

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 WRIT PETITION NO. 3536 OF 2016
WITH CA/11720/2016 IN WP/3536/2016

SARDAR SURJITSINGH JEEVANSINGH GIRNIWALE
VERSUS
KACHARABAI GEETABAI RAHU GACHHE AND OTHERS

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Advocate for Petitioner : Mukhedkar Amit A. And Amol A Kokad
Advocate for Respondents : Deshmukh Charuta Sunil for R/1
Advocate for Respondents : S.S. Gangkhedkar (in C.A.)

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CORAM : T.V. NALAWADE, J.
DATE : 16-09-2016.

ORDER :

1. The petition is filed to challenge the order made in Special Darkhast No. 22 of 2004 on exhibit-211. The proceedings is pending in the court of Civil Judge Junior Division, Nanded. Both the sides are heard.

2. The execution proceedings is filed for execution of decree given in special civil suit no. 106 of 2000. The suit was filed for relief of damages which can be called as mesne profit as the defendants were in possession of the share of plaintiff and the income from the property was not given to the plaintiff. Decree was given in respect of the period mentioned in the suit and each of the three defendants were made liable to pay Rupees One Lakh each. It appears that compromise was also filed in the suit and under the compromise each defendant had agreed to make the

payment and the defendants were not to transfer the ½ portion.

3. Special Civil Suit No. 106 of 2000 was filed on the basis of decision given in the Suit No. 98 of 1993 which was also filed by Smt. Kachrabai. The said suit was filed for relief of partition and separate possession and in the year 2000 decree was given to her to the effect that she was entitled for ½ share in this property. Separate execution proceedings is filed for getting possession of the said portion by Smt. Kachrabai and the said execution proceedings is still pending.

4. The aforesaid circumstances shows that Smt. Kachrabai was entitled to get ½ share in the suit property and as she was not getting any income from the property, she had filed other suit and in that suit defendants who were in possession were directed to pay the damages in respect of use of land by them which was of the share of Kachrabai.

5. The total area of this land on gut no. 21 is 5 Hectare 35 R and Kachrabai is entitled to get ½ share in this land. No partition by metes and bounds is effected and so it can be said that Kachrabai had right to enjoy the entire property along with the defendants as they were members of the joint Hindu family, as the property belongs to joint Hindu family.

6. The submissions made and the record show that, the present petitioner is the purchaser from two defendants Gyanu and Ashok. He purchased 89 portion from each of these two brothers in the year 2005, after the decision of the partition suit. On the basis of these sale deeds the petitioner wants to assert that he is in absolute possession of the shares purchased by him of Gyanu and Ashok.

7. It appears that, in the execution proceedings filed for

recovery of the damages the other co-sharer made the payment and Kachrabai gave it in writing that the decree as against the said co-sharer was satisfied. As no payment was made by the others, application was moved by Kachrabai for appointment of court receiver in respect of the suit property. Order of the appointment was made by the executing court. The said order was challenged by filing writ petition no. 7398 of 2013 by present petitioner. It appears that, the present petitioner showed readiness to pay the amount of Rupees One Lakh and even the other amount which was of his share for satisfaction of the decree given in Special Civil Suit No. 106 of 2000. This court allowed him to make the payment and direction was given to see that after making the payment the executing court states that the decree as against the present petitioner is disposed of as satisfied. The amount of Rupees One Lakh was deposited and the remaining amount was to be calculated. In the petition the order of appointment of court receiver was challenged but no specific order was made like setting aside of the said order and aforesaid condition was put for getting the order that the decree for payment was satisfied.

8. It can be said that such order of appointment of receiver could have been made in other execution proceeding also which was filed on the basis of decree of partition. However, for making recovery of mesne profit, damages also such order could have been made as the possession of the defendants, judgment-debtors of the share of plaintiff Smt Kachrabai was apparently illegal and against the share of other defendants there was decree for recovery of some amount.

9. The petitioner has grievance that even after the decision of writ petition no. 7398 of 2013, the executing court appointed another receiver in respect of the land. Learned counsel submitted that after the decision of the writ petition, it was not possible for

the executing court to make appointment of another receiver by making order on exhibit-211 and the executing court could have only ascertained the amount due from the petitioner and the executing court ought to have disposed of the execution proceedings after asking the petitioner to deposit the said amount.

10. The aforesaid submission made for the petitioner shows that, he wants to enjoy separate possession of the property purchased by him from the original defendants of partition suit. When the parties are Hindus, the petitioner cannot directly or indirectly exclude Kachrabai from the possession of the property. By challenging the order of appointment of receiver, present petitioner, purchaser wants to see that he gets exclusive possession of the portions shown to be purchased by him. This cannot be allowed under any circumstances in view of position of Hindu law. It can be said that, proper steps ought to have been taken in other execution proceeding for Kachrabai, the decree holder in partition suit. In any case, due to such technicalities the petitioner cannot be allowed to enjoy exclusive possession of the property and that too when the decree of partition is in favour of Kachrabai.

11. After making the payment of the damages and on the basis of sale deed, present petitioner can at the most see that there is equitable partition and he gets the shares which can be allotted to his vendors in equitable partition. That is the only recourse open to him even after making payment of the amount due from the original judgment-debtors. In view of these circumstances, this court holds that there is no possibility of interference in the order made by the executing court. It also needs to be kept in mind that even after giving under taking in the compromise by the original judgment-debtors that they will not alienate the property, the sale deeds were executed in favour of the present petitioner. It further needs to be kept in mind that for recovery of the amount Kachrabai

could have gone for attachment of the property which could have come to the share of original judgment-debtors also and the receiver could have been appointed in respect of that share also to ensure that the amount is recovered.

12. In view of these circumstances, this court holds that there are no merits in the present proceeding. The writ petition stands dismissed. Civil applications disposed of.

(T.V. NALAWADE)
JUDGE