

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

905 WRIT PETITION NO. 1828 OF 2017

MOBIN KHAN S/O IBRAHIM KHAN AND OTHERS
VERSUS
DEELIP RAMCHANDRA MANE AND OTHERS

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Advocate for Petitioners : Mr. Kazi S.S.
Advocate for Respondent No. 1 : Mr. Mukhedkar Amit A.

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CORAM : V. K. JADHAV, J.
DATED : 15th FEBRUARY, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. This Writ Petition is directed against the orders passed below Exhibit 37 dated 05.11.2016 and below Exhibit 43 dated 28.11.2016 in Regular Darkhast No. 39 of 2005 by the Joint Civil Judge Senior Division, Parbhani and also for the direction to the learned Joint Civil Judge Senior Division, Parbhani to decide the application Exhibit 51 before proceeding to pass orders on Exhibits 37 and 43.
3. Brief facts giving rise to the present Writ Petition are as follows:

4. One Abdul Wahab s/o Haji Abdul had instituted Regular Civil Suit No. 9 of 1987 for recovery of possession and mandatory injunction in respect of land survey no. 441 situated within the municipal limits of Parbhani against one Ibrahim Khan s/o Sujat Khan. The trial court has decreed the said suit and the Regular Civil Appeal No. 5 of 2005 preferred against the said judgment and decree passed by the trial court also came to be dismissed by the District Court confirming thereby the judgment and decree passed by the trial court. Being aggrieved by the same, the said Ibrahim Khan s/o Sujat Khan preferred Second Appeal No. 182 of 2009. During pendency of the said Second Appeal, the sole appellant Ibrahim Khan died on 16.03.2015. By filing Civil Application No. 11885 of 2015 in Second Appeal No. 182 of 2009, the present respondent nos. 2-1 to 2-5 are substituted in his place as his legal heirs. This Court, by order dated 5.5.2016, dismissed the said Second Appeal. Even the Special Leave to Appeal No. 3682 of 2017 preferred by the legal heirs of Ibrahim Khan s/o Sujat Khan also came to be dismissed as withdrawn by the Supreme Court. As such, the decree of possession passed in R.C.S. No. 9 of 1987 has attained finality.

5. Meanwhile, the said Abdul Wahab s/o Haji Abdul has filed Regular Darkhast No. 39 of 2005 and during pendency of the said proceedings, Abdul Wahab s/o Haji Abdul (decree holder) has sold the suit property under a registered sale deed in favour of 1) Jagannath s/o Madhavrao Chakrawar, 2) Sachin s/o Dashrathappa Shinde and 3) Deelip Ramchandra Mane. Thereafter, out of the aforesaid three persons, two persons namely Jagannath s/o Madhavrao Chakrawar and Sachin s/o Dashrathappa Shinde sold their undivided share in the suit property in favour of respondent no.1 herein i.e. Deelip Ramchandra Mane under registered sale deed dated 12.03.2010. Accordingly, respondent no.1 herein - Deelip Ramchandra Mane has become the exclusive owner of the suit property. Even during pendency of the Second Appeal No. 182 of 2009 before this Court, the aforesaid three purchasers were added as respondent nos. 2 to 4. Thus, the respondent no. 1 herein steps in the shoes of the decree holder Abdul Wahab, who is also no more.

6. During pendency of the said execution petition, the respondent no.1 herein has filed an application Exhibit 37 to add

him as a decree holder in consequence of the rights assigned to him in respect of the disputed property by the decree holder Abdul Wahab and also in consequence of the registered sale deed executed in his favour dated 12.03.2010 by the other two purchasers. It has also been prayed in the said application Exhibit 37 that the legal representatives of the original judgment debtor Ibrahim Khn also be taken on record as judgment debtors 1/1 to 1/5. By the impugned order dated 05.11.2016, the executing court has allowed the said application.

7. Thereafter, the respondent no.1 herein, who came to be substituted as a decree holder, has filed an application Exhibit 43 for issuance of possession warrant under Order XXI Rule 35 of the Civil Procedure Code and by the impugned order dated 28.11.2016, the executing Court has directed to issue possession warrant.

8. The petitioners herein have filed an application Exhibit 51 stating therein that though there are legal representatives of late Ibrahim Khan s/o Sujat Khan (original judgment debtor) and though they are co-possessors, they are not impleaded as parties

to the execution petition and they got the knowledge of the same only when the bailiff of the court tried to execute the decree. It has also been contended in the said application that the application Exhibit 24 filed under Order XXI Rule 16 of the Civil Procedure Code to substitute the decree holder in consequence of the registered sale deed as aforesaid executed in his favour, is neither decided nor the say of the other side is called. It is thus contended that the present respondent no.1, who poses himself as a decree holder, is not competent to become a decree holder to file application Exhibit 43 for issuance of possession warrant. It is therefore, prayed in the application Exhibit 51 that the execution may not be enforced against the present petitioners.

9. The learned counsel for the petitioners submits that the original defendant, namely, Ibrahim Khan s/o Sujat Khan died on 16.03.2015 and it was incumbent on the part of the respondent no.1 herein to bring all the legal heirs of deceased Ibrahim Khan on record. However, respondent no.1 herein has failed to bring all the legal representatives on record and has only chosen to bring respondent nos. 2-1 to 2-5 on record as legal heirs of deceased Ibrahim Khan s/o Sujat Khan. Consequently, the

petitioners have moved an application Exhibit 51 before the executing court on 24.01.2017. Though application Exhibit 24 is pending and there is a long standing litigation between the parties during the lifetime of deceased Ibrahim Khan s/o Sujat Khan, respondent no.1 herein is trying to execute decree in collusion with respondent nos. 2-1 to 2-5. The learned counsel submits that the said application Exhibit 24 filed by respondent no.1 for substitution of the decree holder is not at all decided. The learned counsel submits that even in the application Exhibit 37, the respondent no.1 had mentioned the names of only respondent nos. 2-1 to 2-5 as the legal representatives of deceased Ibrahim and failed to bring on record all the legal representatives. Thus, the application Exhibit 37 itself is defective. The petitioners came to know for the first time when the possession warrant came to be issued. The learned counsel submits that the petitioners have made out a case and instead of deciding the application Exhibit 51, and without considering the grounds raised by the petitioners in the application Exhibit 51, the executing court has hastily decided the applications Exhibits 37 and 43 in favour of respondent no.1. The learned counsel submits that in terms of the provisions of order XXI Rules 99 and

101, all the relevant issues arising in the matter shall be determined by the executing court and not by a separate suit.

10. The learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on a decision in the case of *N.S.S. Narayana Sarma and others vs M/s. Goldstone Exports (P) Ltd. And others*, reported in *AIR 2002 SC 251*.

11. The learned counsel for the respondent no.1-decree holder submits that the petitioners herein are not claiming any independent right of their own and they are stepping in the shoes of deceased Ibrahim Khan against whom the judgment and decree passed by the trial court has attained finality. The learned counsel submits that it is well settled that in such a case, the court is obliged to decide such questions as would legally arise for determination between the parties. In other words, the court is not obliged to determine a question merely because the resister raised it. The learned counsel submits that in the pending Second Appeal before this court, Civil Application no. 11885 of 2015 came to be filed by the legal heirs of deceased Ibrahim Khan, i.e. respondent nos. 2-1 to 2-5 herein, for

substituting them as legal heirs and this court has allowed the said application and accordingly the respondent nos. 2-1 to 2-5 herein are brought on record in the pending Second Appeal as legal heirs of deceased Ibrahim Khan s/o Sujat Khan.

12. The learned counsel for respondent no.1 submits that so far as application Exhibit 24 filed by respondent no.1 before the executing court is concerned, the same is not-pressed by respondent no.1 by filing a pursis Exhibit 52. It has been specifically contended in the said pursis that in view of the order passed below Exhibit 37, the application Exhibit 24 does not survive and it is thus not-pressed. Even the executing Court has passed the order accepting the said pursis.

13. The learned counsel for respondent no.1 submits that basically, the execution proceeding bearing R.D. No. 39 of 2005 came to be filed by the original decree holder namely Abdul Wahab, who sold the suit property under registered sale deed dated 20.09.2005 to three persons including present respondent no.1, and thereafter, out of the said three purchasers, two of them sold their undivided share in favour of the present

respondent no.1 by way of registered sale deed dated 12.03.2010. Accordingly, respondent no.1 herein has become the exclusive owner of the suit property and stepped in the shoes of the original decree holder. In view of the same, he was arrayed as party respondent no.4 in the Second Appeal No. 182 of 2009 in the earlier round of litigation. Similarly, the legal heirs of the original judgment debtor Ibrahim Khan were also substituted as legal heirs and as such, the rights of the parties are decided and adjudicated up to this Court which is confirmed by the Supreme Court. The learned judge of the executing court has, therefore, rightly passed the impugned orders. No interference is required. There is no substance in the Writ Petition. The learned counsel also submits that the present petitioners are bound by the decree and the issues relating to the post-decree events cannot be framed. The executing court can only consider the issues which are germane to adjudication under order XXI rule 97 and not otherwise.

14. The learned counsel for respondent no.1 placed reliance on the decisions in the following two cases:

1. *Veljiben V. Satra vs Kanaiyalal Purshottamdas Shah and others*, reported in *2017 (1) Mh.L.J. 335* and
2. *Ratnakar Bank Limited vs State of Maharashtra*, reported in *2016 (2) Bom. C. R. 85*.

15. In the instant case, the petitioners are not claiming any independent title to the property and admittedly they are stepping in the shoes of deceased Ibrahim Khan, against whom the judgment and decree passed by the trial court has attained finality. It is well settled that the person in possession of the immovable property claiming legal entitlement thereto on his own right and obstructing the execution of decree of possession cannot be dispossessed till his rights are adjudicated in the appropriate proceeding and the decree holder cannot take possession unless such proceeding terminates in his favour. In the instant case, the petitioners are not claiming any independent right so as to claim legal entitlement of possession in respect of the suit property. The learned Judge of the executing court has, therefore, rightly decided the applications Exhibit 37 and 43 respectively. It appears that the present petitioners are obstructing the execution without any entitlement or without any independent right to the suit property.

16. I find no substance in the contention raised on behalf of the petitioners that the respondent no.1 is not competent to become a decree holder. It is not disputed that the respondent no.1 alongwith two other persons had purchased the suit property from the original decree holder under the registered sale deed dated 20.09.2005 and subsequent thereto, out of the three purchasers, two purchasers have sold their undivided share in the suit property to the present respondent no.1 under the registered sale deed dated 12.03.2010. The respondent no.1 herein, thus, has become the exclusive owner of the suit property. There is also no substance in the submission that before deciding application Exhibit 24, the executing court has hastily decided the application Exhibit 43. In view of the orders passed by the executing court below Exhibits 37 and 43, the respondent no.1 herein has not-pressed his application Exhibit 24 by filing a pursis Exhibit 52. It has been specifically mentioned in the said pursis Exhibit 52 that since the executing court has decided the application Exhibit 37, the application Exhibit 24 filed for the same purpose is not-pressed and may be disposed of accordingly. The executing court has passed the order on the said pursis as “seen”.

17. In view of the above discussion, I find no substance in this Writ Petition. The Writ Petition is liable to be dismissed. Hence the following order:

The Writ Petition is hereby dismissed with costs.

18. At this stage, the learned counsel for the petitioners submits that the interim relief granted by this Court may be continued for six weeks so as to enable the petitioners to approach the Supreme Court. The learned counsel for respondent no.1 submits that the decree has been confirmed by the Supreme Court by rejecting the S.L.P.

19. In view of the above, and considering the issues raised in this Petition, I do not find any reason to continue the interim order any further. The request is refused.

(V. K. JADHAV, J.)

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