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

WRIT PETITION NO.10193 OF 2012

1. Pandharinath s/o Shamrao Kayande,
Age: 60 years, Occu: Agril.,
R/o Borgaon, Tq. & Dist. Jalna
2. Vasant s/o Shamrao Kayande,
Age: 45 years, Occu: Agril.
R/o Borgaon, Tq. & Dist. Jalna ..PETITIONERS

VERSUS

1. Sudhakar s/o Sawanda Kayande,
Age: 58 years, Occu: Agril.,
R/o Borgaon, Tq. & Dist. Jalna
2. Madhukar s/o Sawanda Kayande,
Age: 54 years, Occu: Agril.,
R/o Borgaon, Tq. & Dist. Jalna
3. Ashok s/o Sawanda Kayande,
Age: 50 years, Occu: Agril.,
R/o Borgaon, Tq. & Dist. Jalna ..RESPONDENTS

Mr M. V. Nagargoje, Advocate for petitioners;
Mr D. B. Shinde, Advocate holding for Mr M. S. Deshmukh, Advocate for
respondent Nos. 1 & 2

CORAM : N.W. SAMBRE, J.

DATE : 28th September, 2017

ORAL ORDER

The petitioners-plaintiffs filed Regular Civil Suit No.376 of 1992, which came to be decreed by the judgment and decree dated 3rd May, 1997, passed by Civil judge Junior Division, Jalna, with following observations :-

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- “i) The suit is decreed with costs.
- ii) The defts. are directed to put the plffs. In possession of encroached portion of 26 R land out of suit within three months from the date of this order.
- lii) A separate enquiry be held under Order 20 R. 12 of C.P.C for determining the future mesne profits from the date of institution of this suit until delivery of possession to the plaintiff.

Decree be drawn up accordingly.”

2. An appeal being Regular Civil Appeal No.84 of 1997 against the aforesaid judgment and decree before the learned District Judge suffered same fate at the behest of the present respondents. Both these judgments were subject-matter of challenge in Second Appeal No.1388 of 2014 at the behest of respondents, which came to be dismissed on 3rd April, 2009.

3. Pursuant to the decree passed in favour of the petitioners-decree holders, initiated execution proceedings being Regular Darkhast No.106 of 2004, which is pending on the file of the learned Civil Judge Senior Division, Jalna.

4. In the aforesaid execution proceedings before the learned Civil Judge Senior Division, Jalna, applications Exh.28 and 39 came to be moved by the judgment debtors, which are allowed vide order dated 12th

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September, 2012 directing the parties to the decree to get measured lands Gat No.72 and 73 and submit a report along with a map in respect of 26 R land and 14 R land said to be in possession of respective parties, with further direction to bear respective costs. Thus, the present petition.

5. Mr Nagargoje, learned Counsel appearing on behalf of the petitioners submits that the issue as regards encroachment made by the respondents, to the extent of 26 R land out of the suit property was already gone into and appreciated by the Trial Court in the backdrop of pleadings and evidence brought before it. The Trial Court as such decreed the suit on 3rd May, 1997, which decree remained un-executed for last more than twenty years. According to him, it is for the first time, the present respondents-judgment debtors are trying to avoid execution of decree by moving on applications, claiming that the present petitioners-decree holders have encroached to the extent of 14 R land. According to him, by passing the impugned order, the executing court has travelled beyond the scope of the decree and as such impugned order is not sustainable. According to him, unless there are findings recorded in execution proceedings about proving of encroachment of petitioners-plaintiffs over the land of the respondent-defendants, the executing court cannot pass order directing measurement of respective lands. He submits that the order impugned is not sustainable.

6. Per contra, learned Counsel appearing on behalf of the respondents-judgment debtors submits that the learned Trial Court has

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rightly appreciated the contentions raised by the respondents-judgment debtors. According to him, unless the lands of respective parties are measured, it will be difficult to come out with exact area of encroachment made by each of the parties. According to him, the petition is liable to be dismissed.

7. What is required to be noted is, the executing court, while passing the order impugned has considered the statement of the present respondents-judgments debtor as correct for forming an opinion that *prima facie* a case of encroachment by the plaintiffs-decree holders was made out and as such proceeded to pass an order of measurement.

8. What was expected of the learned executing court is to act strictly in accordance with the decree and not to travel beyond the scope of the decree. Even while determining the objections, if any raised pursuant to Section 47 or Order XXI, Rule 35 of the Code of Civil Procedure, the executing court is required to act with the decree. It has no power to modify the decree in execution proceedings.

9. By passing the impugned order, the executing court has exceeded its jurisdiction by ordering measurement of the lands of the respective parties so as to find out encroachment made by the petitioners-decree holders on the suit properties, to the extent of 14 R of the land of respondents-judgment debtors.

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10. Unless the respondents-judgment debtors, in an independent suit establish that petitioners-decree holders have encroached on their land to the extent of 14 R by leading evidence in the backdrop of pleadings, the executing court cannot record a finding which may result in modifying the decree. The short-cut adopted by the executing court for finding out encroachment, that too at the behest of the judgment debtors is not identified within the scheme of Section 47 or Order XXI of the Code of Civil Procedure.

11. In the aforesaid backdrop, the impugned order passed by the executing court on 12th September, 2012, is not sustainable and is liable to be quashed and set aside.

12. In that view of the matter, petition stands allowed in terms of prayer clause (B).

13. It shall be open for the respondents-judgment debtors to take out such independent proceedings as shall would be advised and available in law on the issue of encroachment of 14 R land, as claimed in the objection.

(N.W. SAMBRE, J.)

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