

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

**WRIT PETITION NO. 8526 OF 2015
WITH
CA/15076/2015 IN WP/8526/2015**

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Deepak s/o Ishwardas Badsha
age 55 yrs, Occ. Business,
R/o Khara Kuwan, Aurangabad

Petitioner.
L.R of orig def.no.1

VERSUS

1. Ranchoddas s/o Murlidas Badsha
through his Legal Representatives
 - A] Janumati Ranchoddas Badsha,
age 80 years, Occ. Household, R/o Khara Kuwa,
Aurangabad.
 - B] Ajeet s/o Ranchoddas Badsha,
age 59 years, Occ. Service, r/o.
Indore (M.P).
 - C] Sharad Ranchoddas Badsha,
age 56 years, Occ. R/o. S.T.work Shop,
Chikalthana, Aurangabad.
 - D] Rajendra Ranchoddas Badsha,
age 52 years, Occ. Service
R/o Khara Kuwan, Aurangabad.
 - E] Mandan Ranchoddas Badsha,
age 47 years, Occ. Business,
R/o as above.
 - F] Yamini Satishkumar Saraf,
age 55 years, Occ Household,
R/o Paithan, Tq. Paithan,
Dist. Aurangabad.
2. Ishwardas s/o Narsidas Badsha
(Expired)

3. Pushpabai w/o Kanhyalal (Expired)
 4. Harsha d/o Kanhyalal,
age 47 years, Occ Household,
r/o Khara Kuwa,
Aurangabad.
 5. Sangeeta d/o Kanhaiyalal
age 38 years, Occ. Household,
R/o as above.
 6. Manojkumar s/o Kanhaiyalal,
age 39 years, Occ. Business,
R/o as above.
 7. Navinchandra s/o Ishwardas,
age 72 years, Occ. Business,
R/o as above.
 8. Sharda w/o Jainilal Shah,
age 68 years, Occ. Household,
R/o P.D. Society, Borivali,
Ramnagar, Bombay.
 9. Lata w/o Chandrakant Chaudhari,
age 65 years, Occ. Service,
R/o Bhagyanagar, Aurangabad.
 10. Manju w/o Sharadkumar Modi,
age 62 years, Occ. Service,
R/o Khara Kuwan, Aurangabad.
 11. Kum. Asha d/o Ishwardas,
age 58 years, Occ. Household,
R/o as above.
 12. Usha w/o Dwarkadas Nawale,
age 57 years, occ. Service,
R/o Khara Kuwan, Aurangabad.
 13. City Survey Officer,
City Survey Office,
Aurangabad.
- Respondents.

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Advocate for Petitioner : Mr D S Kulkarni
AGP for Respondent No.13 : Mr. G O Wattamar
Advocate for Respondents No. 1A to 1F : Mr D K Kulkarni
Advocate for Respondent No.8 : Mr S B Sant
Respondents No.4 to 7 and 9 to 12 served.

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CORAM : V.K. JADHAV, J.

Dated: February 03, 2016

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ORDER :-

1. By this petition, the petitioner is challenging the order passed by the learned Joint Civil Judge (S.D.), Aurangabad in M.A.R.J.I No.243 of 1985 below Exh.172 and 174 dated 19.06.2016 and 20.7.2015, respectively.

2. Brief facts giving rise to the present writ petition are as follows :-

The father of respondent Nos.1A to F instituted a suit bearing RCS No.467 of 1979 for partition and separate possession to the extent of 1/3rd share in respect of certain house property situated in Aurangabad city against the father of petitioner and respondents No.2 to 12. After considering the pleadings of the parties and evidence on record, learned 2nd Jt. Civil Judge J.D. Aurangabad, by judgment and decree dated 28.9.1981, decreed the suit. Being aggrieved by the same, father of the petitioner had challenged the said judgment and decree before the District

Court, Aurangabad by preferring Regular Civil Appeal No.287 of 1981. The said appeal came to be dismissed by District Judge, Aurangabad. Father of the petitioner has preferred Second Appeal No.243 of 1985 before this Court. Second Appeal also came to be dismissed. Thereafter, the petitioner instituted a suit bearing Regular Civil Suit No.819 of 1993 claiming therein that the decree passed in the aforesaid Regular Civil Suit No.467 of 1979 is illegal, null and void and not binding on the petitioner. The learned Jt. Civil Judge J.D., Aurangabad by the judgment and decree dated 30.4.2011 dismissed the said suit RCS No.819 of 1993. Petitioner has preferred First Appeal bearing Regular Civil Appeal No.208 of 2011 and the learned District Judge, Aurangabad, by judgment and decree dated 31.8.2012 dismissed the said appeal. Petitioner has preferred Second Appeal No.748 of 2012 before this Court, which also came to be dismissed by this Court. Petitioner has filed Special Leave Petition before the Hon'ble Supreme Court which also came to be dismissed.

3. Meantime, father of respondent No.1A to F filed an application bearing MARJI No.243 of 1985 for preparation of a final decree. In furtherance of the order passed by the Executing Court below Exh.122 on 4.8.2010, below Exh.145

on 9.7.2014 and below Exh.157 dated 24.7.2014, the City Survey Officer is appointed as a Court Commissioner with a direction to execute the partition decree by demarcating the properties mentioned in said MARJI No.243 of 1985 in three parts after giving an opportunity of hearing to all concerned and submit report of said demarcation to the Court on or before 14.8.2014.

4. Since the Court Commissioner, City Survey Officer has not submitted his report before the due date, respondents no.1A to F filed an application Exh.163 before the Court for taking action against the Court Commissioner. The Court Commissioner, City Survey officer has submitted his reply vide Exh.165 dated 17.10.2014 to the notice issued by the Court. In view of the reply filed by the Court Commissioner below Exh.165, the respondent-decree holder filed an application below Exh.166 for providing police aid to the Court Commissioner City Survey Officer for carrying out measurement in respect of the subject matter. After hearing the parties, said application was allowed by the Court vide order dated 29.11.2014. The petitioner has challenged the said order before this Court by filing writ petition No.231 of 2015, which is pending. Thereafter, the Court Commissioner, City Survey Officer has executed the Commission and

submitted his report to the Court below Exh.171/1 to 171/5. On 19.6.2015 the Respondent-Decree Holder filed an application Exh.172 for issuance of the warrant of possession. The learned Judge of the Trial Court, thus, issued the possession warrant as prayed by order dated 19.6.2015.

5. The petitioner has filed an application dated 20.7.2015 below Exh.174 for recalling the order of issuance of the warrant of possession on various grounds. The learned 3rd Jt. Civil Judge, S.D. Aurangabad, by order dated 20.7.2015 passed below Exh.174 in MARJI No.243 of 1985 rejected the application. Hence, this Writ Petition.

6. The learned counsel for the petitioner submits that, the Court Commissioner-City Survey officer had not given any notice to the petitioner in respect of the execution of commission. In the report also, no date is mentioned as to when the Commission was executed. The learned counsel further submits that, even though, Court Commissioner City Survey Officer was specifically directed to submit his report after giving an opportunity of hearing to all the concerned, no hearing was given by the Court Commissioner before the submission of the report to the Court. Learned counsel

further submits that on 27.3.2015 the petitioner-J.D. was present when the case was adjourned for filing of the report by the Court Commissioner and next date was given by the Court i.e. 11.6.2015. Thereafter, the matter was adjourned on 11.6.2015 for awaiting the report and next date was given as 20.7.2015. Learned counsel submits that, meantime, respondent-decree holder filed an application on 19.6.2015 for issuance of the warrant of possession vide Exh.172 and without recording any say of the Judgment Debtor, the Court below issued warrant of possession. Learned counsel submits that, the Trial Court has not properly considered the application filed by the petitioner below Exh.174. Learned counsel submits that the report submitted by the Court Commissioner was not admitted by either of the parties. Learned counsel submits that, the Court Commissioner has prepared the report as per say of the Decree Holder. Learned counsel submits that, without giving any notice to the petitioner, commission was executed behind his back. The learned counsel submits that, as per judgment and decree passed in RCS No.467 of 1979 which has attained finality, it is directed that, as far as possible, the premises occupied by the parties, as per subject matter of the present suit should be allotted to their respective shares. Learned counsel submits that, it is not clear from the map that there is a

partition effected by the Commissioner keeping in mind the said directions as aforesaid. The learned counsel, therefore, submits that, the order passed by the Trial Court below Exh.172 and Exh.174 are not proper, correct and legal and the same are liable to be quashed and set aside by allowing the writ petition.

7. The learned counsel for respondent No.1A to 1F submits that, after issuance of the Commission writ vide Exh.159 dated 25.7.2014, the petitioner and respondents no.2 to 12 were given notice by the Commissioner on 29.8.2014 directing them to remain present in the commission work scheduled to be held on 19.9.2014. On the date of Commission work, the petitioner sent her sister to obstruct the said Commission work and therefore, the commission could not be executed on that day. Consequently, the petitioner and respondents No.2 to 12 were given notice by the Court Commissioner for execution of the Commission scheduled on 17.10.2014. However, the same was obstructed and therefore, the Court Commissioner was pleased to report the obstruction to the executing Court vide his report dated 17.10.2014 vide Exh.165. Learned counsel further submits that, after report of the obstruction submitted by the Court Commissioner, the respondent-

decree Holder filed an application seeking police aid which was granted by the Executing Court vide order passed below Exh.166 dated 29.11.2014.

8. Learned counsel further submits that, thereafter, the Court Commissioner issued notices to all the concerned including the petitioners and all respondents by Registered Post A.D. on 4.3.2015 informing them the date of execution of Commission work scheduled on 20.3.2015 and accordingly, on that day, the Commission was executed. Learned counsel submits that, the petitioner having lost all the hopes in three rounds of litigation, made a futile attempt by filing an application at Exh.174. Learned counsel submits that, application Exh.174 was filed by the petitioner for recalling of the order of issuance of possession warrant on two grounds: firstly - non supply of the copy of the report of the commission and non service of the notice of the execution of the commission work. Learned counsel submits that, the learned Judge of the Executing Court, after hearing both the parties, rightly rejected the application Exh.174 by impugned order dated 20.7.2015. Learned counsel submits that the respondent-decree holders are not getting the fruits of the decree since the year 1981 and in view of this the writ petition is liable to be dismissed with costs.

9. Though Respondent Nos. 4 to 7 and 9 to 12 are duly served, none appears for them.

10. I have also heard the learned counsel for respondent No.8 and the learned AGP for the respondent No.13.

11. I do not find any substance in this writ petition. The Court Commissioner has submitted his report on 17.10.2014 vide Exh.165. The Court Commissioner City Survey Officer has tendered his explanation to the Court by Exh.165 contending therein that the Commission could not be executed as the work is obstructed by the parties to the application under the pretext that they were not served with the notice. The Court Commissioner has further contended in the said application Exh.165 that, even though notices were sent to all the concerned by speed post, notices are returned to the office with the endorsement as 'refused to accept.' The Court Commissioner, City Survey Officer further informed to the Court that, some of the parties are not interested in carrying out the execution of the commission and, therefore, the Court Commission can be executed under the police aid. Consequently, the respondent-decree holder filed an application Exh.166 praying therein to provide police aid consisting women police constables to

Court Commissioner City Survey Officer while carrying out the measurement of the subject matter. Said application was opposed by the petitioner-Judgment Debtor with the contention that the Court Commissioner is trying to pressurize them by giving a false report. The learned Judge of the Executing Court while deciding the said application Exh.166 has given reference to the observations made by this court while disposing of Second Appeal No.748 of 2012 when, the appellants-judgment debtors prayed before this Court in the said second appeal to stay the order to approach the Hon'ble Supreme Court. Even at the time of disposal of the second appeal, this Court has observed that present litigation is mischievous litigation and granting further stay will be doing injustice to the decree holder. It is also observed that, original decree holder could not get the fruits of the decree though decree was passed in the year 1981. The learned Judge of the Executing Court has thus come to the conclusion that, the demarcation of the suit property is not possible without providing the police aid to the decree holder as litigation has been dragged since the the year 1981 to 2014. The learned Judge, accordingly, allowed the said application vide order dated 29.11.2014 passed below Exh.166.

12. On careful perusal of the annexures filed to the petition, as well as the reply submitted by the respondent-decree holder and the respondent no.13-the City Survey Officer, it appears that, the notices were sent to the parties concerned by the Speed Post in respect of execution of the Commission. The Commission work of the measurement of the suit property was carried out on 20.3.2015 under the police aid. It appears that the petitioner and respondent nos. 2 to 12 though served with the notice, remained absent at the time of execution of the commission. I find no substance in the submissions that the petitioner and respondents No. 2 to 12 had no notice of the execution of the commission work.

13. It appears from the Record that the Court Commissioner City Survey Officer has carried out the measurement of the suit properties demarcating the same as A,B and C by drawing panchnama and also submitted the measurement plan to the Court vide Exh.171/2 to 171/5. Consequently, the respondent-decree holder has filed an application Exh.172 for issuance of the possession warrant directing delivery of possession with the assistance of city survey officer to identify the said properties in light of his report so that the parties would get equal share in the

property. Learned counsel for the petitioners even raised his objection to the prayer clause of the application Exh.172 wherein the assistance of a city survey officer is sought for executing the possession warrant. I do not find any substance in the submission that copy of the said report should have been given to the petitioner-judgment debtor. The Court Commissioner has submitted report on 19.5.2015. However, the report bears wrong dated as 28.11.2014 and the Court Commissioner has accepted that mistake has occurred inadvertently.

14. The learned Judge of the Executing Court, while deciding the application at Exh.174 has observed that, the petitioner Judgment Debtor did not participate in the Commission work and even nobody has come forward to raise any objection when the Court Commissioner, City Survey Officer has submitted his report in the Court. There is nothing on record to show that the order below Exh.172 came to be passed on 19.6.2015 even though later date is given in the matter. This ground is also not raised by the petitioner-Judgment Debtor in his application at Exh.174. Even petitioner has not raised any ground in the application Exh. 174 that the commission was not effected as per decree. Learned counsel for petitioner has also failed to demonstrate

though report and map prepared by the Court Commissioner are placed on record, that the commission is not executed as per the decree. It appears that the application Exh.174 was filed after thought with an intention to prolong the matter. The learned Judge of the Executing Court has rightly rejected the application at Exh.174.

15. In view of the above discussion, I find no substance in the writ petition. Writ Petition is devoid of any merit. The Respondent-decree holder are not able to enjoy the fruits of the decree since the year 1981. Hence, following order.

ORDER

1. Writ Petition is hereby dismissed.
2. No order as to costs.
3. In view of disposal of writ petition, pending civil application also stands disposed of.
4. At this stage, learned counsel for petitioner submits that, the order passed by this Court may be stayed for certain period. Request stands refused.

(V.K. JADHAV, J.)

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