

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

WRIT PETITION NO.13974 OF 2018

**KAMAL MOHANLAL AJMERA AND ANOTHER
VERSUS
SAYED AHMED HUSSAIN DIED THR LRS SYED ABBAS
HUSSAIN AND OTHERS**

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Advocate for the Petitioners : Shri M. M. Patil (Beedkar)
Advocate for Respondent Nos. 1-1, 1-2, and 2 : Shri S. G.
Chapalgaonkar

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 10th JANUARY, 2019.

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PER COURT :

1. When this Court passed an order on 17/12/2018, the submissions of the learned Advocate for the petitioners were recorded in the order as under :-

"1. *Heard the learned counsel for the petitioners.*

2. *The learned counsel for the petitioners submitted that on the application made by the respondent-decree holder, the learned Civil Judge on 22 September 2017 has opined that to effectuate the present decree it is necessary to bring the actual facts on record and to appoint the Commissioner. He submitted that after the application is disposed of, the respondent-decree holder had placed an endorsement "not pressed" on 13 February 2018. He submitted that the application has already been allowed and therefore, the Commissioner be appointed to give effect to the earlier order.*

3. The petitioners will give notice to the respondents and file affidavit of service. Stand over to 10 January 2019.

4. In case the next date in the execution proceeding is before the date assigned to this petition, the executing court will grant necessary adjournment."

2. I have heard the learned Advocates for the petitioners/judgment debtors and respondent Nos. 1-1 and 1-2, who are the decree holders.

3. There is no dispute that the decree holders have succeeded up to the Honourable Supreme Court and the claim of the judgment debtors has been rejected. The execution proceedings are in progress in relation to the decree which is dated 03/02/1999.

4. The issue before this Court is as regards an application filed by the decree holders below Exhibit 48 in Regular Darkhast No. 5/2004, seeking appointment of a court commissioner. By the order of the executing Court dated 22/09/2017, the said application was allowed and the following directions were issued :-

- "1. *The application is allowed.*
2. *Advocate Shri D. G. Gavhane is hereby appointed as Court Commissioner to inspect the property as mentioned above and to submit his report about the encroachment.*
3. *He is further directed his report on or before 13/10/2017.*
4. *The Decree Holder is directed to deposit Rs. 2,000/- as Court Commissioner Fee in the court.*
5. *Issue Commission on P.F."*

5. It is the contention of the decree holders that they have deposited the amount of Rs. 2,000/- before the executing Court on 27/09/2017. As the order of the executing Court dated 22/09/2017 was not brought into effect, the judgment debtors preferred an application Exhibit 70 on 17/11/2018 (after 14 months) praying for a direction to the decree holders to have the order implemented. By the impugned order dated 17/11/2018, Exhibit 70 has been rejected by the executing Court.

6. The grievance of the judgment debtors is that once the order of appointment of a court commissioner is issued, the Darkhast proceedings should not proceed until the order is

complied with. Until the court commissioner submits his report subject to the further rights of the judgment debtors, the executing Court should not proceed with the execution proceedings. It is also contended that the decree holders are obliged to implement a judicial order and the statement made by the decree holders before the executing Court that Exhibit 48 is not pressed, cannot be sustained after Exhibit 48 had already been decided.

7. The learned Advocate for the decree holders submits that Exhibit 48 was filed after the decree holders noticed that there are some temporary structures like a tin shed having been erected on the suit property. The said application was filed seeking appointment of a court commissioner to determine the extent to which such temporary structures or encroachment have been done. The amount of Rs. 2,000/- was also deposited as per direction. However, for reasons known to the commissioner, who is a practicing advocate, he declined to accept the said assignment and hence the order could not be implemented. With the passage of time, the decree holders noticed that no purpose will be served by

appointing a court commissioner as they can acquire the possession of the decreed property with the assistance of such machinery as is permissible under the Code of Civil Procedure.

8. I find that the executing Court had directed an advocate to perform the role of a court commissioner and submit his report on or before 13/10/2017. The advocate, so appointed had a change of thought and declined to accept the said assignment. The amount of Rs. 2,000/- was also deposited by the decree holders on 27/09/2017. The report of the court commissioner was to be submitted on or before 13/10/2017.

9. If the beneficiary of the order of appointment of the court commissioner subsequently does not desire to proceed and since the executing Court had given a deadline, the order of the executing Court beyond the deadline was, therefore, inoperable. If at all the decree holders wanted to implement the said order, they were required to file an application seeking enlargement of time under Section 148 of the Code of Civil Procedure. Neither such an application has been made, nor has the decree holder approached the executing Court with

a request to implement the said order. On the one hand, the advocate has shown his reluctance and on the other hand, the decree holder subsequently lost interest and did not desire to go ahead with the permission for the appointment of the court commissioner that was granted.

10. In the above backdrop and after considering that the execution proceedings are more than 14 years old and since the appointment of a court commissioner was an issue which was at the behest of the decree holders, I find that the executing Court was right in concluding that Exhibit 70 was not required to be filed and did not deserve to be entertained. As such, 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.

11. It is often said that lesser time is required to earn a decree from the competent court and it is a herculean task to get the decree implemented. This case is also one such example. Though the execution proceedings were lodged in 2004, the same are yet to attain finality in 2019.

12. In view of the above and since the proceedings are more than 14 years old, I deem it appropriate to direct the executing Court to ensure that the execution proceedings are concluded as expeditiously as possible and in any case, on or before 31/05/2019. If any of the litigating sides files an application for adjournment and if the said application appears to create obstacles in the expeditious disposal, the executing Court would be at liberty to reject such application by imposing costs.

(RAVINDRA V. GHUGE, J.)

shp/-