

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

WRIT PETITION NO.10413 OF 2010

Damodhar s/o Malharrao Sapkal
(died), through the legal heirs

1. Narmadabai w/o Damodhar Sapkal,
Age 64 years, Occu. Household
2. Nanda w/o Ajay Talekar,
Age 39 years, Occu. Household
3. Sangita d/o Damodhar Sapkal
Age 37 years, Occu. Household
4. Shivaji s/o Damodhar Sapkal,
Age 35 years, Occu. Advocate
5. Parmeshwar s/o Damodhar Sapkal,
Age 31 years, Occu. Education
6. Maya d/o Damodhar Sapkal,
Age 32 years, Occu. Education
7. Chhaya d/o Damodhar Sapkal,
Age 29 years, Occu. Education

All R/o Karanja road, Beed,
Taluka and District Beed.

..Petitioners
(Judgment Debotrs)

Versus

1. Panch Committee, Line Galli,
Beed, Taluka and Dist. Beed
2. Rajkumar s/o Ramanna Pagote
3. Kumar s/o Ishwar Swami Pilley
4. Krishna s/o Mithasswami Pilley
5. Ibrahimkhan s/o Mohammadkhan
6. Gokuldar s/o Shivanna Gole
7. Kisan s/o Janhaya Pagote

8. Saraswati @ Rukmini w/o Jagannath Gole
9. Suresh s/o Jankiram Pagote
10. Ramesh s/o Nagappa Pilley
11. Babu s/o Kisanrao Raut
- (12) Rajesh s/o Ramthswami Pilley ..deleted as per Court's leave dated 7.7.2014
13. Bhagirathibai w/o Balaram Pagote
14. Dayanand s/o Narayan Pagote
15. Govind s/o Hiraswami Pilley

Respondents No.2 to 15 to be served through Panch Committee, Line Galli, Beed, Taluka and District Beed

..Respondents (Resp.No.2 to 14 original Decree Holders)

Mr V.D. Salunke, Advocate for petitioners
 Mrs C.S. Deshmukh, Advocate for respondents No.3 to 11, 14 & 15
 Respondent No.12 deleted as per Court's leave dated 7.7.2014

CORAM : N.W. SAMBRE, J.

DATE : 20th April 2015

PER COURT

1. This petition is by judgment debtors – defendants.
2. The respondents filed Regular Civil Suit No.8/1992 for possession and mandatory injunction which came to be decreed on 2nd September 1993. While deciding the said suit, the trial Court has framed following issues and answered the same accordingly.

<u>ISSUES</u>	<u>FINDINGS</u>
1. Do plaintiffs prove title over the portions 'A' & 'B' shown in the map annexed with plaint ?	Yes
2. Do they prove that defendant has made encroachment over the portion 'A' by constructing three rooms over it three years prior to institution of suit ?	Yes
3. Do they prove that defendants erected pillars over portion 'B' recently ?	Yes
4. Does defendant prove that portion 'A' is the part and parcel of his house No.372 ?	No
5. Does he prove his adverse possession over disputed portion of 38' x 26' to the north of house No. 372 ?	No
6. Are plaintiffs entitled to relief of mandatory injunction as prayed ?	Yes
7. Are they entitled to relief of possession of portion 'A' ?	Yes

3. The trial Court thereafter passed the decree on 2nd September 1993 as under :

“ ORDER

1. The suit of the plaintiffs is decreed with costs.
2. The defendant is hereby directed to remove construction of three shop premises in the suit portion 'A' as shown in the map annexed with plaint and that he is also directed to give vacant possession of suit portion 'A' to the plaintiffs within three months from the date of this order.
3. The defendant is also hereby directed to remove pillars erected by him in the suit portion 'B' as shown in the map annexed with plaint within three months from the date of this order.
4. An enquiry be held under Order 20 Rule 12 of C.P.C. In respect of future mesne profits.
5. Decree be drawn accordingly.”

4. Pursuant to decree passed by the trial Court, Execution Petition No.11/2009 came to be filed by the decree holders-respondents. In the said execution proceedings, possession of area 60 feet north-south and 40 feet east-west of House No.377 was prayed.

5. Pursuant to the execution proceedings, the learned executing Court issued warrant of possession on 14th July 2010 by mentioning the schedule as under :

“ To remove the construction of three shops mentioned in Part – 'A' of the said warrant in House No.377 (old) 1-8-83 (new) at Line Galli, Karanja road, 60 feet south-north and 40 feet east-west.”

6. Subsequent thereto, the petitioners-judgment debtors filed two applications raising therein certain objections to the execution of decree to name few, the pendency of appeal against the judgment and decree under execution, the locus of the decree holders to execute the decree, title to the suit property etc. The said objection was numbered as Exh.19. The petitioners-judgment debtors also moved another application Exh.34 praying therein appointment of Court Commissioner for submission of report after measurement of the property in question.

7. Both these applications after taking into account the say filed by the decree holders, came to be rejected by order dated 27th October 2010, as such the present petition.

8. While questioning the legality of both the orders, Mr Salunke, learned Counsel for the petitioners has invited attention of this Court to the fact about the pendency of the petition before this Court at the behest of judgment debtors in the matter of restoration of appeal against the judgment and decree in execution. In addition to above,

he would urge that the locus of the decree holders is itself under cloud as the decree holder is Panch Committee, whereas individuals are before this Court for execution. He would further urge that in Writ Petition No.2713 of 2009, which was preferred by an adjoining plot owners, the appointment of Court Commissioner, his cross-examination was granted and according to him, here also the petitioners/judgment debtors are entitled for similar relief. He urged that in absence of identification of the suit property, the decree cannot be executed.

9. Mrs Deshmukh, learned Counsel for respondents No.3 to 11, 14 and 15 would urge that the decree was passed on 2nd September 1993 and the decree holders are trying hard to get the decree executed. She would urge that in spite of lapse of twenty years of period, the petitioners - judgment debtors are successful in delaying the execution of the decree. According to her, the facts of the present case and that of Writ Petition No.2713 of 2009 are altogether different. According to her, the present petition lacs merits and same is liable to be dismissed, as the executing Court has recorded sufficient reasons in support of rejection of the claim raised in Exh.19 and Exh.34.

10. After considering the submissions made by respective parties and upon analysing the same, it is noticed that the appointment of Court Commissioner in another matter, i.e. Writ Petition No.2713 of 2009 was not by virtue of the orders passed in execution proceedings, but it is upon an order passed by the High Court in Second Appeal

No.1665 of 2005. Though the said proceedings were arising out of a similar issue, however, note is required to be taken of the fact that the petitioners-defendants in the said petition resisted the claim in Regular Civil Suit No.482 of 1991 for possession. The said claim was rejected till the decree for possession came to be approved in Second Appeal No.1665 of 2005.

Whereas in the present case, the decree in question was passed in 1993 and the appeal preferred by the petitioners was dismissed. The respondents-decree holders are unable to enjoy the fruits of the decree though the decree is holding the field since more than twenty years.

11. If we go through the observations made by the executing Court, particularly while dealing with application Exh.19, the executing Court was alive to the fact that the appeal of the judgment debtors was twice dismissed in default. This shows the negligent/delaying attitude on the part of petitioners and the petitioners wanted to take benefit of their own wrong by citing cause of pendency of their proceedings in relation to appeal against the decree under execution. The executing Court has taken into account all facets of the objections raised by the judgment debtors and noticed that the objections are not *bona fide*. It is required to be noted that the executing Court cannot travel beyond the decree in question and the perusal of the issues, the observations and the verdict of the trial Court reflects great clarity in identifying the suit property in the background of (specifications) in the suit claim. Once the encroachment was specifically established in the suit, raising

objection again and again and grant of such objection at the behest of judgment debtors amounts to opening the ponder box. The executing Court, while deciding the Exh.19 and Exh.34 has considered the claim for appointing of Court Commissioner under Order XXVI, Rule 9 of the Code of Civil Procedure and for appropriate reasons rejected the same. In my opinion, the reasons recorded by the learned executing Court while rejecting the objections Exh.19 and Exh.34 preferred by the present petitioners has taken into account the very decree i.e. under execution and specifications of the suit property mentioned therein. The approach of the petitioners, particularly in the background of twice dismissal of their appeal in default, then taking those proceedings before this Court, is nothing but an abuse of process of law. I have perused the judgment delivered by the learned trial Court on 2nd September 1993 in Regular Civil Suit No.8 of 1992 and noticed that the same contains utmost clear specifications about the suit property.

12. In view of above, the writ petition preferred by the present petitioners is hereby dismissed with costs.

13. The executing Court is directed to take appropriate steps to execute the warrant of possession forthwith.

(N.W. SAMBRE, J.)

vvr