedings, including the resounding rejection of the earlier attempt on the part of the Appellants to question the attachability of the subject property in execution of the decree.

18. To conclude, the Appellants already had two opportunities to adduce evidence in support of their objection. Failure to do so was at the peril of the Appellants. Thus, no substantial question of law arises for determination.

19. The Second Appeal, thus, stands dismissed.

20. In view of the dismissal of the Second Appeal, Interim Application No.18352 of 2022 also stands disposed.

21. IA No.13332 of 2023 filed by the Respondents – Decree Holders for withdrawal of the amount deposited by the Appellants before the executing Court pursuant to the interim order passed by this Court on 21 September 2022, stands disposed with a direction to the trial Court to pass appropriate order on the said application construing the said amount to have been deposited towards the part satisfaction of the decree.

22. No costs.

(N.J.JAMADAR, J.)

23. At this stage, Mr. Vakil, learned Counsel for the Appellants seeks continuation of the ad-interim relief.

24. Since the ad-interim order is in operation from 21 September 2022, the same shall continue to operate for a further period of four weeks.

25. However, in the meanwhile, the executing Court shall be at liberty to decide the application for withdrawal of the amount deposited by the Appellants, on its own merits and in accordance with law.

(N.J.JAMADAR, J.)