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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9678 OF 2014

Sanjay Ramchandra Kotiye and others.

..Petitioners

-Versus-

Munnabai Mohanlal Badode and others.

..Respondents

.....

Mr.R.K.Bhakde, Advocate for the Petitioners.

Mr.Hemant Surve, Advocate for the Respondent Nos.1 to 5.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 14th January, 2015

Per Court:

1 The contention of the Petitioners is that the Petitioner No.1 is the brother of the Petitioner Nos.2 and 3. These siblings are born out of the wedlock between the deceased Ramchandra and Ashabai. Ramchandra has passed away on 01.07.1993. Premabai is the first wife of the deceased Ramchandra who passed away on 06.08.2004.

2 It is the specific contention of the Petitioners that they were never arrayed as Defendants in RCS No.6/2002. The said proceedings have culminated into the judgment and decree which was put for execution in RD No.1/2007. The Petitioners were not aware about the said execution proceedings and after gathering knowledge of the same,

they have preferred an application Exhibit-31 on 19.07.2013 under Order 21 Rule 97 of the Code of Civil Procedure posing themselves as obstructionists in the execution proceedings.

3 The Petitioners further contended that by the impugned order dated 05.08.2014, their application Exhibit-31 has been rejected summarily and without affording an opportunity to lead evidence. The impugned order is an outcome of non-observance of the procedure as required to be followed under Order 21 Rule 97 of the Code of Civil Procedure and the valuable right of establishing their case by recording evidence has been taken away.

4 The Petitioners further contend that since they are legal heirs of the deceased Ramchandra and Ashabai who is alive even today, they developed a right, title and interest in the suit property. The Executing Court can go behind the decree and permit the Petitioners to establish their claim as regards the right, title and interest in the suit property.

5 The Petitioners submit that it has been wrongly stated in paragraph 3 of the memo of the petition that the Petitioners had appeared in RCS No.6/2002 and had filed their Say/ Written Statement at Exhibit-33.

6 The Petitioners further submit that the deceased Ramchandra was a recipient of the Sanad issued by the Government of Maharashtra through the Collector in respect of the suit property. Therefore, the Petitioners, as legal heirs of the deceased Ramchandra, have developed a right in the property. The Petitioners, therefore, submit that the impugned order be quashed and set aside and the Petitioners be allowed to lead evidence before the Executing Court and to establish their right, title and interest to the suit property.

7 Mr.Surve, learned counsel appearing for the Respondent Nos.1 to 5, has drawn my attention to the cause title of RD No.1/2007. It is submitted that the deceased Premabai, who was alive when RCS No.6/2002 was filed, was arrayed as Defendant No.2. She has passed away on 06.08.2004. Ashabai, mother of the Petitioners, was arrayed as Defendant No.1 in the said suit. The Petitioner No.2-Kokilabai was already married prior to the institution of the suit and, therefore, was not arrayed as a Defendant. Narsing, son of the deceased Ramchandra and Premabai, was major and, therefore, arrayed as Defendant No.3 in the said suit. Sanjay, the Petitioner No.1 herein, was a minor and, therefore, not impleaded as a Defendant. Rukminibai, the Petitioner No.3 herein, was also married prior to the institution of the suit and, therefore, not

impleaded in the said suit.

8 Mr.Surve has further drawn my attention to certain findings on facts. RCS No.6/2002 was filed for possession on the basis of the title and permissive possession by the deceased Ramchandra. Ashabai was already the Defendant No.1 in the said proceedings. The said suit has been decreed and it has been concluded that Ashabai has no right, title and interest in the suit property. It is further pointed out that the deceased Premabai and Ashabai had also filed RCS No.181/2000 against the deceased Manoharlal. The decree holders are the legal heirs of the deceased Manoharlal.

9 Mr.Surve further points out that the decree was challenged by the Defendants in RCA No.278/2006 and the said Appeal was also dismissed. The issue as regards non-joinder of necessary parties was dealt with and the Trial Court as well as the Appeal Court have concluded that RCS No.6/2002 did not suffer and was not bad in law for non-joinder of alleged necessary parties. The Second Appeal was also filed by the said Defendants and same has been rejected by this Court. The Special Leave Petition before the Apex Court has also been rejected.

10 Mr.Surve further submits that the Petitioners can be said to be

guilty of suppression of material facts. Their contention throughout this petition has been that no opportunity of hearing was given to them, that application Exhibit-31 has been rejected summarily and the liberty to lead evidence was taken away.

11 He has pointed out, from the history of the case i.e. RD No.1/2007, that the matter was posted for allowing the Petitioners to lead evidence on six dates from 11.09.2013 till 03.12.2013. Since they have failed to lead evidence, the Court below has posted the matter for arguments. The Petitioners have not challenged the closing of evidence.

12 The execution proceedings were posted for arguments on application Exhibit-31 from 07.01.2014 till 30.09.2014. The Petitioners were afforded 17 dates for the said purpose wherein they could have moved an application seeking permission to lead evidence. It is not the case of the Petitioners that they have moved such an application during the said period and that the said application has been turned down.

13 Having heard the learned counsel appearing for the respective sides at length and having gone through the petition paper book, I do not find that the impugned order could be said to be perverse or erroneous. An adequate opportunity was afforded to the Petitioners to lead evidence.

Even when the matter was posted for arguments, the Petitioners were never precluded from moving an application seeking liberty to lead evidence. The impugned judgment is sought to be assailed on the ground of violation of the established procedure and denial of an opportunity to establish their case. These submissions, in my view, are misleading and the record indicates the otherwise.

14 Taking an overall view of the facts as recorded above, this Writ Petition is devoid of any merit and is, therefore, dismissed. No order as to costs.

(RAVINDRA V. GHUGE, J.)