

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

WRIT PETITION NO. 5591 OF 2012

Vilas S/o Dongarlal Jaiswal

Petitioner..

VERSUS

Prabhakar D. Jaiswal & Ors.

Respondents..

.....

Mr Nikhilesh K. Tungar, Advocate for the petitioner
Respondent No. 1 served.

Mr M. M. Bhokarikar, Advocate for respondents No. 2A to 2D.

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CORAM : **V. L. ACHLIYA, J.**

DATE : 16TH APRIL, 2016.

PER COURT:

. Heard Shri. Tungar, learned counsel for the petitioner and
Mr Bhokarikar, learned counsel for respondents No. 2A to 2D.

2. Petitioner has preferred this writ petition against the order
dt. 29.03.2012 passed by Civil Judge Sr. Division, Jalgaon in Special
Darkhast No. 31 of 1995 whereby the application filed by the petitioner
vide Exh. 1059 came to be rejected. The fact is not in dispute that, the
decree passed in Special Suit No. 44 of 1985 attained finality and no
proceeding is pending against final judgment and decree. The fact is
also not in dispute that, as against the order dated 29.03.2012 passed by

Civil Judge Sr. Division, Jalgaon arising out of Special Suit No. 44 of 1985, the deceased Ashok had preferred writ petitions before this Court which were registered as 5624 of 2008 and 5625 of 2008 and same were disposed of vide order dated 03.02.2010 with following directions.

13. In view of the foregoing discussion, the Writ Petition Nos. 5624 of 2008 and 5625 of 2008 are dismissed. The other two (2) petitions are also dismissed with directions as below:

(I) The executing court shall ascertain from Decree Holder Vilas and shall enquire about dues of municipal taxes etc. and clear the encumbrances due till date of the auction sale from the deposited amount and shall, thereafter, disburse the amount as per shares of each of the brother.

(II) The amount payable to Decree Holder Prabhakar shall be paid only on obtaining a bank guarantee to the extent of Rs. 3,00,000/- (Rupees Three Lacs) from him so as to ensure refund of the earnest amount along with other benefits, if any, to Ashok and his wife Savitribai if their Suit is ultimately decreed against him, for alternate relief.

(III) The executing court shall disburse the remaining amount as per shares of the remaining two (2) brothers.

14. It is made clear that if at all the suit filed by Ashok and his wife Savitribai is decreed and the trial court directs re-opening of the sale proceedings, the parties will be bound by such direction.

15. Since there is no stay order issued by this Court in Second Appeal No. 1401 of 2005 and 1495 of 2005 and the subject matter of those Second Appeals are quite different, unless there is specific order by this Court in the said Second Appeals, the present sale proceeding be deemed as concluded in the terms mentioned above.

*The petitions are accordingly dismissed. No costs.
Rule is discharged in Writ Petition No. 3048 of 2008.
All Civil Applications are disposed of.*

3. In nutshell, the grievance of the petitioner is that the respondents are not adopting the decree and submitting application for withdrawal of the amount. Due to this reason, the petitioner is unable to withdraw the amount to the extent of his share in accordance with the decree passed by this Court as well as the directions given in Writ Petitions No. 5624 of 2008 and 5625 of 2008. It is further contended that, the respondents are not entitled to make claim over the interest accrued on the amount deposited in the Court which was subsequently invested in Fix Deposit. It is further contended that, the executing Court is not acting strictly in terms of the decree passed in the matter.

4. Learned Counsel for the respondents supported the order passed by the executing Court. He has submitted that the respondents have filed separate suit and also preferred appeal, which is pending before the High Court.

5. Having appreciated the submissions advanced in the light of the order passed, I am of the view that there is no merit in the petition. The executing Court cannot go beyond the decree and the

directions given by this Court in Writ Petitions No. 5624 of 2008 and 5625 of 2008, which restricts only as to the ascertainment of encumbrances and obtaining bank guarantee. The directions given by this Court in Writ Petitions No. 5624 of 2008 and 5625 of 2008 are not beyond the scope of the decree but it is step in aid of execution of the decree i.e. dismissal of decretal amount. Therefore, there is no question of trial Court going beyond the scope of the decree. The argument advanced in this behalf are found to be without basis.

6. Perusal of the order dt. 29.03.2012 reveals that the trial Court has observed that the Court is bound to disburse the amount and interest accrued as per order dated 29.03.2012 passed in the matter. Therefore, there is nothing in the order passed which could be termed as executing Court is going beyond the scope of the decree passed in the matter. So far as the interest part is concerned, the amount of interest is to be disbursed in proportion to the share of each of the persons entitled to receive the amount as per the decree. While disposing of the writ petitions No. 5624 of 2008 and 5625 of 2008, this Court has rightly given direction that, the decretal amount be paid as per the decree after ascertaining the dues of municipal taxes etc. and the encumbrances due till date of the auction sale from the deposited amount and thereafter the

amount be disbursed as per shares of each of the brother. Therefore, there is nothing in the order passed which can be termed as beyond the scope of decree.

7. The petitioner is entitled to the extent of his share after the final amount is worked out. He shall be entitled to the amount together with interest accrued to the extent of his share. Same is the position of other decree holders, who are also entitled to receive the amount as per the terms of the decree. The submission advanced that for want of steps being taken by the respondents to withdraw the amount, the petitioner may not be permitted by executing Court to withdraw the amount appears to be without any basis. Once the amount to be payable is ascertained after adjusting the municipal taxes and encumbrances etc., the trial Court is bound to allow the petitioner to withdraw the amount to the extent of his share with interest accrued thereon. If the respondent is not making any application for withdrawal of the amount to the extent of their share, the Court may pass appropriate order in accordance with law. In this view of the matter, there appears to be no merit in the petition. Petition is dismissed with no order as to costs.

[V. L. ACHLIYA, J.]