

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

Writ Petition No. 07475 of 2017

District : Ahmednagar

Ganpat s/o. Ramchandra Raut,
Age : 50 years,
Occupation : Business,
R/o. House No. 3452, Church Road,
Khist Galli, Ahmednagar.

.. Petitioner.

versus

1. Rajendra s/o. Ratilal Munot,
Age : 61 years,
Occupation : Business,
R/o. Vijaya Residency,
Chitale Road,
Ahmednagar.
2. Kailash Balasaheb Nistane,
Age : 52 years,
Occupation : Business,
Church Road, Ahmednagar.
3. Anita Kailash Nistane,
Died through L.Rs.,
 - 3-A] Kailash Balasaheb Nistane,
Age ; 52 years,
Occupation : Business,
Church Road, Ahmednagar.
 - 3-B] Sau. Suvarna Yashwant Namde,
Age : 31 years,
Occupation : Household,
Namde Chawl, Mohan Nagar,
Chinchwad, Pune.
 - 3-C] Sau. Rani Ganesh Chanwandke,
Age : 29 years,
Occupation : Household,
Bhimnagar, Gandhinagar,
Kopergaon, Dist. Ahmednagar.

3-D] Pallavi Kailash Nistane,
Age : 25 years,
Occupation : Business,
Church Road, Ahmednagar.

3-E] Vinod Kailash Nistane,
Age : Major,
Occupation : Business,
Church Road, Ahmednagar.

.. Respondents.

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*Mr. S.S. Manale and Mr. A.M. Gholap, Advocates, for
the petitioner.*

*Mr. A.S. Bajaj, Advocate, with
Mr. S.R. Andhale, Advocate, for respondent no.01 (caveator).*

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CORAM : SUNIL P. DESHMUKH, J.

DATE : 27TH JULY 2017

ORAL JUDGMENT :

01. Rule. Rule made returnable forthwith. Heard learned counsel appearing for parties finally by consent.

02. The petitioner is before this court challenging order dated 04-05-2017 passed by Civil Judge (Senior Division), Ahmednagar, an executing court, whereunder applications of present petitioner - exhibits 113 and 116 in regular *darkhast* no. 240 of 2012 stand dismissed with a show cause notice to the present petitioner to explain as to why preliminary inquiry be not initiated under section

340 of the code of criminal procedure.

03. The petitioner is defendant no.05 in special civil suit no.158 of 2006 instituted by present respondent no.01 against respondents no.02 and 03 seeking specific performance of agreement of sale of plot bearing no. 3452 situated at Ahmednagar. The suit had been instituted contending that defendants no.03 to 08 therein were tenants of defendants no.01 and 02 in possession of one room each in suit property and defendants no.01 and 02 had agreed to deliver possession of suit property to the plaintiff upon recovery of possession from tenants.

04. While the suit came to be contested by defendants no.01 and 02, present petitioner - defendant no.05 had chosen to be away from the proceedings. Eventually, the trial court had considered that as defendants no.01 and 02 had not taken efforts to take possession from tenants, yet the plaintiff had been ready and willing to go ahead with the specific performance and purchase the property. The trial court had observed that defendants no.01 and 02 had deliberately avoided to execute the sale deed in favour of the plaintiff and had thus seemingly not made any effort to take possession from tenants. The suit was eventually decreed, clause no.02 of which reads thus :-

"2. The defendant no.01 and legal heirs of defendant no.02 are directed to execute sale deed of the suit property after accepting amount of Rs. 3,50,000/- from the plaintiff within a period of one month from today and directed to hand over possession of the suit property. "

05. Against judgment and decree dated 22nd July, 2009, defendant no.01 and legal heirs of deceased defendant no.02 had taken the matter in regular civil appeal no. 380 of 2012 wherein as well, present petitioner had not participated. Appellate court while dismissing the appeal on 19-09-2014 had observed in paragraph no.26 as under :-

" Before parting with it is to be mentioned here that the plaintiff is entitled for symbolic possession in respect of premises in possession of tenants. "

06. Regular *darkhast* no. 240 of 2012 had been in the interregnum moved against legal representatives of defendants no.01 and 02 seeking execution of sale deed and possession. Sale deed came to be executed through court commissioner in execution of decree, yet possession had not been handed over and as such, execution proceedings were being prosecuted. Application at exhibit 26 came to be moved for possession of the property described in the plaint.

07. While deciding exhibit 26, the executing court had noted that defendants no.04, 07 and 08 had filed application at exhibit 36 and third party had filed application at exhibit 39. Under order dated 04-11-2015, application - exhibit 26 had been allowed and possession warrant had been issued in respect of the property mentioned in paragraph 1 of the plaint and schedule annexed to the *darkhast*. Thereupon, it appears, bailiff had been deputed to hand over possession of suit property to decree holder. He found the property having three doors on eastern side had been locked from outside. On one of its doors paper plate having name Kishor Sarolkar had been displayed. Bailiff further found that the door on the way to go to upper rooms had been locked. While he peeked through small opening, inside on a closed door, name plate of Sadashiv Bondge was seen. Since the way for going to upper floor was locked, bailiff could not go to upper floor and since there had been no order of handing over possession to decree holder by breaking open locks, *panchanama* accordingly had been prepared. Bailiff report dated 19-11-2016 is supported by *panchanama* of even date.

08. While the bailiff went on 25-11-2015 along with *panchas*, he had been resisted by a person bearing surname Gondhale and his relatives. While the judgment debtors - defendants no.01 and 03

had been on scene, they had also asked family of Gondhale to vacate the premises, however, they had refused. Accordingly, bailiff had submitted a report on 25-11-2015 along with *panchanama* of even date. Proceedings ensued thereupon at the instance of Mr. Gondhale which went up to high court in second appeal. Resistance by said Gondhale had been turned down throughout, even in second appeal no.785 of 2016 under an order dated 01st March, 2017.

09. Present petitioner has *suo motu* presented an application dated 12-04-2017 at exhibit 113 and also filed application at exhibit 116 feeling aggrieved by order dated 04-11-2015 on exhibit 26 issuing possession warrant in respect of suit property. In both, petitioner claimed that he is in possession of two rooms, one admeasuring 12 X 10 feet on east-north facing south and the other situated having dimensions 8 X 8 feet situated middle facing east, as tenant. Resistance had been on the ground that admittedly petitioner has been accepted as tenant in possession and that the appellate court had granted only symbolic possession.

10. Said applications came to be resisted by the decree holder claiming that defendant no.05 is no longer in possession of the suit property. On two occasions, bailiff has not found petitioner in possession of suit property and had not recorded their possession. Claim of defendant no.05 has been actuated by *mala fides*. The

applications are moved in order to harass the decree holder. In the circumstances, proceedings were adjudicated.

11. The petitioner, in support of his claim, had submitted certain documents, such as, licence under Bombay Shops & Establishment Act referring to his address of suit property as well as ration card bearing said address. With reference to the same, it had been claimed that having regard to the pleadings and observations of the trial and appellate courts, he is in possession of disputed property and he has not vacated suit premises nor it is the case, after suit had been instituted or it had been decreed, possession had ever been taken from defendant no.05.

12. While resisting applications at exhibits 113 and 116, it appears that the decree holders had submitted a few documents viz.; Aadhar card and voters list showing defendant no.05 to be resident of some other place other than the disputed property.

13. The executing court, however, considered that it may not be said that defendant no.05 can be said to be in possession of disputed property having regard to the record placed in the proceedings. Documents which had been submitted in support of defendant no.05 are documents procured during pendency of the proceedings and further that there is no contemporaneous evidence

indicating, showing and proving actual occupancy of the disputed property by defendant no.05 as on the date of putting up claim under exhibits 113 and 116.

14. Court considered that there is no material placed showing occupancy of and running business by defendant no.05 in suit premises during visits by bailiff. The application was rejected and, thus, the petitioner is before this court.

15. Mr. S.S. Manale, learned counsel for the petitioner, vehemently submits that it is the decree holder's own claim that the disputed property had been in possession of tenants including defendant no.05. The trial court also found that disputed property being in possession of tenants and appellate court has confirmed the same observing that decree holder would be at the most entitled to symbolic possession of the property in possession of tenants. He further submits that over and above this, the decree holder did not intend to have actual possession of disputed property from defendant no.05. While execution proceedings were filed, defendant no.05 had not been a party. Defendant no.05, as such, was not aware of the pendency of the proceedings. While it came to his notice, immediately applications at exhibits 113 and 116 had been moved. It is submitted that the documents supporting possession have been duly placed on record, however, appreciation of the

executing court in respect of the same has been improper and the executing court had unnecessarily got swayed away by the documents like Aadhar card and voters list, while documents like licence under Bombay Shops & Establishment Act and ration card show address of defendant no.05 to be that of disputed property. The executing court had refrained itself from appreciating the same. During the course of his submissions, learned counsel has put emphasis on pleadings of decree holder and observations of the executing court. He submits, in the face of such situation, unless possession is shown to have been delivered to persons legally entitled, dispossession of defendant no.05, if any, shall be deemed to be illegal. Appreciation by executing court is erroneous and away from record. Applications at exhibits 113 and 116 deserve to be granted.

16. Mr. A.S. Bajaj, learned counsel appearing for respondent no.01 - decree holder, however, finds it difficult to go by the submissions advanced on behalf of the petitioner. He submits that the record sufficiently depicts that defendant no.05 has not been in possession of the suit property from quite a while during pendency of the suit. There is nothing to show that during pendency of execution proceedings, petitioner had been in possession. He submits that the record showing ration card and licence under the Bombay Shops & Establishment Act are obtained by making applications without

consulting and without the decree holder being informed about the same. Defendant no.05 cannot assert possession over the disputed property on the basis of the same. He submits that besides the documents are obtained during the proceedings. There is no contemporaneous other record showing actual possession of the petitioner viz.; electricity bills or any business being done over the property. He further submits that while in the suit, the plaintiff had specifically mentioned that the tenants are in possession of one room each, whereas the claim is being now made by the petitioner is of two rooms. It had never been the case of the petitioner during pendency of the suit, they were tenants in two rooms nor it was his case that he had been carrying on any business in the room. He further purports to submit that it is difficult to consider that in such a small place, defendant no.05 can be said to carry on business and reside simultaneously. In the circumstances, a proper view has been taken based on record by the executing court.

17. Mr. Bajaj further submits that the petitioner has not been occupying the disputed property is a position reinforced by findings of the executing court. Two bailiff reports vividly make it clear that defendant no.05 had not been in occupation of the suit property. He was neither seen to be occupying nor there had been indication of him running business or residing there. He submits that the bailiff found entire premises locked on one occasion from outside. There

had been no egress and ingress to the building is sufficient indication that nobody had been occupying the premises. On the other occasion it was being claimed to be occupied by third party. On that occasion, as well, it was not at all seen that defendant no.05 had been in occupation of the suit property. Third parties ultimately turned out to be stooge of defendant nos.01 and 02. After their attempt failed up to second appeal, applications at exhibits 113 and 116 have been moved.

18. Having heard learned counsel for parties, the executing court, it appears, with reference to material which has been placed before it, found that there is no credible evidence available to support the case being put up by the petitioner about him being in actual possession. The executing court has noted that there is no document produced on record by the petitioner like electricity bill, telephone bill or school record indicating that he had been doing some activity over disputed property. The suit had proceeded on the footing that it was defendants no.01 and 02 who were to take possession and hand it over to the plaintiff and further that there has been some evidence by defendants no.01 and 02 about possession having been taken over from tenants. The executing court found that defendant no.05 was residing at some other place other than the suit property. The executing court has found that while it came to execution of decree in 2014, certain other tenants had been to the

executing court purporting to resist the decree and their claim had been rejected. Taking stock of the situation with reference to the material on record, executing court appears to have considered that the case of petitioner being in actual possession turns out to be hollow and thus has rejected applications at exhibits 113 and 116. While appellate court observed about taking over of symbolic possession of property in possession of tenant, executing court found that defendant no.05 had not been in possession of tenanted premises, as such, possession is to be taken over.

19. There is no compatibility in the claim of the petitioner in exhibits 113 and 116 with the assertion in the suit which was allowed to be tried by the petitioner without taking part in the same. The petitioner does not appear to be aware of actual tenanted premises. Material on record is not supporting the claim of the petitioner. Applications at exhibits 113 and 116 claim interest in excess of the uncontested assertion. There has been disparity in the claim under applications at exhibits 113 and 116 and the one which has been in the suit. This is one more circumstance which would not lend credence to the claim. It had not been a case by defendant no.05 in the suit that he had been carrying on business in suit premises. Material on record does not show petitioner would be able to assert actual possession.

20. However, one may have to take into account, the court ought to have observed caution while passing the order directing issuing show cause notice seeking explanation as to why proceedings pursuant to section 340 of the code of criminal procedure be not initiated. May be that the petitioner is trying to vex and harass the respondent, yet while issuing show cause notice, the court ought to have seen that defendant no.05 had been trying to claim to be in possession on background of pleadings and purported to assert the same in applications exhibits 113 and 116. He may have failed to adduce sufficient evidence to support his claim but that alone is not an indication of substance in allegations by decree holder in this respect.

21. Thus, the writ petition is partly allowed. Clause 2 of the order on exhibits 113 and 116 in regular *darkhast* no. 240 of 2012 stands set aside. The writ petition succeeds to that extent. Rest of the claims and reliefs prayed for in writ petition stand rejected. Writ petition fails in respect of rest claims and reliefs.

22. Rule made partly absolute to the extent as referred to above. Rule discharged in respect of rest of the claims and prayers in the writ petition. In the circumstances, there shall be no order as to costs.

23. The effect and operation of this order stands deferred by five weeks from today at the request on behalf of the petitioner.

(Sunil P. Deshmukh)
JUDGE

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