

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2117 OF 2016

SMT. NAGESHWARI MURUGAN VISHWAKARMA
AND ANR. ...Petitioners

Versus

M/S. SHERALI KHAN MOHAMED MANEKIA
AND ORS. ...Respondents

WITH

Writ Petition NO. 1977 OF 2016

KAMALAKAR BAJIRAO RANE ...Petitioner

Versus

M/S. SHERALI KHAN MOHAMED MANEKIA
AND ORS. ...Respondents

WITH

Writ Petition NO. 2137 OF 2016

SHRI. R.S. KUMAR ...Petitioner

Versus

M/S. SHERALI KHAN MOHAMED MANEKIA
AND ORS. ...Respondents

....

Mr. R.S. Apte, Senior Counsel a/w. Mr. Mandar Limaye and
Mahendra M. Agavekar, Advocate for the Petitioners.

Mr. P.K. Dhakephalkar, Senior Counsel a/w. Mr. P.S. Dani,
Senior Counsel a/w. Ayaz Bilawala and Siddhi Joshi i/b.
Bilawala & Co. for Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 26th FEBRUARY, 2016

P.C.

1. Heard Mr. R.S. Apte, learned Senior Counsel with Mr. Mandar Limaye, learned Counsel for the petitioners and Mr. P.K. Dhakephalkar, learned Senior Counsel with Mr. P.S. Dani learned Senior Counsel for respondent No.1, at length.

2. All these Petitions are directed against the judgment and order dated 29.1.2016 passed by learned 4th Joint Civil Judge, Senior Division, Thane below Exhibits-67, 78, 97 and 100 in Special Darkhast No.4/1999. By that order, learned trial Judge rejected the applications Exhibits-67, 78, 97 and allowed application Exhibit-100. Learned trial Judge ordered issue of separate warrant of possession under Order 21 Rule 35 of Code of Civil Procedure, 1908 (for short, 'CPC') against each of the judgment debtors on payment of separate process fee for each judgment debtors and special bailiff if prayed for possession of the vacant land for removal of encroachment and handing over possession of encroached portion to the first respondent, hereinafter referred to as 'decree holder'. Learned trial Judge also gave 30 days to enable the judgment debtors to remove encroachments and hand over vacant possession, failing which

the decree will be executed through the bailiff who shall take possession of the structure on the suit property, seal the property and thereafter caused it to be demolished and thereafter hand over vacant possession of the land to the decree holder. If execution of the possession warrant is unauthorizedly resisted by any person, in that case, the bailiff shall initiate appropriate legal action against such person for obstructing a public servant in discharge of his duties. Bailiff was also given liberty to take assistance of police for purpose of security, if requires, at the time of execution of possession warrant.

3. Writ Petition No.1977/2016 is instituted by the petitioner, hereinafter referred as to 'judgment debtor No.10'. Judgment debtor No.10 has filed application Exhibit-97 under Section 47 of CPC for dismissal of the Darkhast on the ground that decree is inexecutable.

4. Writ Petition No.2137/2016 is instituted by the petitioner, hereinafter referred to as 'judgment debtor No.7'. Judgment debtor No.7 has filed application Exhibit-78 under Section 47 of CPC for dismissal of the Darkhast on the ground that the decree is inexecutable.

5. Writ Petition No.2117/2016 is instituted by the petitioner, hereinafter referred to as 'judgment debtor No.24'. Judgment debtor No.24 has filed application Exhibit-67 for dismissal of Darkhast on the ground that the decree is inexecutable.

6. Since common question of law and facts arise in these petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised between the parties, the facts from Writ Petition No.1977/2016 are taken in a representative capacity. The relevant and material facts giving rise to filing of these Petitions, briefly stated, are as under:

7. In pursuance of powers vested under Section 20 of the Displaced Persons (Compensation and Rehabilitation Act), 1954 (for short, 'D.P. Act'), a public auction was held on 15.6.1964 for selling Survey No.34/1 admeasuring 0.36 gunthas equivalent to 36.36 square meters and Survey No.35/3 (part) admeasuring 1 Acre and 8½ gunthas equivalent to 4906 square meters (out of 2 Acres 23½ gunthas) situate at village Panchpakhadi, Thane. On 29.3.1982 the Settlement Commissioner for Compensation Pool

Properties-cum-Custodian of Evacuee Property, Maharashtra State, Bombay (for short, 'Settlement Commissioner') issued sale certificate in favour of respondent No.1, hereinafter referred to as the 'decree holder', in respect of these properties.

8. Decree holder instituted Special Civil Suit No.37/1980 in the Court of Civil Judge, Senior Division, Thane for specific performance of the contracts dated 15.6.1964 and 27.6.1964 executed by defendant No.1 (State of Maharashtra, defendant No.2 (Settlement Commissioner), defendant No.3 the Collector of Thane; for direction to defendant Nos.1 to 3 to issue sale certificate in favour of decree holder and for delivery of the vacant and peaceful possession of the suit land as more particularly described in the plaint; for direction to defendant Nos.1 to 3 to remove defendant Nos.4 to 24/judgment debtor No.24 from the suit lands who had encroached upon some portion. Decree holder also sought decree against defendant Nos.4 to 7/judgment debtor No.7, 9 and 10/judgment debtor No.10 from the receiver and for damages and mesne profits. By judgment and decree dated 4.2.1988, learned Joint Civil Judge, Senior Division, Thane decreed the suit against defendant Nos.1,

2, 3, 7, 8, 10, 11, 13, 15, and 21 to 24 jointly and severally. Defendant Nos.1 to 3 were directed to deliver vacant and peaceful possession to the plaintiff. Defendant Nos. 7, 8, 9, 10, 11, 13, 21 to 24 were ordered to deliver vacant and peaceful possession of the portions occupied by them out of the suit property of the plaintiffs. The trial Court also gave liberty to the decree holder to move High Court for taking possession of the suit property from the Court Receiver appointed by the High Court.

9. Aggrieved by this decision, judgment debtor No.10 instituted First Appeal No.767/1988 as also instituted Writ Petition No.2293/1986 under Article 226 of Constitution of India in this Court. The Writ Petition was directed against the order passed in Revision Petition No.4 of 1980 with Misc. Petition No.1 of 1980 by the Settlement Commissioner (Exh-A), a sale certificate dated 24.3.1982 issued by the Settlement Commissioner and order in Application No.1 of 1982 passed by Secretary to Government of Maharashtra, Revenue and Forest Department dated 15.11.1985. These proceedings were instituted under the Administration of Evacuee Property

Act, 1950 (for short 'E.P. Act') and D.P. Act. By judgment and order dated 22.12.2004, writ petition as also First Appeal was dismissed. Aggrieved by this decision, judgment debtor No.10 preferred Special Leave Petition which was dismissed by Apex Court on 19.2.2007. It appears that decree holder had filed application in the trial Court for appointment of the Court Receiver in Special Civil Suit No.37/1980. By order dated 3.5.1980, learned trial Judge rejected that application. Aggrieved by that decision, he preferred Appeal From Order No.221/1980. By interim order dated 22.7.1980, this Court appointed Court Receiver, High Court Bombay on suit properties consisting of land survey No.34/1 admeasuring 36 gunthas and Survey No.35/3 admeasuring 1 Acre and 8½ gunthas situate at Panchpakhadi, District Thane. The Court appointed the Court Receiver to immediately take possession of the suit property. This Court further directed that all those persons who were present at that time in actual possession of any part of the suit property either land or structure should continue to remain in possession of the same and further directed the Court Receiver to collect the rent/compensation from all the persons in actual possession, after verifying from them their present rights to

remain in possession and the Court Receiver was further directed to take suitable direction from the Court in that behalf. I am told that appeal from order was disposed of on 10.3.1983. Pending that Appeal from Order, the Court Receiver was submitting the reports to this Courts. It appears that the Court Receiver submitted report on 25.7.1980 enclosing copies of the reports dated 23.7.1980 and 25.7.1980. Court Receiver's Report No.25/2007 and Additional Report No.383/2012 in Appeal From Order No.221 of 1980 were heard together and by a common judgment and order dated 14.1.2013, the proceedings were disposed of. This Court disposed of the reports submitted by the Court Receiver. Aggrieved by that decision, decree holder instituted Civil Appeal Nos.2475-2476 of 2015 before the Apex Court. By order dated 27.2.2015, Apex Court dismissed the Civil Appeals. In para-14 of that order, it was observed that the decree holder had already put the decree in execution for recovery of possession. Apex Court, therefore, was of the opinion that the Executing Court while executing the decree may take assistance of the Receiver or by appointing new Receiver or Commissioner for effecting delivery of possession in accordance with law.

10. In the meantime, decree holder has instituted Special Darkhast No.4/1999. Initially decree holder desired to execute the decree against all the judgment debtors except judgment debtor No.10. Subsequently decree holder filed application Exhibit-45 on 23.7.2015 for amending column No.9 of Darkhast application thereby deleting the words “except defendant No.10” from column No.9 of the Darkhast Application. Said application was allowed by the trial Court. Judgment debtor No.10 instituted writ petition in this Court against that order which was also rejected. In view thereof, decree holder also has sought execution against all the judgment debtors including judgment debtor No.10. During pendency of the darkhast, applications Exhibit-67 was taken out by judgment debtor No.24. Application Exhibit-78 was taken out by judgment debtor No.7 and application Exhibit-97 was taken out by judgment debtor No.10 for dismissal of the darkhast on the ground that the decree passed in Special Civil Suit No.37/1980 is inexecutable. As against this, decree holder took out application Exhibit-100 under Order XXI Rule 35 of CPC for issuing warrant of possession. By the impugned order, learned trial Judge rejected applications Exhibits-67, 78 and 97 and allowed application

Exhibit-100. It is against this judgment and order, judgment debtor Nos.7, 10 and 24 have instituted these petitions.

11. In support of Writ Petition No.1977/2016, Mr. Apte submitted that the decree holder had purchased 1 Acre and 8½ gunthas. However, the suit property is not in existence. He invited my attention to the description of the suit property given in the Suit instituted by decree holder and in particular the Schedule of the property as given in Exhibit-A to the plaint. He submitted that perusal of Schedule-A insofar as survey No.35/3 (part) admeasuring 1 Acre and 8½ gunthas is concerned, no boundaries were mentioned. He submitted that this is fatal and did not comply the mandatory requirements of order VII Rule 3 of CPC. Order VII Rule 3 lays down that where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. He submitted that as the boundaries were not mentioned in Schedule of the property at Exhibit-A, the decree is not executable.

12. Mr. Apte invited my attention to the order dated 14.1.2014 passed by this Court in Court Receiver's Report No.25/2007 and Additional Report No.383/2012 and in particular directions sought by the Court Receiver in para-36 as also para-45 and submitted that the Court directed decree holder to obtain possession in execution proceedings. The prayer made by the decree holder to direct the Court Receiver to hand over possession in pursuance of the report submitted by him was not accepted. He also invited my attention to the boundaries given in sale certificate dated 29.3.1982. As far as boundaries of Survey No.35 are concerned, it is bounded as follows :

East – highway,

West – boundary of survey No.53,

North – boundary of survey No.34,

South – boundary of survey No.51.

13. He invited my attention to colum No.9 of Special Darkhast No.4/1999 wherein decree holder intended to execute decree against all the defendants except defendant No.10. Decree holder filed application Exh.45 under Order VI Rule 17 of CPC read with Order 21, Rule 11(2)(i and j) of CPC for amending the

darkhast. By the proposed amendment, decree holder has sought deletion of the words “except defendant No.10” from column No.9 of the Darkhast Application.

14. Mr. Apte also invited my attention to the impugned order and in particular paragraphs-17 to 20 as also map at Exhibit-108 [Exhibit-P, page-277]. He submitted that comparison of the sale certificate dated 29.3.1982 (page-64) with map at Exhibit-108 (Exhibit-P, page 277) will clearly reveal that decree holder has purchased survey No.35/3 (part) admeasuring 1 Acre and 8½ Gunthas out of 2 Acres and 23½ Gunthas having 'Highway' on the eastern side. He submitted that in the year 1997-98 this portion was acquired by Thane Municipal Corporation for road widening. He, therefore, submitted that the suit property is not in existence. As against this, judgment debtor No.10 is tenant in respect of entire Survey No.35/3 since 1939. He has also constructed a chawl and other structures which are standing in Survey No.35/3 since long and the said fact is evident from the report dated 23.7.1982 and in particular paragraph-24 thereof.

15. Mr. Apte invited my attention to the judgment and

decree dated 4.2.1988 passed by the trial Court in Special Civil Suit No.37/1980 as also decision of the Division Bench of this Court in Writ Petition No.2293/1986 and First Appeal No.767/1988. Mr. Apte submitted that as the suit property is acquired by the Corporation in the year 1997-98, decree holder cannot execute the decree and the decree is rendered inexecutable. The suit property is not in existence. He further submitted that though the decree holder had purchased 36 gunthas from Survey No.34/1, the Court Receiver took possessions of 38 Ares. Like wise, the decree holder had purchased land from survey NO.35/3 (part) admeasuring 1 Acre and 8½ gunthas out of total 2 Acres and 23½ gunthas, the Court receiver took possession of entire 2 Acres and 23½ gunthas. He submitted that unless survey No.34/1 and 35/3 (part) purchased by decree holder are de-markated, decree cannot be executed. Mr. Apte invited my attention to paragraph-19 of the impugned order which records sub-divisions of survey Nos.34 and 35 in form No.IV. Lastly, he submitted that judgment debtor No.10 is having structures in Survey No.35/3A which is not subject matter of the decree. Though these objections were raised right from the beginning in the litigation

between the parties, the same are not decided. On all these grounds, he submitted that the impugned order is liable to be set aside.

16. On the other hand Mr. Dhakephalkar supported the impugned order. He submitted that on one hand judgment debtor No.10 contends that the property is not in existence and on the other hand, he contends that the property is acquired by the Corporation. Though judgment debtor No.10 claims that suit property is acquired he has not substantiated that contention by producing any concrete material on record.

17. He has taken me through decision of this Court in Writ Petition No.2293/1986 and First Appeal No.767/1988 and submitted that this Court has held that judgment debtor No.10 has no right, title and interest in the suit property. Aggrieved by this decision, judgment debtor No.10 approached Apex Court and the SLP was dismissed by Apex Court. In short, he submitted that the finding that judgment debtor No.10 has no right, title and interest in the suit property has attained finality. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of Constitution of India.

18. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Before I consider the submissions advanced by learned Counsel for the parties, it is necessary to consider the finding recorded by the Division Bench of this Court in Writ Petition No.2293/1986 and First Appeal No.767/1988. That Writ Petition was instituted challenging the order passed by the Settlement Commissioner in Revision Petition No.4/1980, sale certificate issued by the Settlement Commissioner and order dated 15.11.1985 passed by the Secretary to the Government of Maharashtra, Revenue and Forest Department. Those proceedings were under E.P. Act and D.P. Act.

19. In para-22 of the order, the Division Bench observed that before the Settlement Commissioner, the judgment debtor No.10 herein contended that in or about May 1939 lands in question were leased out to his predecessors in title by the owners for purpose of cultivation on an annual rent of Rs.150/-. His father expired in the year 1963. Thereafter his mother also died. Necessary mutation entry was effected in the village record indicating judgment debtor No.10 as tenant of these

lands. Reliance was also placed on the decree passed in Special Suit No.73/1943 filed by one of the owners against the judgment debtor No.10's predecessor claiming that they are trespassers. It was contended that once the suit was dismissed on the basis that judgment debtor No.10's predecessors were held to be lawfully cultivating the land, there is no further proof of his rights as tenant necessary. It is on that basis that right, title and interest in the lands in question were claimed and it was contended that at the time of sale i.e. 15.6.1964 judgment debtor No.10 was in possession of the lands as tenants and they were entitled to be protected. An auction sale depriving them of protection in the lands is thus nullity and liable to be set aside.

20. In para-23, Division Bench considered the findings recorded by the Settlement Commissioner. In para-24, Division Bench considered the conduct of judgment debtor No.10. After considering the conduct of judgment debtor No.10, it was held that he could not demonstrate that he was in possession of the land at the relevant time or even at the time of auction sale and, therefore, there is no question of protecting his rights. In paras-

26 and 27, Division Bench observed thus :

“26. In his deposition in the trial court in special civil suit No.37 of 1980, petitioner once again talks of only 2000 sq.yds. In his cross examination at para 8, petitioner could not even mention the area of S.No.34/1 and S.No.35/3. On the other hand, it appears that petitioner had a small structure. Thereafter, he extended his encroachment further by constructing chawl and that fact is admitted by him, inasmuch as it is stated that the W.C. in the chawl was constructed after court receiver was appointed. A suggestion was made to him that chawl was constructed some time in 1970-72. Cross examination of the petitioner centres around his possession of suit property. Once, it is clear from the written statement that the petitioner could not substantiate the plea of tenancy over the entire land but restricted his claim to only 2000 sq.yds. which also is not proved, then, we cannot hold that the petitioner was in any manner protected.

27. In the light of the factual material before the authorities as well as before the trial court, we are of the view that they were in no error in holding that the petitioner has no right, title and interest in the property in question and he is bound and liable to deliver possession thereof to respondent No.5. The authorities as well as the trial court have gone into the materials placed before them meticulously and have given full opportunity to petitioner to make good the case set up by him. The petitioner having miserably failed to substantiate his pleas before them, we cannot now accept the case of tenancy in respect of entire property. It is clear to us that petitioner having encroached upon the property and extended his structure is squatting on the same for financial gains and only with a

view to obstruct handing over possession by the authorities to the rightful claimants. Petitioner having not objected to the auction sale and allotment of the land to Rukibai goes a long way to show that he was not in possession much less as a tenant cultivating the land. The writ petition is, therefore, dismissed.”

21. Perusal of paragraph-26 extracted hereinabove, shows that judgment debtor No.10 claims rights in respect of 2000 sq. yards. In his cross-examination at para-8, he could not even mention the area of Survey Nos.34/1 and 35/3. On the other hand, judgment debtor No.10 had a small structure and he extended his encroachment further by constructing chawl and that fact is admitted by him, inasmuch as it was stated that the W.C. in the chawl was constructed after court receiver was appointed. It was further observed that from the written statement, judgment debtor No.10 could not substantiate the plea of tenancy over the entire land but restricted his claim to only 2000 square yards which also was not proved. Division Bench, therefore, held that judgment debtor No.10 was not protected in any way.

22. In para-27 the Division Bench affirmed the findings recorded by the learned trial Judge wherein it was held that

judgment debtor No.10 has no right, title and interest in the property in question and he was bound and liable to deliver possession thereof to decree holder. It was further recorded that judgment debtor No.10 having encroached upon the property and extended his structure is squatting on the same for financial gains and only with a view to obstructing handing over possession by the authorities to the rightful claimants. Judgment debtor No.10 having not objected to the auction sale and allotment of the land to Rukibai goes a long way to show that he was not in possession much less as a tenant cultivating the land.

23. Said decision was affirmed by Apex Court by dismissing SLP on 19.2.2007. Perusal of the decision of Division Bench of this Court shows two things, namely, (1) Division Bench categorically recorded that judgment debtor No.10 has no right, title and interest in the suit property and that (2) he was not in possession of the suit property.

24. In the light of these, the submissions advanced by Mr. Apte are considered, in my opinion, said submissions cannot be reconciled together. On one hand, judgment debtor No.10

claims that suit property is not in existence and on the other hand he claims that suit property is acquired by the corporation. To substantiate the plea that suit property is acquired by the corporation no material is produced on record. That apart, the contention that suit property is not in existence cannot be accepted at all. Judgment debtor No.10 claimed tenancy over the suit property. Said claim was turned down by the trial Court and said decree was confirmed right upto Apex Court.

25. Mr. Apte further submitted that perusal of the eastern boundary in map at Exhibit-108 shows that highway is shown on the eastern boundary. In short, he submitted that said portion is acquired by the Corporation and, therefore, suit property does not exist. On the other hand, Mr.Dhakephalkar submitted that the sale certificate is issued on 29.3.1982. At that time, survey No.35 was not sub-divided and the boundaries of entire survey No.35 were shown in the sale certificate. Subsequently survey No.35/3 sub-divided into three parts, namely, survey Nos.35/3A, 35/3B and 35/3C. Survey No.35/3C is shown as road. Survey No.35/3B is shown as a

service road leaving behind survey No.35/3A. Decree holder had obtained decree against judgment debtor in respect of Survey No.35/3A. Judgment debtor No.10 did not contend in the earlier round of litigation that the suit property is not in existence. On the other hand he contested the proceedings right upto Apex Court. It is only after having failed in the earlier round of litigation, judgment debtor No.10 is raising objection so as to delay handing over possession to the decree holder.

26. As far as impugned order is concerned, learned trial Judge has noted that decree holder is entitled to possession of Survey No.34, Hissa No.2 admeasuring 37 gunthas and 30 paisa and that Survey No.34, Hissa No.3 admeasuring 60 paisa though decree holder is entitled to possession of that area it is shown as road for Thane Municipal Corporation. As far as Survey No.35/3, Hissa No.3-A admeasuring 30 gunthas and 5 paisa, and Survey No.35/3 Hissa No.3-B the decree holders are entitled to possession of 30 gunthas 5 paisa and 18 Gunthas 5 paisa respectively. Out of that, survey No.35/3 Hissa No.3-B admeasuring 18 gunthas 5 paisa is shown as for road for Thane Municipal Corporation. In para-21, learned trial Judge recorded

that the land was in possession of judgment debtor No.10 is still in existence is not acquired for road widening and accordingly overruled the objections. Learned trial Judge thereafter proceeded to consider the claim of tenancy as well as adverse possession set up by judgment debtor No.10. In para-24 learned trial Judge further recorded that encroachment of defendant is after institution of the suit, carried out on express breach of injunction and particularly when the property was in possession of the Court Receiver and consequently there is no question of the plaintiff complying Order VII Rule 3 at the time of institution of the Suit. On the other hand, learned trial Judge also observed that proper cadestrial survey was carried out which is sufficient for executing Court to understand the extent of possession of each party for execution of the decree. Learned trial Judge accordingly came to the conclusion that there is no substance in the objections raised by judgment debtor No.10.

27. As noted earlier, the issue is really concluded by the order of Division Bench of this Court dated 22.12.2004 in Writ Petition No.2293/1986 with First Appeal No.767/1988. In view thereof as also having regard to the conduct of judgment debtor

No.10, I do not find any case is made out for interference with the impugned order more so in exercise of powers under Article 227 of the Constitution of India. Hence, the Petitions fail and the same are dismissed.

28. At this stage, Mr. Apte appearing for the petitioner in Writ Petition No.1977/2016 orally applies for stay of this order for a period of 12 weeks from today. He assures that within two weeks from today the petitioners in all the Petitions along with adult family members residing with them will give usual undertaking in this Court incorporating therein that (1) they are in possession and nobody else is in possession, (2) they have so far not created and they will hereinafter neither create third party interest nor part with possession, (3) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will hand over vacant and peaceful possession of the suit property to decree holder. In view thereof, notwithstanding dismissal of the Writ Petitions, subject to the petitioners, in all the petitions, along with adult family members residing along with them in each petition filing an undertaking in the aforesaid terms, the possession warrant

shall remain stayed for a period of 12 weeks from today. It is made clear that, in case, the petitioner in each petition does not file undertaking within the stipulated period and/or commits breach of any of the conditions of the undertaking, the decree holder is at liberty to proceed with the matter in accordance with law. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)