

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12477 OF 2017
(Gangadharappa Chanbasappa Chaudhari (died) and others
Vs.Jankibai Dnyanoba Patil (died) and others)

Mr.S.V.Natu, Advocate for the petitioners.

(CORAM : Ravindra V.Ghuge, J.)
DATE : 13/10/2017

PER COURT :

1. The petitioners are aggrieved by the order dated 21/07/2017 by which the Executing Court has rejected application Exh.40 which was filed by the petitioners/judgment debtors praying for recalling the order of appointment of the Court Commissioner.

2. The submissions of the learned advocate for the petitioners can be summarized as under :-

[a] On 27/02/1981, deceased Jankibai Dnyanoba Patil filed RCS No.270/1968 at Ambajogai for recovery of possession of 1 acre land. The father of the petitioner was the defendant.

[b] After the suit was transferred to the Court at Kej and renumbered as RCS No.11/1972, the suit was decreed on 27/02/1981.

[c] The petitioner was directed to deliver the possession of 1 acre land to the plaintiff and also pay the past mesne profits of

Rs.200/-. Inquiry as regards future mesne profits was directed to be made separately till the defendant delivered the possession to the plaintiff.

[d] The judgment debtor moved RCA No.50/1981 before the Appellate Court. By judgment dated 10/10/1988, the appeal was dismissed.

[e] Second Appeal No.333/1988, filed by the petitioners, was dismissed by the judgment of this Court dated 21/04/2009.

[f] The decree holder preferred Reg.Dkt.No.10/2010 for seeking execution of the decree in his favour.

[g] The decree of the Trial Court has merged with the decree of the Appellate Court and hence the Regular Darkhast cannot be maintained.

3. I find that the Appellate Court has directed the Trial Court to appoint a DILR as Commissioner in the execution proceedings for measuring the land Survey Nos. 174/A, 174/B and 174/C with a direction to carve out the encroachment of 1 acre of the plaintiff's land from survey No.174/C, draw a map and thereafter handover the possession of the said land as per the map, to the plaintiff.

4. The contention of the petitioners is that the Appellate Court has directed the Trial Court to appoint a DILR as a Commissioner. However, it is contradicted that the Trial Court cannot give the possession of the suit land to the plaintiff.

5. For ready reference, the directions of the Appeal Court are reproduced as under :-

“The appeal is dismissed with costs.

The Trial Court is directed to appoint D.I.L.R. As Commissioner in the execution proceedings for measuring the land S.No.174/A, 174/B and 174/C with a direction to carve out the encroachment of one acre of plaintiff's land from S.No.174/C of the defendant and draw the map. After the measurement and drawing of the map the possession of the suit land shown in the map drawn by the Commissioner be given to the plaintiff. Plaintiff to bear expenses of court commissioner.”

6. The learned advocate for the petitioners submits that because the Trial Court was directed to appoint a DILR as a Commissioner, the further direction to hand over the possession of the marked portion to the plaintiff, cannot be executed or implemented by the Trial Court. It, therefore, appears that on the one hand, the petitioners contend that the Trial Court should have appointed the DILR going by the language of the reproduced portion above and on the other hand, contend that the further direction that the suit land be handed over to the plaintiff cannot be implemented by the Trial Court.

7. It cannot be ignored from the observations of the Appeal Court

in paragraph Nos. 18, 20 and the reproduced portion of the order hereinabove that the Appeal Court intended that when the decree holder would initiate the execution proceedings, a Court Commissioner would be appointed for marking out the encroached portion of 1 acre of land and that portion was to be handed over to the plaintiff in the same execution proceedings. It, therefore, seems probable that the Appellate Court may have erroneously used the word "the Trial Court" instead of the words "the Executing Court" as the words "Executing Court" fit into the operative part of the order when it comes to the appointment of a Court Commissioner in the execution proceedings which would be followed by handing over of the possession of the suit land to the plaintiff in execution proceedings.

8. Considering the above, I do not find that the impugned order could be termed as being perverse or erroneous. This petition, being devoid of merit, is therefore, dismissed.

(Ravindra V.Ghuge, J.)