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

WRIT PETITION NO.13876 OF 2017

Ramesh Subrao Shinde and ors ... Petitioners.

V/s.

Abdul Samad Noormohammad

Mulani andors ... Respondents

Mr. Manoj A. Patil, for the Petitioners.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 9th JANUARY, 2018.

P.C. :

1] Heard learned counsel for the Petitioners, finally at the stage of admission itself.

2] By this petition, filed under Article 227 of the Constitution of India, the petitioners are challenging various orders, passed by the Executing Court - 3rd Joint Civil Judge Junior Division, Kolhapur, below Exh.181, 176, 140, 119, 131 and 135 in Regular Darkhast No.63 of 2000, passed on the different dates and last such order being passed below Exh.181 on 25.9.2017, requesting the Court to recall the order passed below exh.119 on 31.10.2014. Thus, it is clear that infact the impugned order which the petitioners are challenging is the one passed below Exh.119 on 31.10.2014. It is pertinent to note that the

said order was not challenged by the petitioners when it was passed, but petitioners had thereafter filed various applications including this application at Exh.181 for recalling the order passed below Exh.119.

3] The case of the petitioners is that they are the judgment debtors in Regular Darkhast No.63 of 2000, filed by respondent – decree holders for specific performance of the contract. The suit property is bearing City Survey No.827-A admeasuring 4.2 sq. meters and C.T.S.No.872 admeasuring 67.53 sq. meters, situated within the limits of Kolhapur Municipal Corporation. According to them Respondent No.1 has filed R.C.S.No.651 of 1986 for specific performance of the agreement of sale dated 30th October, 1977 in respect of the suit property against the original defendant Nos. 1 to 3 namely the present respondent Nos. 2 to 4. The predecessor of the present petitioners was impleaded as defendant No.8 in the suit. The said suit came to be decreed on 23rd August, 1999.

4] The said suit was contested by the predecessor of petitioners contending inter alia that he was in possession of the suit property as a mortgagee from the true owners. It was also contended that true owners -respondent Nos 2 to 4 had filed R.C.S.No.683 of 1979 against the petitioners for redemption of the mortgage and possession. It was also decreed in 1986.

5] It is further case of petitioners that the predecessor of the

petitioners challenged the judgment and decree dated 23.8.1999 passed in R.C.S. No.651 of 1986 in Regular Civil Appeal No.356 of 1999 and the respondent Nos 2 to 4 had also filed Regular Civil Appeal No.400 of 1999. Both the appeals came to be dismissed by the First Appellate Court, by order dated 4.4.2008.

6] The petitioners preferred Second Appeal No.475 of 2008, challenging the said judgment and order passed by the first Appellate Court and this Court after hearing the parties, vide its judgment and order dated 27.8.2008, dismissed the Second Appeal. Thereafter respondent No.1 has filed present Execution Proceeding bearing Regular Darkhast No.63 of 2000.

7] In the said Execution Proceeding, respondent No.1 filed Application at Exh.119 seeking permission to deposit an amount of Rs.5,000/- pursuant to the directions of this Court in Second Appeal No.475 of 2008 and prayed for possession of the suit property. This application came to be resisted by the petitioners pointing out that respondent No.2 has already filed R.C.S.No. 683 of 1979 against the predecessor of the petitioners. The said suit was decreed on 17.3.1986 and respondent No.2 was directed to pay an amount of Rs.5,000/- on or before 30th June, 1986 and take possession of the suit property. However, the said amount was not paid by respondent No.2 to the petitioners within time, therefore, there was no

compliance of the decree on his part. The limitation for compliance of the decree was over, therefore, the reliefs sought below Exh.119 cannot be granted.

8] Further it was contended that on 15.11.1988, respondent Nos. 2 to 4 had executed an agreement of sale in favour of the predecessor of the petitioners and a suit for specific performance of the same, bearing R.C.S.No.1564 of 2000 is also pending in the Court. Hence on this ground also execution proceedings are not tenable.

9] According to learned counsel for the petitioners, the Executing Court, however, after hearing learned counsel for both the parties, vide its impugned order dated 31st October, 2014, allowed the application below exh.119 and being aggrieved thereby the petitioners filed application Exh.181 for recalling of the said order. However, the Executing Court vide its impugned order dated 25.9.2017, rejected the said application. Prior to that, also petitioners had filed Application Exh.140 for recalling the order passed below Exh.119.

10] The petitioners have also filed application at Exh. 131 contending that the predecessor of the petitioner was tenant in the suit property and hence issue of tenancy also needs to be adjudicated. The Executing Court rejected the said application vide order dated 7.4.2015.

11] Thereafter the petitioners filed application Exh.145 for calling certain documents. The Executing Court rejected the said application also.

12] All these orders are challenged in the present writ petition.

13] Thus even a cursory glance to the various applications filed by the petitioners before the Executing Court, is more than sufficient to show that every attempt is made by the petitioners who are the judgment debtors to somehow or other to deprive the respondent No.1 from getting the fruits of the execution of the decree.

14] It is pertinent to note that the decree which was passed and confirmed in the Second Appeal No.475 of 2008, by this Court, clearly goes to show that the said judgment was passed by this Court with the consent of the learned counsel for the parties. The relevant observations of this Court in paragraph No.5 of the said judgment read thus :-

“5. From the facts and circumstances noted above, it is clear that the defendant No.8 is in possession of the suit property as a mortgagee from the defendant No.1 and for the redemption of the mortgage and possession, already the decree has been passed in 1986 in favour of the defendant No.1 in Regular Civil Suit No.683 of 1979. The

plaintiff and the defendant Nos. 4 to 6 in the present litigation are entitled to get the decree for specific performance against the defendant Nos. 1 to 3. Defendant No.1 has filed an appeal against judgment of the District Court. Thus, the said judgment and decree have become final about execution of the sale deed. As per the said decree, plaintiff and defendant Nos. 4 to 7 would step into the shoes of the vendor i.e. defendant No.1 and thus, in relation to the defendant No.8, they would be in position of the mortgagers. As such, they can claim possession of the property by redeeming the mortgage as per the law. In view of this after some discussion, the learned counsel for the parties consented that the paragraph 5 of the final order passed by the trial Court may be modified as follows :-

“5. On execution of the sale deed as per this decree, the plaintiff and the defendant Nos. 4 to 7 shall be entitled to redeem the mortgage and get possession from the defendant No.8 as per the law as if they step into the shoes of the defendant No.1, the original mortgager”.

(emphasis supplied)

15] Thus, modification was made in the final order passed by the trial Court with the consent of learned counsel for both parties and as per said order, it was clearly directed that on execution of the sale deed, as per this Court's order, plaintiff and defendant Nos. 4 to 7 shall be entitled to redeem the mortgage and get possession from the

defendant No.8, as per law as if they step into the shoes of the defendant No.1, the original mortgager.

16] In view thereof, respondent No.1 on the basis of decree passed in R.C.S. No.651 of 1986, made application before Executing Court for permission to deposit an amount of Rs.5,000/- in order to get possession of the suit property. The Executing Court has, after considering the above said judgment and order by this Court in Second Appeal No.475 of 2008, permitted the respondent No.1 to deposit the said amount of Rs.5,000/- and this order is now sought to be recalled by filing various application at Exh.131, 140 and 181. The perusal of the order passed by the Executing Court below Exh.119 clearly goes to reveal that Executing Court has adverted to the fact that after taking into consideration the judgment in R.C.S.No.651 of 1986 and 683 of 1979, this court has modified the decree while disposing of the Second Appeal No.475 of 2008. In consonance of the said order, Respondent No.1- the Decree Holder was rightly permitted by the Executing Court to deposit an amount of Rs.5,000/- by allowing application at Exh.119.

17] It is pertinent to note that none of the party has challenged the decree passed by this Court in Second Appeal No.475 of 2008. Hence, if in execution of such modified decree, respondent No.1 was permitted to deposit an amount of Rs.5,000/- in the Court,

no fault can be found in the impugned order passed by the trial Court, below Exh.119 so as to recall the same by application at Exh.140 or by application at exh.181.

18] There is also no substance in the contention of the petitioners that their possession is of tenant as such contention was not at all raised at earlier stages and neither any material is produced to substantive. Hence the executing court has rightly rejected the said application at Exh.131.

19] Thus, there is hardly any substance in the Writ Petition filed by the petitioners. The only inference which the Executing Court has rightly drawn is that these are the last ditch attempts made by the petitioners to protract and prolong the delivery of the possession of the suit property to the respondent decree holder.

20] Therefore, Writ Petition has to be dismissed and accordingly stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]