

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 658 OF 2014

Kachrual s/o Babulal Bhurewal
(Died), through legal representatives:-

1. Gokulabai Kachrual Bhurewal
Age - 60 years, Occ - Household
R/o Kalikurti Road,
Near Amar Chaya Talkies
Jalna
2. Kanhaiya Kachrual Bhurewal
Age - 30 years, Occ - Laborer,
R/o Kalikurti Road,
Near Amar Chaya Talkies
Jalna
3. Akash Kachrual Bhurewal
Age - 22 years, Occ - Student,
R/o Kalikurti Road,
Near Amar Chaya Talkies
Jalna

.. APPELLANTS

VERSUS

1. Dr. Shriram Gopalrao Joshi
Age - Major, Occ - Doctor
2. Dr. Sau. Kunda w/o Shriram Joshi,
Age - Major, Occ - Doctor

Both R/o Near Shivaji Statue Road,
Jalna, Taluka and District - Jalna
3. Abdul Hamid Jan Mohammad,
(Died) LRs.
 - a. Khurshidbegum w/o Abdul Hamid,
Age - 77 years, Occ - Household
R/o Mangal Bazar, Jalna
 - b. Sk. Rafik s/o Abdul Hamid,
Age - 48 years, Occ - Business
R/o As above.

- c. Smt. Zarina w/o Asif
Age - 46 years, Occ - Household
R/o Padampura, B & C Office,
Aurangabad
 - d. Abdul Rauf Abdul Hamid,
Age - 43 years, Occ - Business,
R/o Mangal Bazar Jalna
 - e. Rais Ahmad Abdul Hamid,
Age - 41 years, Occ - Business,
R/o Mangal Bazar, Jalna
 - f. Sultana Begum w/o Sk. Aziz,
Age - 36 years, Occ - Household
R/o N-7, CIDCO, Aurangabad
 - g. Shafik Ahmad Abdul Hamid,
Age - 38 years, Occ - Business,
R/o Mangal Bazar, Jalna
 - h. Sameena Begum w/o Ayub Khan,
Age - 36 years, Occ - Household
R/o Afgan Mohalla, Old Jalna
 - i. Shabana Begum w/o Sk. Nazim,
Age - 36 years, Occ - Household
R/o Mangal Bazar, Jalna
 - j. Abdul Majeed Abdul Hamid,
Age - 35 years, Occ - Business,
R/o Mangal Bazar, Jalna
 - k. Abdul Majeet Abdul Hamid,
Age - 35 years, Occ - Business,
R/o Mangal Bazar, Jalna
 - l. Amina Begum Shaikh Naeem,
Age - 26 years, Occ - Household
R/o Chawani, Aurangabad
4. Badrinarayan s/o Shivcharan Bhurewal,
Age - Major, Occ - Trade,
R/o Kalikurti, Jalna

.. RESPONDENTS

.....
Mr. A. S. Bajaj, with Mr. N.S. Jaju, Advocates for appellants
Mr. V.J. Dixit, Senior Advocate i/b Mr. A.N. Nagargoje, for
respondents no. 1 and 2

CORAM : SUNIL P. DESHMUKH, J.

DATE : 5th DECEMBER, 2015

ORAL JUDGMENT :

1. Heard learned advocates for the parties.
2. This is a second appeal preferred by objection petitioner, claiming possession over a strip of land admeasuring 30' X 15' contentedly formed / created by deposits of salvages, garbage and due to flow of water, suggesting that it is an alluvial land.
3. Respondents no. 1 and 2 herein are the plaintiffs in regular civil suit no. 153 of 1978. In the plaint, they have stated that a firm M/s. Pestonji Meharwanji Jalanawala was the owner and possessor of landed property triangular in shape bearing municipal number 4283 (new) and 4110(old). The plaintiffs have purchased piece of property from aforesaid firm under a registered sale-deed in 1971. Pursuant to sale deed they came in possession of said triangular portion of land. The property is described in the plaint then bearing municipal house property No. Old 4110 and New 4283 forming a triangular piece of land, situated at Sadar bazar, Near Shivaji Statue, Jalna, falling within boundaries referred to in the plaint. In

the course of time, the property came to be re-numbered by municipal council as municipal plate No. 1-32-177, comprising previous numbers 4283 and 4283/1.

4. Defendant no.1 in the suit, namely, Abdul Hamid Jan Mohammad was in occupation of said property upon an arrangement with the earlier owner, namely, M/s. Pestonji Meharwanji as referred to in the plaint. In due course, notice came to be issued to defendant no. 1 and the relationship with him had been terminated.

5. During pendency of litigation, defendant no.2, namely, Badrinarayan Shivcharan Bhurewal had been found carrying out certain activities over the land and it transpired that he had raised *khoka* of the size 4.8' X 4.6' and committed trespass.

6. After the notice to defendant no. 1 terminating relationship, being entitled to possession, plaintiffs instituted regular civil suit no.153 of 1978 seeking delivery of possession of property shown in the plaint map by removing tin shed constructed by defendant no. 2 and *mesne* profit.

7. In due course suit came to be decreed in 1992, regular civil appeal by defendants against said decree came to be dismissed in 1999 and the second appeal therefrom had been dismissed on 28-11-2013 by this court.

8. In the meanwhile, execution proceedings had been initiated bearing regular darkhast no. 157 of 1992 referred to herein above. While the decree was sought to be executed, objection was raised by present appellant – objection petitioner that the property occupied by him is different from the one about which execution proceedings can be taken up. He is in occupation of a land, which is an alluvial land formed by accumulation/collection of garbage, salvage and soil by flow of water. His father had been in possession of the same for over 35 years and after him, it is the objection petitioner. It has been numbered by the municipal council as municipal property bearing No.1-32-275 in or around 2002 and that the municipal authorities have also levied tax on the same. Accordingly, objection petitioner has paid taxes. Under the garb of execution of decree, it is this land, which is sought to be taken in possession. It does not form subject matter of the decree. It was thus prayed in the objection petition that the objection petition be allowed holding that the property in occupation of objection petitioners is different from the suit property and that the decree holders / judgment debtors have no concern with the same.

9. According to their contention, the land in their occupation is beyond the property claimed by the plaintiffs in the suit and upon said land, there are erected kiosks about three in number and two

have been let out to two other persons and in the third the objection petitioner is running his cycle taxi business and earlier his father used to tether cattle over said land.

10. The objection petition was resisted to by the plaintiffs – decree holders by filing say and upon determination of questions arising from the same, the executing court has dismissed the objection petition. Against dismissal of the objection, earlier regular civil appeal bearing No.219 of 2006 had been preferred and the district court then had allowed the same remanding the matter to the executing court by directing appointment of Taluka Inspector of Land Records (" TILR ")as the court commissioner to find out municipal property number 1-32-177 [No.4283 (new) 4110 (old)] directing further the objection petitioners to deposit a sum of Rs.1000/- towards payment of fees to court commissioner. However, the fee was not paid by the objection petitioners. Order in regular civil appeal formed subject matter of writ petition bearing No.4466 of 2007, however the same came to be rejected with a modification that instead of objection petitioners, it would be open for the decree holders to deposit the amount of Rs.1000/- directed by the district court, observing thus -

“ Court commissioner so appointed shall inspect and demarcate and identify the property and submit his report to the trial Court within three months of 25.2.2008. ”

11. It has emerged on record that the measurement pursuant to the orders of the courts were being meddled with and resisted to by objection petitioners impelling writ petition at the instance of plaintiffs - decree holders bearing No.1073 of 2008. By the order in said writ petition, aforesaid commission as directed was allowed to be carried out in police protection. Accordingly, it appears that the TILR has carried out the same and submitted his report on 29th June, 2009 referring to that CTS No. 4131 is based on consolidation map record No.36 and 53 and accordingly measurement has been carried out with reference to plaintiffs' house, *nala* and road and statements and *panchanama* has been recorded.

12. Proceedings initiated by present appellants - objection petitioners appear to have been accordingly tried and the executing court has ruled against the objection petitioners. Consequently, the objection petitioners had moved the district court in regular civil appeal, which too has been dismissed and hence present second appeal.

13. The thrust of learned advocate Mr. A. S. Bajaj h/f Mr. N. S. Jaju appearing for the appellants - objection petitioners is against the report submitted by the Taluka Inspector of Land Records. According to him, it emerges in evidence that the measurement cannot be said to be in accordance with rules. He submits that no

fixed points were taken for measurement and the measurement has been carried out in accordance with physical position. According to him, entire city survey No.4131 ought to have been measured. He makes various submissions, *inter alia*, that original report had not been considered in accordance with the rules. He further contends that the statements recorded in the cross examination of the decree holders and the TILR tantamount to admissions and in the circumstances the decree put in execution can not be allowed to be executed with reference to measurement carried out by the TILR. Learned advocate further goes on to submit that the admissions of the decree holders and the TILR have not been given their due while appreciating the evidence.

14. According to learned counsel, with such defects in the measurement, it is hazardous to allow the decree to be executed. It is further submitted on behalf of the appellants that from present physical position pursuant to the measurement carried out by TILR, it emerges that the land measured by him is more than the one claimed by the plaintiff in the suit which lends credence to the objections by the appellants and their claim that they are in possession of a land which is not part of the land under the decree. He, in view of aforesaid, purports to submit that the matter be remanded directing measurement by officer superior to TILR.

15. Mr. Bajaj, learned counsel for the appellants, purports to support his submissions by decision in the case of *Govind s/o Raoji Katole vs. Ganpati s/o Tukaram Khanke*, reported in 2002 (1) Bom.C.R. 124, wherein the court appears to have observed with reference to certain citations that, if the court finds that the report is not free from blemish and there is discrepancy in evidence of commissioner and his report which is likely to mislead the court, such report should be rejected, so also evidence.

16. Learned senior advocate Mr. Dixit appearing for respondents no. 1 and 2, however, submits that the execution is pending since 1992; attempts to have the execution of the decree are being thwarted by raising objections on one count or the other. Contentions, objections by judgment debtors, earlier objection petitioners, Wakf board have been discarded and overruled. It is not a different property from the one in respect of which execution was sought when earlier attempts had been made. It was then wife and son initially; thereafter the Wakf board and now a third person who are putting on hurdles and obstruction to the execution of the decree.

17. Learned senior advocate further submits that the claim with regard to measurement by TILR being not proper is fallacious. It cannot be said that the measurement by TILR is not in accordance

with directions of the courts. Measurement of property pursuant to the directions of the appellate court and the high court have been duly carried out.

18. He further refers to that although measurement was at the instance of the appellants for carrying out the same, objection-petitioners had been reluctant to comply with directions to deposit ₹ 1000/- towards fees to TILR, under the circumstances, the decree holders were compelled to bear the same. While that was sought to be done not only there was non co-operation by appellants for measurement of the land but also attempts to measure the land were meddled with, obstructed and interfered with requiring police aid. Thus causing interference in the course of administration of justice. Intention of the appellants-objection petitioners is only to frustrate execution of decree, which is easily discernible from the facts and circumstances and their conduct. Report of TILR reveals as to why appellants were reluctant to actually carry out measurement. They were aware that measurement would throw light on truth.

19. The next leg of submissions of Mr. Dixit is that objections to execution by appellants is unsustainable as they have not been able to bring forth any material to lend credence to their case about them being in occupation of the alluvial land. There is no record

either revenue, municipal or, for that matter, city survey in respect of formation/creation of such land. In the face of appellants' failure to adduce any evidence in this respect, the so called lacunae in the measurement sought to be pointed out alleging it being not in accordance with the rules would hardly have any efficacy, for, it is the obligation of the person who claims existence of a particular thing to prove its existence and to discharge such burden. Here in the present case, appellants-objection petitioners have failed to discharge such burden. He further submits that although much ado is being made about that the measurement is not in accordance with the rules, the appellants have failed to bring forth relevant rules.

20. It is contended by respondents that the property under occupation of the objection petitioner is the property under the decree and it does not bear house number as claimed by the objection petitioner. It is the contention of the decree holders that the judgment debtors want to frustrate execution of decree and deprive them of the enjoyment of fruits of decree and, therefore, have been putting up objections one after the other. The objections are at the behest of the judgment debtors, initially by wife and son of Abdul Hamid, then by Wakf Board and now by present objection petitioners. According to the decree holders, the objection petitioner has been put in occupation by the judgment debtors and

at their behest he occupied the property. The objection petitioner has occupied property under the decree. There is no substance in the contentions on behalf of the objection petitioner – appellant about collection of garbage and salvage and formation of alluvial land. According to them, there is no record either in the municipal council, with the city survey or even for that matter in revenue office, about existence of such land. According to them, there is no land other than the land under the decree and the boundaries referred to in the plaint. The decree holders' contentions on the other hand are that there is no property existing bearing municipal house number as claimed by the objection petitioner.

21. Here in the present case, the executing court had on the basis of the claims on either side framed issues with respect to independent right to the property claimed by objection-petitioners, about their possession over the same and their entitlement to the reliefs claimed, answering in negative about objection-petitioners' independent right to the property, holding them to be in possession which is not legal and entitlement of the appellants to relief prayed was answered in the negative.

22. The executing court considered that the objection-petitioners had failed to establish that due to accumulation and collection of salvage and garbage, an alluvial land is created which they claimed

father of Kachrualal-original appellant to be using since 1970. It has further been appreciated by the executing court that objection – petitioners had failed to show that disputed property is altogether different. The court on appreciation of evidence had found that possession of the objection-petitioners is traceable through judgment debtor who inducted the objection-petitioner and in the absence of material to show that disputed property was independent property and had no concern with the suit property, the court considered that the objection-petitioners had failed to show their entitlement to possession over the property claimed.

23. The appellate court as well, had framed necessary points for determination, particularly the one as is being vaunted here in the second appeal, namely, whether the measurement carried out by the court commissioner is defective and whether the property claimed by the objection-petitioners is a part and parcel of the suit property, answering them in the negative and ruled against the claims of the objection – petitioners.

24. The appellate court considered that the map drawn by the TILR pursuant to the orders of this court would have presumptive value in the facts and circumstances of the case and it was the burden of the objection – petitioners to prove that disputed land was his property. On appreciation of evidence of the TILR, the

appellate court as well has considered that said evidence cannot be said to aid the objection-petitioners and it is not the case that the TILR could not find out location of suit property or there is any doubt about the same. It has been considered that the TILR had referred to that since CTS number is divided into different sub divisions, it is difficult to point out particular sub division in which the suit property had fallen. Additionally, the covering letter depicts that the TILR had taken into account survey record bearing CTS nos. 53 and 36 and it is with reference to the same that the measurement has been carried out. The appellate court had additionally found that the claim of the objection petitioners about the land being bearing municipal number 1-32-275 had not been supported by any evidence and a solitary municipal tax receipt of 2005 can hardly be related to the property claimed by the objection-petitioners. Both the courts have additionally, considered that the existence of municipal receipt is during the course of the proceedings. The courts have further considered it is not the case that said property can be said to have concern with CTS No. 4131.

25. While the decree was put in execution, referred to herein above, initially wife and son of Abdul Hamid (present respondent No.3), purportedly caused resistance to execution of decree. Said matter accordingly had been tried with reference to relevant rules, particularly Rules 97 to 101 of Order XXI of the Civil Procedure

Code. The matter culminated into second appeal before this court and the objection by the wife and son of Abdul Hamid stood overruled. Thereafter, there was another objection and resistance to the execution of the decree by *Wakf* Board claiming the suit property to be *Wakf* property. Objection by the *Wakf* Board was not maintained. Subsequently *Wakf* Board filed a suit bearing *Wakf* Suit No.180 of 2006 before the *Wakf* Tribunal. The *Wakf* Board was not successful in said suit. The matter culminated into revision application before this court, which too failed.

26. It is now thereafter, on third occasion, the decree was sought to be resisted. Objection petition by present appellants in the executing court has also been treated according to Rules 97 to 101 of Order XXI of the Civil Procedure Code.

27. The objection-petitioners had not brought any evidence to show that the land claimed by them bearing municipal no. 1-32-275 is the alluvial land as contended by them and that said land has been given municipal number under any procedure in respect of the same. There is no record or any government document depicting existence of alluvial land as claimed by the objection-petitioners. Additionally the courts, on facts, have found that the objection-petitioners' claim about their father being in possession of the property in question over 35 years has not been proved.

The executing court has found that induction of the appellants-objection petitioners is traceable to be through judgment debtor. Executing court as well as appellate courts have at quite some length and with elaboration considered the record, finding that the objection-petitioners have failed to prove their claims while resisting the execution.

28. It emerges that the objection petition himself has come with a case which appears to have dithering base. In the first place he submits that there was no naturally pre-existing land beyond the property claimed by the decree holders. His case is about formation of alluvial land due to accumulation/collection of garbage, salvage and water flow and it is upon that land his father had been initially in occupation and subsequently him and has accordingly been given municipal house number.

29. The courts hitherto, on appreciation have considered that there is no evidence with regard to occupation by father of objection petitioner and much less length of the same as contended by the objection petitioner. He purports to rely on solitary receipt, which he claims to have reference to the land in his occupation.

30. It additionally will have to be borne in mind that the courts had directed the TILR to find out property municipal house number

1-32-177 and accordingly measurement has been carried out. It is not the case of objection-petitioners that the measurement has not been carried out. The directions under the order of the appellate court merging into order of the high court appear to have been carried out by the TILR and said order/directions of measurement are not challenged by objection petitioners. Taking into account aforesaid background of the matter, it appears to be an attempt by the objection-petitioners to take up a plea alleging flaws after measurements is carried out by TILR. However, in the present matter that would carry little significance.

31. Having regard to the facts and circumstances of the present case and the ones involved in *Govind s/o Raoji Katole vs. Ganpati s/o Tukaram Khanke (supra)* relied on by appellant, it does not appear that said decision would be able to hold the present case.

32. It cannot be said that the courts have passed orders only with reference to measurement/report by TILR but have also considered other evidence on record and have also considered failure of the objection-petitioners to prove formation and possession over alleged alluvial land and also possession of father of deceased appellant for over thirty five years and that the appellants – objection-petitioners have not been able to bring independent right to the property claimed.

33. Appellate court has quite extensively dealt with the matter and has given reasons in paragraphs no. 19 and 20 and from 21 to 25 which are not amenable to be faulted with. Appellate as well as executing court have considered various aspects and based on appreciation of evidence have given decisions impugned.

34. There does not appear to be any question which can be said to give rise to substantial question of law.

35. Second appeal, as such, fails and stands dismissed.

36. Civil application consequently, does not survive and stands disposed of accordingly.

SUNIL P. DESHMUKH, J.

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