

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

920 WRIT PETITION NO. 3314 OF 2016
WITH CA/10314/2016 IN WP/3314/2016

DEEPAK ISWARDAS BADSHA
VERSUS
RANCHODDAS MURLIDAS BADSHA THR LRS JANUMATI
RANCHODDAS BADSHA AND OTHERS

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Advocate for Petitioner : Dube Anjali (Bajpai)
Advocate for Respondents 1A to 1F : D.K. Kulkarni
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CORAM : T.V. NALAWADE, J.
DATED : 29th November, 2016.

ORDER :

1. The petition is filed to challenge the orders made by the learned Civil Judge, Senior Division, Aurangabad on Exhs. 181 and 183 from MARJI No. 243/1985. Both the sides are heard.

2. The applications were filed by the present petitioner, judgment debtor and prayer was made to treat the applications as one under section 47 of Civil Procedure Code and to stay execution of the decree. Possession warrant is already issued by the Executing Court on the basis of report submitted by the Court Commissioner under the provisions of Order 26, Rule 13 and 14 of Civil Procedure Code.

3. The main contention of the petitioner is that after

receipt of the report of the Court Commissioner, the objections of both the sides were not called by the Executing Court as provided in Order 26, Rule 14 of Civil Procedure Code and so, the subsequent order made to give particular portion to decree holder cannot be used against the present petitioner, judgment debtor. Another submission was made that the Executing Court had virtually avoided to discharge the judicial function and Court Commissioner was allowed to demarcate the property, when the Court ought to have seen that there is equitable partition and partition is made as per the decree given in the suit.

4. The learned counsel for respondent, decree holder drew the attention of this Court to the decision given by this Court (Other Hon'ble Judge) in Writ Petition No. 8526/2015. The said petition was filed by present petitioner, judgment debtor to challenge the orders made below Exhs. 172 and 174 of the same proceeding i.e. MARJI No. 243/1985 by the learned Civil Judge, Senior Division. Exh. 174 was filed to recall the order made on application, Exh. 173 filed by the decree holder to give possession of particular portion of the property in execution proceeding. The order was made on the application by the Executing Court and the application of the decree holder was allowed and accordingly, possession warrant was issued by the

Executing Court on 19.6.2015. Thus, this order was under challenge in the said Writ Petition. The aforesaid contentions made in the present proceeding were made in Writ Petition No. 8526/2016 also. All the contentions made by the judgment debtor were considered by this Court. The conduct of the judgment debtor was also considered by this Court. The observations made by this Court (Other Hon'ble Judge) show that judgment debtor did everything to see that the execution is protracted. When the suit was filed in the year 1970 and the judgment debtor had gone up to the Apex Court to challenge the decree, the decree holder could not get the fruits of the decree only due to approach and conduct of the judgment debtor. At every stage, the judgment debtor created obstacles in the way of execution of decree. Even when the Court Commissioner was expected to work with the cooperation of both the sides, there was the obstruction from the side of judgment debtor to the Court Commissioner also. At every stage, different objection was raised by the judgment debtor and that way, the execution of the decree was protracted. The time taken by the judgment debtor for all these things and the opportunity which was already given to the judgment debtor was considered by this Court while deciding Writ Petition No. 8526/2015. This Court held that the order made by the Executing Court on Exhs. 172 and

174 cannot be set aside.

5. Now the judgment debtor wants to give different colour to his objection and in application at Exh. 181, the judgment debtor contended that his objections need to be treated as one under section 47 of Civil Procedure Code. Such objections are not at all tenable under section 47 of Civil Procedure Code. Only the provisions of Order 26, Rule 13 and 14 of Civil Procedure Code need to be considered. Such challenge was made in the aforesaid previous Writ Petition by the judgment debtor, but the judgment debtor failed in that proceeding also.

6. The contention of the learned counsel for judgment debtor that the decree needs to be executed in terms of decree cannot be disputed. At one place, in the decree, it is observed that so far as possible the possession of the parties is to be protected while effecting partition and giving separate shares to three co-sharers. This observation cannot be stretched to make the partition impossible or to make the equitable partition impossible. It is up to the Executing Court to decide as to what amounts to equitable partition and who is entitled to get particular portion. When such order is made and when there are

aforesaid circumstances, this Court is not expected to interfere in the orders made by the Executing Court under provisions of Order 26, Rule 13 and 14 of Civil Procedure Code.

7. The learned counsel for petitioner placed reliance on some reported cases like **AIR 1962 SC 1493 [R.B.S.S. Munnalal Vs. S.S. Rajkumar]**. The learned counsel submitted that in the present matter, the Executing Court has virtually delegated his judicial powers to the Court Commissioner for demarcating his share. This submission is not at all acceptable. It is the job of the Court Commissioner to propose the shares by preparing the map and that work was done by the Court Commissioner. After receipt of such report, it becomes the job of the Executing Court to pass further orders and such orders are made by the Executing Court. The learned counsel also placed reliance on the case reported as **AIR 2009 SC 1089 [S. Satnam Singh & Ors. Vs. Surender Kaur & Ors.]**. It was submitted that entire property which is available for partition and which is included in the decree need to be partitioned. It was submitted that from the report of Court Commissioner, it can be said that some property is left out. The map prepared by the Court Commissioner shows that some property which is to be treated as road is excluded, but the property which can be used

is considered by the Court Commissioner. In that case also, if some portion is left out, that point is also considered by the Executing Court itself. This Court is not expected to deal with that thing. This point can be separately raised before the Executing Court. Reliance was placed by the learned counsel for petitioner on the case reported as **AIR 1995 SCC 2493 [Mool Chand and Ors. Vs. Dy. Director, Consolidation and Ors.]**. It was submitted that the procedure as laid down in Order 26, Rule 13 and 14 need to be strictly followed by the Executing Court. There cannot be dispute over this proposition. The relevant facts of the present matter are already discussed. This point was already raised before this Court in previous petition and this point is considered by this Court.

8. The aforesaid circumstances and position of law show that there are no merits in the present proceeding. It is one more attempt of judgment debtor to see that the things are protracted and he continues in possession of the entire property and the decree holder is deprived of the fruits of the decree. In view of these circumstances, this Court holds that the judgment debtor needs to be saddled with cost of Rs. 25,000/- (Rupees twenty five thousand). This amount can be recovered by the decree holder by filing proper proceeding in Executing Court.

The petition stands dismissed. The amount, if any, deposited in this Court is to be sent to the Executing Court as there will be question of determination of mesne profits and this amount will be considered by the Executing Court. Civil Application is disposed of.

[T.V. NALAWADE, J.]

ssc/