

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 13577 OF 2016

Murlidhar Ravaji Tatane
Since deceased through Legal heirs
Jayantabai Murlidhar Tatane & Ors. ... Petitioners
V/s.
Devram Thama Damale (deceased) & Ors. ... Respondents

Ms. Pallavi N. Dabholkar for the Petitioners.
Mr. C.G. Gavnekar a/w Mr. Subhash Deokar for Respondent No.3.

CORAM : V.L. ACHLIYA, J.

RESERVED ON : 19th JANUARY, 2018.

PRONOUNCED ON : 28th MARCH, 2018.

PC. :

1 The petitioners has filed this Petition under Article 227 of the Constitution of India challenging the order dated 01.04.2016 passed in Execution Application No.38 of 2006 by the Joint Civil Judge, Junior Division, Sinnar, District Nasik.

Facts in brief :

2 In view of the limited challenge raised in the Petition, it is not necessary to discuss the facts in detail. Petitioners are the original plaintiffs and the respondents are the original defendants in R.C.S. No.97 of 1973 filed by the petitioners in the Court of Civil Judge, Junior Division, Sinnar, in respect of agricultural land bearing Survey Nos.10/1, 11/1, 10/3(11/3)

12/2 (13/2) situated at Kasabe Sinnar, Tal. Sinnar District Nashik. The suit was filed seeking decree for injunction in respect of said property. The respondents resisted the Suit claim by filing written statement and also made counter claim. By the judgment and order dated 30.06.1992 passed in said suit, the learned Civil Judge, Junior Division dismissed the suit as well as counter claim. Against the said judgment, the respondents preferred appeal before the District Court, Nasik, which was registered as Regular Civil Appeal bearing No.92 of 1993. The appeal was allowed to the extent of counter claim of the respondents. By the decree passed the Petitioners were directed to handover the possession of suit land to respondents. In order to execute said decree, the respondents filed execution proceeding on 16.12.2000 which was registered as Execution Application No.70 of 2001. On 18.06.2005, the said application was dismissed in default of the respondents. On 12.09.2006, the respondents without disclosing the fact of dismissal of earlier execution application, filed another application seeking execution of said judgment and decree which came to be registered as regular Execution Application No.38 of 2006. The respondents filed application seeking warrant of possession of suit property. The petitioners appeared and filed reply to said application. The said application seeking possession of warrant came to be disposed of by order dated 01.11.2007 passed in favour of petitioners.

3 The petitioners challenged the order dated 01.11.2007 by filing Writ Petition No.3810 of 2008 which was heard and disposed of by this Court (Coram : Shri A.M. Khanwilkar, J.) vide order dated 02.04.2009. During the course of hearing of said application, the petitioners raised objection as to maintainability of regular darkhast No.38 of 2006 with contention that the respondents could have got restored the regular darkhast No.70 of 2001 which was dismissed in default. In order to avoid the controversy, the learned counsel for the respondents made a statement before the Court that the respondents will be advised to pursue the regular darkhast No.70 of 2001 by seeking recall of order dated 18.06.2005 and in that case the respondents may not pursue regular darkhast No.38 of 2006. He further submitted that the statement to that effect would be made before the executing Court and appropriate orders would be invited in regular darkhast No.38 of 2006. In view of the statement made by the learned counsel representing the respondents, this Court disposed of the writ petition No.3810 of 2008. Subsequent to the order dated 02.04.2009 passed in writ petition No.3810 of 2008, the respondents made an application before the Court of Joint Civil Judge, Junior Division, Sinnar, District Nasik, vide Exh. 50 seeking restoration of regular darkhast No.70 of 2001. After giving an opportunity of hearing to the petitioners, the application (Exh. 50) was allowed vide order dated 18.09.2014. Regular

darkhast No.70 of 2001 came to be restored to file. In the year 2016, the petitioners have filed an application u/s.151 of the Civil Procedure Code seeking recall of order dated 18.09.2014 passed below Exh. 50 and to reject the application Exhibit 50. The learned Joint Civil Judge, Junior Division, Sinnar, vide impugned order dated 01.04.2016 rejected the application filed by petitioners. Being aggrieved the petitioners/ judgment debtors have preferred this petition.

3 Heard the learned counsel for the petitioners as well as the learned counsel representing the respondents and perused the impugned orders as well as the order dated 02.04.2009 passed in writ petition No. 3810 of 2008.

4 Learned Counsel for the petitioners assailed the impugned order with contention that the order dated 18.09.2014 passed below Exh.50 was obtained by misinterpreting the order passed in writ petition No. 3810 of 2008. By referring the order passed in writ petition No.3810 of 2008 it is pointed out that in the order passed it is nowhere directed the Trial Court to restore the earlier execution application. Still the respondents have filed application as if this Court has directed the restoration of Execution Application No. 70 of 2001. In this background the learned Counsel urged

to set aside the impugned order.

5 On the other hand learned counsel appearing for respondent Nos.1 to 3 supported the impugned order passed. It is pointed out that the order dated 18.09.2014 allowing the application Exh. 50 and restoring the Execution Application No.70 of 2001 was passed after giving opportunity of hearing to the petitioners and same has attained the finality. In this context, learned counsel has invited attention of the observations made by the trial Court in paragraphs 4 and 5 of the order passed, which reads as under :-

“4 On the other hand, the learned advocate of decree holders has submitted that entire submissions of judgment debtors are causing contempt of court. All order passed at exh.50 shows judgment debtors availed full opportunity to reply. Last order at exh. 50 is consistent with direction of Hon'ble Bombay High Court in aforesaid writ petition. However, these judgment debtors have filed present applications by raising false and untenable technical points and submissions. Under these circumstances, there is no reason to set aside order dated 18.09.2014 at exh. 50 or reject entire application at exh. 50.

5 **Considering entire submissions and perusal of record, it appears that, application at exh. 50 was filed by decree holders on 13.03.2014. At that time, decree holders have filed order of Hon'ble Bombay High Court in aforesaid writ petition. On that day, the learned advocate of judgment debtors was present, as revealed from roznama dated 13.03.2014. Thereafter, matter was adjourned on 19.03.2014, 20.03.2014, 30.04.2014, 10.07.2014, 24.07.2014, 21.07.2014 and 18.09.2014. During these dates,**

matter was kept for say of judgment debtors, from 30.04.2014 till 24.07.2014. On 24.07.2014, advocate of judgment debtors was present. On rest dates, judgment debtors and their advocate absent for best reason known to them. Thereafter on 18.09.2014, order at exh. 50 was passed after hearing argument of decree holders. All these facts are revealed from roznama of this case. So, it is clear that neither judgment debtors have filed say and argue upon exh. 50 nor proceed with this case during priod from 13.03.2014 till making these application at exhs.51 and 52, despite of full knowledge of application at exh. 50 and document filed therewith since 13.03.2014. Therefore, all submissions of judgment debtors that they did not know about application at exh. 50 till 11.12.2014, is absolutely contrary to record of this case and therefore same is not acceptable.”

6 It is further pointed out that by the present petition, the petitioners have challenged the order dated 01.04.2016 rejecting the application filed u/s. 151 of Civil Procedure Code seeking recall of the order dated 18.09.2014. It is further pointed out that the order dated 18.09.2014 passed by the trial Court to restore the Regular Darkhast No.70 of 2001, is not challenged in the instant petition. In this background it contended that no case is made out to call for exercise of writ jurisdiction under Article 227 of the Constitution of India.

7 On due consideration of submissions advanced, I am of the

considered opinion that no case is made out to call for exercise of writ jurisdiction under Article 227 of the Constitution of India to interfere with the impugned order. It is quite settled position in law that the supervisory jurisdiction under Article 227 of the Constitution of India cannot be restored unless the order passed by the trial Court is found to be without jurisdiction or perverse or arbitrary. When the order passed by the trial Court is found to be based upon sound consideration of law and fact it cannot be interfered in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. In my view, the order passed by the trial Court is reasoned and well within the jurisdiction vested with the trial Court. There is absolutely no perversity or arbitrariness in exercise of powers of the trial Court.

8 If we consider the order dated 02.04.2009 passed in writ petition No.3810 of 2008 then the petitioners themselves made submission before this Court that the Regular Darkhast No.70 of 2001 which was dismissed in default can be restored. Considering the statement came to be made that respondents would pursue the remedy to seek the restoration of Regular Darkhast No.70 of 2001 and they will not pursue Regular Darkhast No.38 of 2006, the application Exh. 50 seeking restoration of execution came to be filed and name has been allowed vide order dated 18.09.2014. The said order has attained the finality.

9 The application seeking restoration of Execution Application No.70 of 2001 came to be allowed vide order dated 18.09.2014. The order was passed after due opportunity of hearing to the petitioners. In the impugned order the Trial Court has observed that the application Exh. 50 was presented on 13.03.2014. Thereafter the case was adjourned on 19.03.2014, 20.03.2014, 30.04.2014, 10.07.2014, 24.07.2014, 21.07.2014 and 18.09.2014. During the period 30.04.2014 to 24.07.2014 the matter was kept for say of judgment debtors/petitioners. Thus, the order dated 18.09.2014 has been passed after giving full opportunity of hearing to petitioners. It is recorded in the order that the petitioners have not objected the application Exh.50. The order dated 18.09.2014 passed by the trial Court was not challenged by the petitioners and same has attained the finality. In the instant petition also the petitioners have not challenged the order dated 18.09.2014. By the present petition, the petitioners have challenged the order rejecting the application filed by the Petitioners u/s. 151 of the Code of Civil Procedure seeking recall of order dated 18.09.2014 passed below Exh. 50. Thus, in absence of challenge to order dated 18.09.2014 the petitioners are not entitled to any relief in the present petition. The petition is devoid of merit and substance therein. Accordingly, the petition is dismissed with no order as to costs.

(VL. ACHLIYA, J.)