

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4313 OF 2000

Jagannath Khandu Gade .. Petitioner
VS.
Chandrabhagabai Rajaram Gade & Ors. .. Respondents

Ms A. R. S. Baxi for Petitioner.
None for Respondents.

CORAM : M. S. SONAK, J.
DATE: 18 APRIL 2015

P.C. :-

- 1] This petition challenges two orders dated 5 August 2000 which are annexed to this petition as Exhibits 'I' and 'K' respectively.
- 2] The first order at Exhibit 'I' directs auction of an area of 0.85 R from out of Gat No. 156 in satisfaction of a claim for mesne profits raised by the respondents – decree holders. The second order at Exhibit 'K' directs partition and delivery of possession, in pursuance of decree of partition in Special Civil Suit No. 83 of 1974 and Darkhast No. 7 of 1988.
- 3] There appears to be no serious dispute that in pursuance of the impugned orders, the auction has already been affected and further the Tahsildar has also proceeded to effect partition and delivery of possession.

4] Ms Baxi, the learned counsel for the petitioner however submits that in the decree as originally made on 31 January 1981, the plaintiffs therein, who have been impleaded as respondent nos. 1 to 6 herein, had been allotted $\frac{4}{5}$ th share in the suit property. However, in pursuance of appeal instituted by the petitioner, the appeal court, by judgment and decree dated 25 October 1985 and modified the said decree and it was held that the plaintiff nos. 1, 2 and defendant no. 2 each have $\frac{42}{300}$ th share in the suit property; the plaintiff nos. 1, 3 and 4 have $\frac{12}{300}$ th share in the suit property; and the defendant no. 1 i.e. the petitioner herein has half share in the suit property. Ms Baxi submitted that in determining the quantum of mesne profits, cognizance has to be taken of the judgment and decree made by the appeal court on 25 October 1985. The auction has taken place, on basis of execution application instituted prior to the appeal court's decree dated 25 October 1985 and secondly, the respondents have availed a larger share of mesne profits, than what they were really entitled to in terms of the decree made by the appeal court on 25 October 1985.

5] There is really no sufficient material on record to accept the aforesaid contention of Ms Baxi. This is because, the execution application, in which, the impugned orders have been made

referred to Darkhast No. 7 of 1988. This would obviously be after the appeal court's decree dated 25 October 1985. The case of the petitioner, it appears was that the petitioner had instituted a second appeal questioning the appeal court's decree dated 25 October 1985. Accordingly, it was the claim of the petitioner that until such second appeal is decided, the auction is required to be stayed. In fact, in paragraph (XIX) of the petition, the petitioner has raised the following grounds :

“XIX. The Petitioner states that the petitioner is in possession of Gat Nos. 147 and 156 only. The Petitioner states that those lands are the only livelihood of the petitioner and his family members. The petitioner states that, however, respondent No. 1 is in possession of 4 ares land out of Gat No. 147, 2-1/2 ares out of Gat No. 156, Gat No. 320 and Gat No. 316 situated at Mouje Shinwad, Taluka Dindori, District Nasik. The Petitioner states that, therefore, in the interests of justice till the disposal of the Second Appeal the auction of 85 ares of land out of Gat No. 156 is required to be stayed in the interests of justice.”

6] There is no dispute that the second appeal instituted by the petitioner has since been dismissed. Accordingly, there is no reason to interfere with the impugned orders.

7] However, there is lack of clarity as to whether the mesne profits were determined by the Executing Court after taking

cognizance of the position of shares indicated in the appeal court's decree dated 25 October 1985. Though, it is very much probable that such an exercise has been carried out by the Executing Court, nevertheless, it would be appropriate if the Executing Court once again, verifies this position. In case, the Executing Court, comes to the conclusion that the determination of mesne profits was not entirely consistent with the shares as indicated in the appeal decree dated 25 October 1985, then, the Executing Court to direct restitution only in the matter of adjustment of mesne profits, if, some portion of the mesne profits is required to be returned to the petitioner. There shall be no necessity of reversing the position arising out of auction of the property or partitioning delivery of possession as may have been effected by the Tahsildar.

8] Accordingly, the petitioner shall be at liberty to make appropriate application before the Executing Court after placing authenticated copy of this order, on record. If such application is made within a period of two months from today, the Executing Court, to consider the same in accordance with law and after afford of opportunity to all parties.

9] Accordingly, although the impugned orders are not interfered with, Rule is made absolute to the extent indicated in the aforesaid paragraphs 7 and 8 of this judgment and order.

10] In the facts and circumstances of the case, there shall be no order as to costs.

11] All parties to act on basis of an authenticated copy of this order.

(M. S. SONAK, J.)

Chandka