

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

904 WRIT PETITION NO.11520 OF 2019

1. Dr. Keshav S/o Tularam Pradhan
Age: 72 years, Occupation: Medical Practitioner
At present near West Glamorgan
United Kingdom

... Petitioner
(Orig. Decree Holder)

Versus

- . Sitaram S/o Tularam Pradhan
Since deceased through his
Legal representatives
1. Smt. Suman W/o Sitaram Pradhan
Age: 60 years, Occu: Service
R/o: Sudarshan, Bhadkal Gate,
Taluka & District Aurangabad
2. Smt. Vidya D/o Sitaram Pradhan
Age: 46 years, Occu: Service
R/o As Above
3. Smt. Vaishali D/o Sitaram Pradhan
Age: 40 years, Occu: Service
R/o As Above
4. Smt. Vijaya W/o Niraj Vikhedkar
Age: 38 years, Occu: Service
R/o Pitru-Matru Prem
Nandanwan Colony
Taluka & District Aurangabad
5. Smt. Charulata W/o Jitendra Magar
Age: 36 years, Occu: Household
R/o: Sudarshan, Bhadkal Gate,
Taluka & District Aurangabad
6. Smt. Malini D/o Sitaram Pradhan
Age: 32 years, Occu: Service
R/o As Above

7. Rajan S/o Sitaram Pradhan
Age: 30 years, Occu: Service
R/o As Above

... Respondents

...
Mr. P.R. Katneshwarkar, Advocate for the Petitioner
Mr. K.C. Sant, Advocate for Respondent Nos.1, 5 to 7
Mr. S.R. Barlinge, Advocate for Respondent Nos.2 & 4
...

CORAM : V. K. JADHAV, J.
DATED : 13th February, 2020

ORDER :-

1. Heard finally with consent of the parties at admission stage.

2. The petitioner is the original plaintiff/deGREE holder. The petitioner/plaintiff has instituted the suit bearing Special Civil Suit No.23 of 1993 for declaration and specific performance of contract before the Civil Judge (Senior Division) Aurangabad. However, by judgment and order dated 31.03.1987, the Civil Judge, (Senior Division) Aurangabad has decreed the suit with costs and thereby declared the petitioner/plaintiff as the owner and the defendant as a (Banamidar) and ostensible owner for the plaintiff with respect to the suit property and further directed the defendant to execute a conveyance deed in favour of the plaintiff, so as to vest title in him. The plaintiff to get possession of the suit property within three months from the date of the judgment

and the defendant is restrained to transfer the property by way of mortgage, exchange, assignment etc. in favour of anybody. Being aggrieved by the same, the defendant/Sitaram Tularam Pradhan (deceased) had preferred Regular Civil Appeal No.390 of 2000 before the Extra Joint District Judge, Aurangabad. By judgment and order dated 13.03.2002, the learned Extra Joint District Judge, Aurangabad dismissed the appeal with costs, with the modification of the decree to the extent that the declaration made in favour of the plaintiff to be Benamidar of property is hereby withdrawn and further confirmed the rest of the decree of the trial Court.

3. The respondents are the legal heirs of deceased Sitaram Tularam Pradhan have, thereafter, preferred Second Appeal No.242 of 2002 before this Court and this Court (Coram: R.M. Borde, J.), by judgment and order dated 12.03.2010 rejected the Second Appeal. The respondents herein have preferred Special Leave Petition No.21237 of 2010 before the Supreme Court and the Supreme Court by order dated 25.08.2010, dismissed the Special Leave Petition. Thereafter, the respondents preferred Review Petition No.1891 of 2010 before the Supreme Court. However, by order dated 09.12.2010, the Supreme Court has dismissed the Review Petition. Thus, the decree passed by the trial Court and modified by the appellate court has attended the finality.

4. The petitioner has filed Regular Darkhast No.72 of 2002, which was subsequently re-numbered as Regular Darkhast No.220 of 2012. In the said Regular Darkhast No.220 of 2012, the petitioner/deed holder has filed an application (Exhibit-43) under Order XXI Rule 34 of the Code of Civil Procedure requesting for execution of the deed of conveyance read with Order XXI Rule 35 of CPC with possession warrant in respect of the suit property and also submitted along with application (Exhibit-43) the draft document of conveyance deed to be executed by the respondents/judgment debtors. The respondents/judgment debtors filed their Say overleaf the application. The respondents/judgment debtors have raised various objections including the objection about draft conveyance deed. However, by order dated 06.07.2018 below Exhibit-43 in Regular Darkhast No.220 of 2012, the learned Judge of the Executing Court allowed the application with certain directions.

5. Being aggrieved by the same, on 27.07.2018, the respondents/judgment debtors have preferred the Regular Civil Appeal No.147 of 2018 before the learned District Court, Aurangabad and the learned District Judge-6, Aurangabad, by judgment and order dated 20.06.2019, allowed the appeal and set aside the order passed by Executing Court below Exhibit-

43 in Regular Darkhast No.220 of 2012. Hence this writ petition.

6. Learned counsel for the petitioner submits that objection by the respondents/judgment debtors about the description of suit property and portion acquired by the Municipal Corporation is erroneous. Learned District Judge has erred in observing that the construction was raised subsequently over the suit property and the decree pertains to the open plot. Learned District Judge has further erred in observing that the decree cannot be executed without demolition of construction, which is in existence on the suit plot. Learned District Judge has erroneously held that it was necessary for the petitioner/decreed holder to get relief of mandatory injunction from the trial court and without there being decree of mandatory injunction the vacant possession of plot cannot be given. Learned District Judge has, thereafter, erroneously held that the respondents/judgment debtors have established the fact that the decree is not executed and as such unless decree is modified by the trial Court, it cannot be executed at all by any means. Learned counsel submits that in Paragraph No.3 of the decree passed by the trial Court, it has been specifically observed that there is no dispute about the description of suit property which is a plot with a compound wall and some structure on it. Learned District Judge has erred

in observing that the construction was raised subsequently over the suit property. Learned counsel submits that it is nobody's case and the learned District Judge has considered the same on his own imagination. Learned counsel submits that the petitioner/decreed holder and defendant/Sitaram Tularam Pradhan (deceased) are real brothers. A dispute pertaining to the suit property was compromised in Letter Patent Appeal No.71 of 1981 between Dr. Lele on one side and deceased Sitaram Tularam Pradhan on the other side. In first paragraph of compromise, the appellant/original defendant i.e. deceased Sitaram Tularam Pradhan is declared as owner of the suit property i.e. plot of land bearing Municipal No. 757/1 (old) and 2-1-128 (New) with open space within the compound admeasuring about 1661 sq. yards together with structure standing thereon. In terms of the said compromise, the LPA came to be disposed of and decree has been drawn in terms of consent terms. Learned counsel submits that in Paragraph No.19 of memo of appeal of LPA, it has been specifically mentioned about the existence of constructed two additional rooms on the suit property. Learned counsel submits that learned District Judge ought to have gone through the entire record and proceedings before arriving at such an erroneous observations.

7. Learned counsel submits that when the decree passed in Special Civil Suit No.23 of 1983 has confirmed up to the Hon'ble Apex Court and attended the finality, the observations made by the learned Judge that 'it was necessary for the petitioner/decreed holder to get relief of mandatory injunction is unwarranted and baseless'. Learned counsel submits that these objections were not raised during the original proceedings and in execution proceedings, such plea cannot be raised. Learned counsel submits that the respondent/judgments debtors on earlier occasions, twice raised trivial issues like that the decree holder being a British National and for framing issues on the objection petition. Even this Court (Coram: Ravindra V. Ghuge, J.), by order dated 24.02.2018, dismissed Writ Petition No.2175 of 2018 preferred by the respondents/judgment debtors with costs of Rs.25000/- and further directed, the Executing Court to expedite the proceedings. Learned counsel submits that the decree holder is 72 years old and waiting to enjoy the fruits since 31.03.1987. The petitioner/decreed holder is deprived of his rights because of the delayed tactics played by the respondents/judgments debtors. Learned counsel submits that the respondents/judgment debtors are waiting for the petitioner/decreed holder to breath his last and thus the litigation will come to an end so they would be able to enjoy

the suit property perpetually.

8. Learned counsel for the respondents/judgment debtors submits that the petitioner/decreed holder has filed an application (Exhibit-43) before the Executing Court along with a draft copy of conveyance deed. After going through the draft copy of conveyance deed, it is found that the petitioner has not given the correct description of property as per the decree. Learned counsel submits that the measurement of the suit property is 1749 sq. mtrs. and there is no mention about the constructed area on the suit property. However, in the draft conveyance deed in Paragraph No.11, the description of property is given as measuring 972.8 sq. mtrs. only and the same is not as per decree. Learned counsel submits that during pendency of suit and proceedings, the Municipal Council, Aurangabad has acquired a land to the extent of 776.2 sq. mtrs. from the suit property for a D.P. road. The petitioner/decreed holder has not filed any application for modification of decree at any point of time. However, in the draft of conveyance deed, the petitioner/decreed holder has mentioned the measurement of property which is not as per the decree. The petitioner/decreed holder has also not mentioned about the standing structure on the suit property and as a matter of fact, the construction is standing on the suit property since prior to

the filing of the suit. Leaned counsel submits that there is no mention of structure in the execution petition and as such, the measurement given in the conveyance is not matching with the description given in the suit so also in the decree. Learned counsel submits that learned District Judge has rightly considered the objection raised by the respondent/original debtors, allowed the appeal and set aside the order passed by the Executing Court below Exhibit-43. There is no substance in this writ petition. Learned counsel submits that the writ petition is misconceived and no case is made out by the petitioner to call for interference of this Court under the extraordinary powers available under Article 227 of the Constitution of India. There is no perversity in the judgment and order passed by the lower appellate court. The writ petition is liable to be dismissed.

9. Learned counsel appearing for the respondent/s submits that the Executing Court cannot go behind the decree and therefore, the learned District Judge was right in observing that the decree is for open plot and the area mentioned in the decree cannot be executed without demolition of construction which is in existence on the suit plot. Learned District Judge was also right in observing that it was necessary for the petitioner/decreed holder to get relief of mandatory injunction. The petitioner is trying to travel beyond

the decree, which is impermissible in law. The writ petition thus deserves to be dismissed with costs.

10. Learned counsel appearing for both the parties accept that in terms of provisions of Order XLIII Rule 1 clause (I), an appeal shall lie from an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement. In view of the same, I assume that the learned District Judge has decided the Misc. Civil Appeal as against the order passed in terms of clause(i) of Order XLIII Rule 1 of the Civil Procedure Code. In view of the same, the writ petition is maintainable as against the judgment and order passed by the learned District Judge.

11. In the pending darkhast, the petitioner/original decree holder has filed an application (Exhibit-43) under Order XXI Rule 34 of the Civil Procedure Code requesting for suitable orders directing the judgment/debtors to execute the deed of conveyance in respect of suit property in favour of the decree holder before the competent authority i.e. the office of the Sub-Registrar concerned at Aurangabad and the judgment debtors may be directed to handover the peaceful possession of the suit property in favour of the decree holder. The petitioner/decreed holder has also submitted a draft document of conveyance deed to be executed by the judgment/debtors

in his favour.

12. I have gone through the contents of application (Exhibit-43) so also the draft of conveyance deed, description of the property as mentioned in the conveyance deed is Municipal property No.7-5-7/1 (old) and 2-1-128 (new) / at present 5-4-44 CTS No.2452 from sheet no.3857 with specification about the measurement. The respondents/judgment debtors on overleaf of Exhibit-43 raised the objection to the effect that the District Court while disposing of the First Appeal (as against the decree passed by the trial Court), has modified the decree to the extent of dropping the relief of ostensible ownership and as such the said finding has changed the entire scenario. According to them, the respondents/judgment debtors who are the legal heirs of original defendant/judgment debtors, are not competent to execute the sale deed. Though the objection about the same has been raised on earlier occasion by the judgment debtors and the same has been rejected by this Court, the respondents/ judgment debtors would be filing an appeal against the same and hence the said issue is still open to canvas. It is further contended that the draft of conveyance deed is not proper and has lacuna on various aspects. The draft as it is cannot be accepted. No such draft is legally

recognized or permissible. The respondent/judgment debtors reserved their right to comment on the draft conveyance deed at the time of argument. However, at the outset, they do not admit the contents of draft conveyance deed since the contents are not in consonance with the order as well as the competence of the judgment debtors.

13. It further appears from the order passed by the Executing Court below Exhibit-43 that during the course of arguments, the respondent/judgment debtors have raised the following objections;

(i) The title of the document as “Conveyance Deed” itself is wrong and it must be the “Sale Deed”.

(ii) The liability about the municipal taxes, rents etc. payable up to the date cannot be casted and stated in the deed when there is no record, whether it is paid or not.

(iii) During pendency of the suit and other proceedings, Municipal Corporation Aurangabad has acquired 776.2 sq. mts. area out of suit property for proposed D.P. road. The petitioner/decree holder has failed to brought this act on record either during the trial or during the execution.

14. According to the respondents/judgment debtors, decree needs modification and unless it is modified cannot be executed by the court. The executing

court has no right to modify the decree and hence the executing court should drop the proceedings at this stage. Learned Judge of the Executing Court by referring the various cases observed that in terms of the provisions of Section 47 of the Code of Civil Procedure, the Executing Court to decide all issues regarding the execution and the other objections were already dealt with on the previous occasions.

15. The learned Judge of the Executing Court has passed the order below Exhibit-43. The operative part is reproduced herein below:

“(1) Application is allowed. The draft of conveyance deed is approved subject to addition of statements in para 6(a) of the draft about decree holder/transferee taking liability to pay all dues of municipality, if not already paid by judgment debtors/transferees.

(2) The judgment debtors are directed to submit the true record of the payment of municipal tax, cess, rents and other taxes of the suit property in the court, on or before 9/07/2017. In case of failure necessary order will be followed under order XXXIX rule 11 of the Code of Civil Procedure, 1908.

(3) The decree holder is directed to submit the corrected draft before the court on or before 9/07/2018. Decree holder may submit the required stamp for registration in the court or directly pay it in the office of sub-registrar as required by law.

(4) Assistance Superintendent (A.S.) of Civil Court (Sr.Dn.) Aurangabad is appointed for the purpose of execution of deed of conveyance and get it registered before the competent sub-registrar Aurangabad.

(5) After submission of the corrected draft before the court, judgment debtors to execute the same before the sub registrar on the date fixed by the A.S. which will be within next 7 days from the date of submission of corrected draft in the court.

If judgment debtors failed to comply these directions then Assistance Superintendent of Civil Court (Sr.Dn.), Aurangabad is authorized and directed to execute the deed of conveyance as per provisions of law, in favour of the decree holder.

16. I have carefully gone through the contents of appeal memo filed before the District Court, Aurangabad as against the order passed by the Executing Court below Exhibit-43. It is necessary to repeat here that neither in the Say nor during the course of hearing of application (Exhibit -43), the respondent/judgments debtors have raised the objection with regard to the description of property, particularly to the extent that the possession of vacant plot cannot be given without demolition of a structure by decree of mandatory injunction. However, before the District Court for the first time by way of ground No.10 in appeal memo, the objection has been raised about the same. The said objection in Paragraph No.10 of appeal memo is as follows:

“10. The Trial Court has failed to consider that the Suit plot is not at all vacant but it has a construction approx. admeasuring 2500 sq.ft. existing prior to the date of the Suit. Admittedly, there is no Decree of Mandatory Injunction and in execution of a Decree of Specific Performance, the possession of vacant plot can not be given without demolition of a structure by Decree of Mandatory Injunction.

17. It appears from the impugned order that the learned District Judge has considered the above stated objection only and as such, the objection as raised in Paragraph No.10 before the District Court is only required to be considered in this writ petition. The respondent/judgment debtors have not filed any writ petition against the order passed by the District Judge pertaining to the other grounds as raised by them.

18. I have carefully gone through the impugned order passed by the learned District Judge in Regular Civil Appeal No.147 of 2018, I am shocked to see the observations made by the learned District Judge. The learned District Judge has not taken pains to go through the entire record particularly the history of litigation and the judgment and decree passed by the trial Court in Regular Civil Suit No.23 of 1983, which is confirmed up to the Apex Court. In paragraph No.3 of the judgment passed by the Civil Judge, (Senior Division), Aurangabad in Special Civil Suit No.23 of 1983, it has been

specifically recorded that there is no dispute about the description of suit property which is a plot with a compound wall and some structure on it.

19. It is also not disputed that, in terms of compromise in Letters Patent Appeal No. 71 of 1981, the decree came to be drawn pertaining to the Special Civil Suit No.7 of 1975. This previous litigation was admittedly between one Dr. Lele and the deceased Sitaram Tularam Pradhan (Original defendant/judgment debtors in the present matter) in respect of the property which is the subject matter of present litigation. In terms of the said compromise, the amount of Rs.65,000/- was paid to Dr. Lele in full and final settlement of decretal claim in Special Civil Suit No.7 of 1975 and the property which is the subject matter of present litigation had come in the family of the petitioner and the original judgment debtors deceased Sitaram Pradhan. I have gone through the contents of appeal memo of Letters Patent Appeal No.71 of 1991 at (Exhibit-M), it appears that the said LPA has been preferred by deceased Sitram Pradhan (original defendant/judgment debtors in the present litigation) and in Paragraph no.19, a specific reference has been given to the existence of two additional rooms in the suit property. Furthermore, in Paragraph No.1 of the order dated 23.04.1981 passed by the Division Bench of this Court (Coram: Rege & Kanade, JJ.) in

Letter Patent Appeal No.71 of 1981, the reference to the suit property is given in the following way;

“Appellant – Original Defendant be declared as owner of the suit property i.e. plot of land bearing Municipal No.757/1 (old) and 2-1-128 (new) with open space within the compound admeasuring about 1661 sq. yards together with the structure standing thereon”.

20. The learned District Judge however without going through all these documents and history of litigation passed the cryptic order, which is impugned in this writ petition. It is also pertinent to note that the respondents/judgment debtors have not disputed about the existence of said construction over the suit plot nor raised any objection about the description of suit property at any point of time. So far as the other objections were raised before the Executing Court while opposing the application (Exhibit-43). I find no substance in those objections and the Executing Court has rightly dealt with those objections in terms of provisions of Section 47 of the Civil Procedure Code.

21. The respondents/judgment debtors at least on two occasions had raised trivial issues, this Court (Coram: Ravindra V. Ghuge, J.) had an occasion to deal with the same in Writ Petition No. 2175 of 2018. In Paragraph Nos.23 & 24 of the order, this Court has made the following observations:

“23. Coming to the bonafides of the Judgment Debtors in filing the application Exhibit-61, I find that the following factors need to be noted:

(a) The Decree Holder/Plaintiff succeeded by the judgment dated 31.03.1987.

(b) The decree of the Trial Court has been sustained upto the Honourable Supreme Court when the Special Leave Petition was dismissed.

(c) At least on two occasions, the Judgment Debtors were before this Court raising trivial issues like the Decree Holder being a British national and for framing issues on the objection petition, without even canvassing any such contention in the objection petition.

(d) Though this Court was inclined to impose costs on the Judgment Debtors for having made the Decree Holder suffer rigours of litigation for more than 14 years, this Court had refrained from doing so on the earlier occasion.

(e) The decree was put to execution by the execution proceedings dated 03.07.2002.

(f) The Judgment Debtors have not raised any issue about the doctrine of merger for the past 15 years.

(g) When several efforts to delay the execution proceedings failed upto this Court, the application Exhibit-61 is filed on 27.09.2017.

(h) The Honourable Supreme Court (Three Judges Bench) in the matter of Merla Ramanna vs. Nallaparaju and others, AIR 1956 SC 87, has concluded in paragraph 13 that “if

objection to the jurisdiction is not taken at the earliest opportunity, it must be deemed to have been waived and cannot be raised at any later stage of the proceedings”. It is further held that “We agree with the decision in Balakrishnayya vs. Linga Rao, ILR (1943) Mad. 804, and hold that the objection to the District Court entertaining an application to execute the decree in O.S. No.25 of 1927 is one that could be waived and not having been taken in the written statement is not now available to the appellant.”

24. Taking into account the entire facts as recorded above, I find it appropriate to dismiss this Writ Petition by imposing costs of Rs.25000/- upon the Petitioners. Before commencing the dictation of this order in open court, the view which has been taken, was made known to the learned Advocate for the Petitioners including that costs of Rs.25000/- are being imposed. The learned Advocate for the Petitioners has taken instructions from one of the Petitioners, present in the Court and has stated that the Petitioners request for a judgment in this matter.

22. However, despite the above observations made on earlier occasion by this Court, the respondents/judgment debtors have opposed the application (Exhibit-43) on flimsy grounds. The petitioner/decreed holder is not getting the fruits of decree since the year 1987. The respondents/judgment debtors are trying to kill time as far as possible, however, it is equally sad to note here that learned District Judge has allowed the appeal by such a cryptic order. Thus, the judgment and order impugned in this writ petition is liable to

be quashed and set aside. Hence, I proceed to pass the following order:

ORDER

(I) The Writ Petition is hereby allowed.

(II) The Judgment and order passed by the District Judge-6, Aurangabad dated 20.06.2019 in Regular Civil Appeal No.147 of 2018 is hereby quashed and set aside.

(III) The order passed by the 5th Jt. Civil Judge, Junior Division, Aurangabad (Executing Court) dated 06.07.2008 below Exhibit-43 in Regular Darkhast No.220 of 2012 stands confirmed.

(IV) The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)

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