

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

919 WRIT PETITION NO. 11153 OF 2014

BABU KARBHARI SABLE AND OTHERS
VERSUS
CHANDRABHAGABAI BABASAHEB MISAL

Shri. Rajendrreea Deshmukkh, Advocate, for petitioners.

Shri. V.D. Hon, Senior Counsel, instructed by Shri. V.B.
Anjanwatikar, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 22 SEPTEMBER 2016

ORDER:

1) The present petition is filed to challenge the order made by the executing Court in Regular Darkhast No.196/2008 (previous No.15/2006) presently pending in the Court of the Civil Judge, Junior Division, Shirur (Kasar). The execution petition is filed by Chhandrabhaga Misal one of the present respondents for execution of the decree of possession given in her favour on the basis of her title. In the said execution petition, application at Exhibit 41 was filed for following two reliefs :

(I) To refer the pursis on which there were thumb impressions of present petitioners to handwriting expert for comparison along with Vakalatnama filed for them.

(II) The declaration that the decree given in Civil Suit no.184/1990 was given against deceased defendant No.1 and so the decree is not binding on the present petitioners who are heirs of deceased defendant No.1 of the suit.

2) In the present petition one more relief is claimed and that is setting aside the order of the possession warrant made by the executing Court against the petitioners.

3) The suit was filed on the basis of title by making contention that when the plaintiff was major and defendant No.3 had no concern with the family of the plaintiff and also the property he had created false record of sale deed by showing himself as the guardian of the plaintiff. Sale deed was executed by defendant No.3 in favour of defendant No.1, predecessor-in-title of the petitioners by showing himself as a guardian of the plaintiff. The Court accepted the contention of the plaintiff that no title has passed to defendant No.1 and the suit came to be decreed.

4) It is the case of the petitioners that defendant No.1 died in September 2002 and the suit came to be decided in December 2005 when the evidence was recorded in October 2005. It is the contention of the petitioners that they were not brought on record as legal representatives of deceased defendant No.1 and no permission was sought under provisions of Order 22 Rule 4(4) of the Civil Procedure Code and so the decree is not binding on them. It is their case that behind their back pursis was filed in the execution proceeding in the year 2006 but they got knowledge about the pendency of the execution petition in the year 2013. Present petitioners had filed appeal in District Court along with application for condonation of delay. The first appellate Court has rejected the application which was filed for condonation of delay. Said decision is challenged by filing second appeal by the present petitioners in this Court.

5) The second appeal in respect of decree of possession is pending in this Court but the petitioners had requested the executing Court to give declaration that the decree is not binding on them. The first appeal was

pending in District Court as it was filed along with delay condonation application on 10-10-2013. Thus, the application for getting declaration from the executing Court itself was misconceived. Further nothing was achieved by the defendant No.1 even if it is presumed that the defendant No.1 had joined hands with one Advocate and false record of appearance of the judgment debtors, petitioners was created in the execution proceeding. Even when the appeal was shown to be filed in 2006 no order of possession warrant was issued till recently and so it can be said that only to protract the things present petitioners wanted to take such steps.

6) In the present petition, the order of possession warrant is challenged. It can be said that when possession warrant was issued on 6-9-2014, the delay condonation application came to be rejected on 22-11-2014. Thus on the date of the order of possession warrant also the first appeal was pending along with delay condonation application and stay to the execution could have been granted only by the District Court as the appellate Court and no such order could have been made by the executing

Court. Thus the prayer made before the executing Court in that regard was also misconceived. Second Appeal is now pending in this Court and so in writ petition challenge against the order of possession warrant dated 6-9-2014 cannot be entertained.

7) Even the best possible case for the petitioners is considered it can be said that there is nothing in the hands of the petitioners to contest. Defendant No.3 could not have transferred the title in the suit property in favour of defendant No.1. Defendant No.3 was neither natural guardian nor the guardian appointed by the Court. In view of these circumstances, this Court has no hesitation to observe that only to protract the things some tactics are being played by the heirs of defendant No.1. It is unfortunate that when decree was given in the year 2005 plaintiff could not get the possession due to such tactics.

8) The learned counsel for the petitioners placed reliance on the observations made by Madras High Court in the case reported as **AIR 1992 Madras 159 (Elisa v. A Doss)**. They are with regard to *ex parte* decree against

the deceased defendant. Relevant material is already quoted. The other defendant, defendant No.3 was on record and the basic challenge was against defendant No.3. Compliance of the procedure under the provision of Order 22 Rule 4 (4) of the Civil Procedure Code was not expected from the plaintiff as both defendant No.1 and defendant No.3 were strangers and the plaintiff had no knowledge about the death. Further it is not disputed that suit summons was duly served on defendant No.1 and the matter was proceeded *ex parte* against defendant No.1. It appears that the matter was proceeded *ex parte* against defendant No.3 also. These circumstances speak volume about the nature of transfer which was made by defendant No.3 in favour of defendant No.1. There are no merits in the proceeding. The petition is dismissed. Interim relief is vacated. Request for continuation of the interim relief is refused. The observations made are for the present matter only and only for considering the possibility of exercising extraordinary jurisdiction of this Court.

Sd/-
(T.V. NALAWADE, J.)

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