

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

**WRIT PETITION NO. 7391 OF 2016
WITH
WRIT PETITION NO. 9733 OF 2016**

Daga Shankar Ghule and Others ..PETITIONERS

VERSUS

Revabai Raman Kadam and Others ..RESPONDENTS

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Mr. G.S. Rane, Advocate h/f Mrs. C.R. Kutti Choudhary, Advocate for petitioners.

Mr. V.P. Raje, Advocate h/f Mr. C.R. Deshpande, Advocate for Respondent Nos.1 and 2.

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**CORAM : T.V. NALAWADE, J.
DATED : 21st SEPTEMBER, 2016**

ORDER :

1. The first proceeding is filed to challenge the orders made on Exhibit 78 and 80 in Regular Darkhast No. 6 of 2011 which is pending in the Court of Civil Judge, Junior Division, Taloda. The other proceeding is filed to challenge the order made on Exhibit 84 in the same proceeding by the Executing Court. Heard learned Counsels for both the sides in the first proceeding. Learned Counsel for petitioner only was heard in other proceeding.

2. The aforesaid execution proceeding is filed for the execution of the decree given in favour of respondents in Regular Civil Suit No. 21 of 1981 which was filed for relief of declaration and for possession of agricultural land bearing Gut No. 108. The decision of the Trial Court has become final as Second Appeal No. 219 of 1996 filed against the said decision is also dismissed by this Court. Application which was filed for restoration of the second appeal came to be rejected in the year 2012 and Special Leave Petition filed against the decision of this Court is also dismissed by the Apex Court.

3. The Trial Court had granted decree in respect of one of half portion of agricultural land and the decision was challenged by filing appeals by both the sides in District Court. The District Court allowed the appeal of the plaintiff and dismissed the appeal of the defendants - present petitioner and District Court gave decree in respect of remaining one half portion of the land also. In the second appeal, interim order was made by this Court and the petitioner was directed to deposit monthly amount for continuation of the stay. The amount was to be deposited from 01st August, 1994 @ Rs.1,000/- p.m. After the disposal of the second appeal, execution proceeding came to be filed in the year 2011. It appears that for few months the amount was not deposited by the judgment debtor - petitioner as per the direction given by this Court and

according to the petitioner, it was necessary to presume that the stay was vacated due to default committed by the present petitioners in making the payment.

4. In the application at Exhibit 78, the petitioner had prayed for granting permission to withdraw the amount deposited by him between 09th December, 1996 and 10th March, 2014 by contending that the decree itself is not executable as application for execution was not filed within the prescribed period of limitation. In the application at Exhibit 80, the petitioner had prayed for framing of issue with regard to limitation and for dismissal of the execution proceeding on the ground of limitation.

5. It is the case of the petitioner / judgment debtor that the interim order was made by this Court on 21st July, 1994 and prior to 25th November, 1996, three defaults were committed by the petitioner in making payments. It is the contention of the petitioner that the second appeal was also disposed of in the year 2000 but execution proceeding was filed on 10th October, 2011 and so the proceeding is not within limitation. The Executing Court has given finding that prior to 25th November, 1996 there were no such defaults as due to holidays the Court was closed on few days which were the last days of the month and so it cannot be presumed that the default was committed. The Executing

Court considered the circumstance that even after November, 1996, the judgment debtor continued to deposit the amount as per the directions of the High Court till the year 2014 and so it cannot be said that he was not enjoying the stay order and he had committed default.

6. Admittedly, till March, 2014 the judgment debtor continued to deposit the amount of Rs.1,000/- p.m. in accordance with the order made by this Court for getting stay. Thus on one hand he was enjoying the stay by showing that he was depositing the amount as per the directions of the High Court and on the other hand he is trying to misuse of circumstances like so called default committed by him in making payments as per the directions of this Court. The record shows that the present petitioner played every tactics to see that the execution is delayed. It can be said that only due to the order made by this Court in second appeal, the decree holder could not take steps for getting the execution of the decree. Persons like petitioners cannot misuse the circumstances created due to orders made by the Courts. The petitioner had opposed everything before the Executing Court. When the Executing Court was about to issue possession warrant, it was contended that the Executing Court had no power and the action like handing over the possession needs to be taken by revenue authority in view of the provision of Section 54 of the Code of Civil Procedure. This objection was rejected as the decree holders are not

seeking partition and they are interested in getting joint possession by getting the execution of the decree. The possession of the defendant – present petitioner was permissive in nature due to his close relations with the plaintiffs though he had taken defence of the transfer of property in his favour. There was no document of transfer and on the basis of one mutation made after many years of death of predecessor of the plaintiff, the defendant had come with the case of transfer.

7. The facts and circumstances of this case show that the decree holders were deprived of the right to get the possession for more than 20 years even after the disposal of the first appeal and the decree holder could not get the possession for more than 35 years from the date of the suit due to the misuse of process of law by the present petitioners. In view of the aforesaid circumstance, it cannot be said that the execution proceeding was not filed within the prescribed period of limitation. So, the application is rightly rejected by the Executing Court.

8. The contention of the judgment debtor that he is entitled to get back the amount deposited as per the order of this Court cannot be accepted. The plaintiff - decree holder will be entitled to recover the mesne profit, the compensation in respect of the use of their land by the present petitioner. Considering the area of the land, it can be said the

said amount will be huge amount and the amount already deposited @ Rs.1,000/- p.m. is a meager amount. Thus the Executing Court has not committed any error in rejecting the application filed for getting back the amount.

9. In the second proceeding the order made of issuing possession warrant by the Executing Court is under challenge. For the reasons already given, it can be said that there is no force in the challenge shown in the second writ petition. There is no other alternative before the Executing Court to issue possession warrant and see that the decree holders get the possession as soon as possible by using all the legal means. Due to aforesaid conduct of the judgment debtor, this Court holds that in Writ Petition No. 9733 of 2016, the petitioner needs to be made to pay costs of Rs.25,000/- (Rupees Twenty Five Thousands Only) to decree holder. So both the petitions stand dismissed. In Writ Petition No. 7391 of 2016, the petitioner to pay costs of Rs.25,000/- (Rupees Twenty Five Thousands Only) to the decree holder. By using this decision the decree holder can recover the amount by filing execution proceeding in the Trial Court.

(T.V. NALAWADE, J.)

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