

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

Writ Petition No. 08823 of 2017

District : Latur

1. Baswanappa Limbanappa Patankar,
Age : 72 years,
Occupation : Business,
R/o. Plot No.B-1, MIDC, Latur.
Taluka & District Latur.
 2. Sarojani Baswanappa Patankar,
Age : 66 years,
Occupation : Household,
R/o. as above.
- .. Petitioners
(Judgment debtors
no.01 & 02)

versus

1. Ramkishan Shankarrao Madne,
Age : 62 years,
Occupation : Business,
R/o. Sul Galli, Latur,
Taluka & District Latur.
 2. Yadav Vithal Shetti,
Age : 61 years,
Occupation : Business,
R/o. Hotel Pooja,
Tilak Nagar, Latur,
Taluka & District Latur.
- .. Respondents
(No.01 - Decree holder)

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Mr. P.S. Shendurnikar, Advocate, for petitioners.

Mr. P.R. Katneshwarkar, Advocate, for respondent no.01.

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CORAM : SUNIL P. DESHMUKH, J.

DATE : 18TH JULY 2017

ORAL JUDGMENT :

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

02. Petitioners purport to take exception to three orders passed on Exhibits 15, 26 and 81 by Civil Judge (Senior Division), Latur, in Regular Darkhast No. 04 of 2015. Regular Darkhast No. 04 of 2015 has been filed seeking execution of decree in Regular Civil Suit No.60 of 1994 whereunder plaintiff - decree holder has been held to be entitled to take in possession property described in plaint showing on the northern side Borwati road and beyond that MIDC area.

03. Exhibit 15 had been moved by petitioners who are judgment debtors in the execution proceedings, seeking stay to execution proceedings, having regard to the pendency of second appeal before high court and to have notice to MIDC or to appoint a cadestral surveyor. The court found that there had been no interim relief granted in the second appeal. As far as other aspects are concerned, the court found it difficult to accede to request by observing that the decree was passed relating to possession of 5 Guntha land from survey no.47 of village Khadgaon as described in the proceedings. Executing court was not supposed to go beyond

decree and notice to MIDC and measurement was not called for. Executing court, as such, rejected the application on 30-11-2015.

04. Subsequently, an application - Exhibit 26 came to be moved for a direction to decree holder to place on record map and to appoint a cadestral surveyor to measure land as per map attached with decree. Executing court had observed that since the judgment debtors have no grievance in respect of description of the property, request to call map was not necessary to be considered. The court found that when judgment debtors have no grievance as far as description of property is concerned, appointment of cadestral surveyor was not called for and already one application had been rejected for appointment of cadestral surveyor. Executing court had further observed that the second appeal which had been referred to in exhibit 15 earlier, had been dismissed. Said application also came to be rejected under order dated 02-09-2016.

05. It appears that Exhibit 81 had been moved by the decree holder seeking amendment to the execution petition with reference to description of the property and the same had been allowed under order dated 03rd May, 2017.

06. It is against aforesaid three orders, present writ petition is preferred by petitioners - judgment debtors.

07. Learned counsel for petitioners proceeds on the footing while the plaint refers to northern side of the suit property a road referred to as Borwati road whereas the execution petition refers to Warwanti Shiv and the same has been sought to be amended as Warwanti road. Learned counsel, thus, submits, it is discernible that the plaintiff - decree holder is not certain about his own property and its boundaries. In the circumstances, in the first place, the amendment is not called for as there is a sea change in description with reference to the property. While it is Borwati road in the plaint, it has become Warwanti road after amendment to the execution petition. He purports to submit that it goes to the root of the matter and renders the decree nullity. The decree holder may encroach on northern side of suit property, affecting petitioners' property lying on that side.

08. In respect of applications with regard to appointment of cadastral surveyor for measurement of the land, according to learned counsel for petitioners, there had been lot of encroachment on the property. He submits that the report of the bailiff dated 21-09-2016 eloquently brings forth the position that the suit property is not ascertainable. In purported execution, it is likely that judgment debtors may cross boundary beyond northern side of the suit property and petitioners' land situated on that side is likely to be

affected.

09. Learned counsel for petitioners refers to a public interest litigation which, according to him, is relevant. In the PIL proceedings, it emerges that width of northern side of the suit property is 33 feet and in case, decree holder purports to take possession of the property as claimed by him, it may be that they may eat away substantial portion of the road or the whole road itself and further encroach upon property of judgment debtors.

10. Mr. P.R. Katneshwarkar, learned counsel for respondent no.01 - decree holder, however, submits that the present petition is an attempt to procrastinate execution of decree and keep away petitioners from the fruits of decree being enjoyed. He submits that on behalf of judgment debtors, there have been series of attempts to prolong execution of decree on one pretext or the other. None of the attempts made by judgment debtors could be sustained in fact and in law. He submits that the decree holder does not intend to have anything more in execution of decree than the decreed property. He submits, on instructions, that the decree holder does not intend to eat into any portion of road on north side described in the proceedings. He further purports to advert to that the bailiff submitted two reports and some criminal proceedings are pending against the bailiff. Though one of the reports submitted by the bailiff

is not authentic while the other one is proper and correct.

11. After hearing learned counsel for parties and on perusal of orders passed from time to time on exhibits 15, 26 and 81, executing court appears to have taken into account relevant aspects involved in the matter. Executing court under order dated 30-11-2015 on application - exhibit 15 has observed as under :-

"6. After hearing both the sides, it reveals that by this application JD nos.1 & 2 prays for three fold prayer which include stay of the matter, issuance of notice to MIDC or appointment of cadestral surveyor. Firstly, it is the contention of JD that, second appeal is subjudice before Hon'ble High Court, so it is necessary to stay this execution proceeding. But perusal of the record that, the second appeal is on the stage of pre-admission which means that appeal is not admitted till today. It clearly shows that, mere second appeal is filed before Hon'ble High Court but it is not admitted so it cannot be said that, second appeal is subjudice before the Hon'ble High Court. Moreover, no any stay granted by the Hon'ble High Court till today. The first appeal was decided in the year 2012 but till today second appeal is not admitted so no ground made out to keep the matter stay and keep away DH from getting fruit of the decree. The citation of Hon'ble High Court which is filed by DH is applicable in the present case. In this case, mere second appeal is filed but no any further stage cross by that appeal. So it is not proper to keep the matter stay for that reason. Therefore, first prayer of JD cannot be allowed. The JD prayed for issuance of notice to MIDC and to appoint cadestral surveyor but this is not the suit, in which further proceeding can be allowed. This is merely execution proceeding and this court being executing court can only execute the decree which was passed by the court. This executing court cannot go behind the decree. As the decree is passed relating to possession of 5 Gunthas land out of sy.no.47 of village Khadgaon. This court only restricted the proceeding relating to possession of that property. So no situation occur

to issue notice to the MIDC or appoint cadestral surveyor. This is the only execution proceeding and in that proceeding it is not necessary to grant that type of prayer of JD. Therefore, in the interest of justice it is necessary to reject the application. "

12. Executing court while rejecting application - Exhibit 26

under order dated 02-09-2016 has observed as under :-

"6. The present application filed J.D. nos.1 & 2 with two fold prayer, the first prayer of JD is to direct the decree holder for submitting map which was part and parcel of the plaint. The main contention of JD is that said map is necessary to ascertaining actual situation of suit property. But JD has no objection about the boundaries of suit property. JD has also not raised any objection relating to situation of suit property. In that circumstances there is no necessity to direct the DH for submitting copy of map in this proceeding. Moreover, JD has admitted four boundaries of suit property. The detail description of the suit property along with four boundaries has been mentioned in the decree. In that circumstances, there is no necessity for submitting said map for satisfaction of the decree. Hence, the first prayer of the JD is not considerable.

7. The JD nos.1 & 2 prayed for appointment of cadestral surveyor for ascertaining actual situation of suit property. According to JD appointment of cadestral surveyor is necessary for discharge and satisfaction of the decree and this court has power to appoint cadestral surveyor u/s. 47 of C.P.C. According to section 47 executing court has power to decide all questions arising between the parties to the decree for execution, discharge and satisfaction of the decree. According to section 47 of C.P.C. if any dispute arise between the parties relating to suit property during the execution, then executing court has power to decide said question. In this application JD has not raised any objection but they merely prayed to appoint cadestral surveyor for ascertaining exact area of the suit property, but JD has admitted situation of suit property. They also admits four boundaries of that property. The JD has already filed similar application for appointment of cadestral surveyor and same was rejected. Inspite

of that he filed present application along with similar prayer. No any changes occurred during this period. Already the appointment of cadestral surveyor application was rejected. So on the same ground JD has no right to file similar application again and again. The second appeal filed by JD against the decree was dismissed. In that circumstances, it is not justifiable to keep DH from getting fruits of the decree. If this application will allowed then unnecessary delay would cause for giving fruits to the DH of that decree, it will cause injustice to the DH, when JD has admitted actual situation of suit property then no ground made out to appoint cadestral surveyor for ascertaining the suit property. The detail description along with four boundaries are given in the decree and on that basis decree can be satisfied. Hence, there is no necessity to appoint the cadestral surveyor. "

13. It would be imperative to note that Exhibit 26 did not expect notice to MIDC, giving an indication that, claim in that respect had not been further pursued.

14. While allowing exhibit 81, the executing court has observed thus :-

" It further seems from the record that, by filing the present application at Exh.76 JD no.1 & 2 have contended that, the decree holder has intentionally shown the wrong boundary towards North side of the suit property as Latur-Warwanti Shiv only to grab the property of judgment debtor, therefore, the decree holder may kindly be directed to correct or rectify the boundary stated in clause 10 of execution petition as shown in the plaint para no.1 / decree as well as boundaries shown in map in the interest of justice. However, the DH has raised objection to this application contending that, in para no.10 of the execution petition the Northern side boundary of suit property has been shown as Warwanti Shiv i.e. also called as Warwanti road, the execution of the decree may be carried as per the boundaries shown in decree and the map filed along

with plaint. And also by filing application at Exh.81 darkhast holder has sought permission to allow him to delete the word 'Shiv' in para no.10 Northern side boundary of suit land and instead of it allow him to insert word Warwanti road contending that in execution petition the Northern boundary shown as Warwanti Shiv instead of Warwanti road merely because of typographical mistake. After going through the entire record and considering the nature and circumstances of the darkhast and also considering the nature of proposed amendment in view of ratio laid down by Hon'ble High Court in *M/s. T.A. Darbar and company and others v/s. Union Bank of India*, AIR 1994 Bombay 217 and in *Gulam Mohammad Khan and others v/s. Ali Mohammad Lorihanji and others*, AIR 2007 (NOC) 565 (J.&K.) if the DH has permitted to carry out the proposed amendment as Warwanti road in place of Shiv appearing in para no.10, as prayed no right of JDs would be prejudice. On the contrary, if the application is rejected, then definitely right of DH would be prejudiced. Further as already DH has filed application for amendment at Exh.81 for inserting word Warwanti road, I am of the view that it is not necessary to give direction. DH to correct the boundaries as prayed by JDs. Considering the above said discussion, I am of the view that in the interest of justice the application filed by JD at Exh.76 deserves to be rejected and the application filed by DH at Exh.81 deserves to be allowed without prejudice to the right of JD. Hence, I answer point no.1 & 2 accordingly and in the result in answer to point no.3, I pass the following order. "

15. While allowing application - Exhibit 81, the executing court appears to have taken into account all aspects involved in the matter.

16. Having regard to aforesaid, it appears that there had been no dispute in respect of description of the property hitherto. It does not appear to be a case where intervention is called for.

17. The writ petition accordingly stands dismissed. Rule stands discharged. In the circumstances, there shall be no order as to costs.

(Sunil P. Deshmukh)
JUDGE

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