

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.2258 OF 2021**

Smt.Anjanabai Gopal Tathe (since deceased)

through LRs

.. Petitioners

Versus

Bharati Shankar Urankar & Ors.

.. Respondents

...

Mr.P.R.Yadav with Mr.Saumitra Salunke for the Petitioners.

Mr.S.R.Surve for the Respondent Nos.1 and 2.

Mr.Mohammad Zain Khan for Respondent Nos.10 to 12.

...

**CORAM: BHARATI DANGRE, J.**

**DATED : 30<sup>th</sup> SEPTEMBER, 2021**

**ORAL JUDGMENT:-**

1. Privy Council in *Court of Wards Vs.Maharajah Cooma Ramapur* has observed as under :-

*“That the difficulties of a litigant in India begin when he has obtained a decree, because the same is hardly executed.”*

2. The present Writ Petition depicts the woes of a decree-holder, who is kept away from the fruits of the decree from 26/07/2004 and the present Writ Petition arises out of an application filed by him, seeking possession of the suit premises.

3. The petitioner/original plaintiff, Smt.Anjanabai Tathe, filed a Special Civil Suit No.96 of 1999 in the Court of Civil Judge, Senior Division, Panvel against the defendants/respondents, seeking a declaration that Sale Deed dated 26/12/1997 executed by defendant No.2 in favour of defendant No.1 and the power of attorney alleged to have been executed by her deceased husband in favour of defendant No.2 is null, void and not binding upon the plaintiffs and defendant Nos.3 to 9 and also sought restraint order against defendant Nos.1 and 2 for causing obstruction in her peaceful enjoyment of the said land located at Survey No.110/1-B of village Chikhale, Taluka Panvel, District Raigad. Pertinent to note that plaintiff Nos.2 to 5 are the real brothers and defendant Nos.3 to 9 are their sisters and Smt.Anjanabai (plaintiff No.1) is their mother.

It was pleaded in the suit that the land belonging to deceased Gopal Krishna Tathe, who expired on 07/01/1998, was cultivated by the plaintiffs and defendant Nos.3 to 9 jointly and they were having undivided share in the suit land, since it was not partitioned during the lifetime of deceased Gopal and it was claimed as an ancestral property. It is averred that Gopal Thate was an alcoholic. On his demise, when the plaintiffs applied for recording their names in the record of right, it was revealed upon them that the suit land was sold by defendant No.2, as a power of attorney holder, to defendant No.1 vide Sale Deed dated 26/12/1997 for consideration of Rs.7,50,000/-. Claiming that defendant No.2 had no right to sell the suit land to defendant No.1 and alleging that the power of attorney in favour of defendant No.2 was forged, the suit was instituted.

4. On 26/07/2004, the suit was decreed by the Civil Judge, Senior Division at Panvel and the declaration, as prayed for by the plaintiffs, was granted. Defendant Nos.1 and 2 were directed to hand over possession of the suit land to the plaintiffs and defendant Nos.3 to 9 within a period of three weeks on receiving intimation of the judgment and they were further restrained from transferring, alienating or creating any third party interest in the suit land. A decree was directed to be drawn up accordingly.

5. The petitioners filed Execution Application wherein respondent Nos.10 to 12 filed an application under Order 21 Rule 97 of the Code of Civil Procedure, 1908 (**for short, “The Code”**), obstructing the execution of the decree. The submission of the petitioners is that in-spite of the decree being granted in their favour, respondent Nos.1 and 2 (original defendant Nos.1 and 2) created third party right in respect of the suit property.

In the Execution proceedings, respondent Nos.10 to 12, who are the subsequent purchasers, were permitted to lead the evidence. In the earlier round of litigation before this Court, when Writ Petition No.163 of 2020 came to be filed challenging the order passed below Exh.72 dated 06/08/2019, this Court refused to interfere in the impugned order, but recorded that it will not preclude the petitioner from executing possession warrant, if any. This order was passed on 22/01/2021.

6. The possession warrant, issued on 01/04/2019, returned back as ‘unserved’ as on the suit property, a company named

‘Offshore Infrastructure Ltd.’ is functioning with 62 to 70 workers and the Bailiff reported that possession of the suit property, as per the possession warrant, cannot be handed over to the decree-holder, without having the boundaries measured by a Government Surveyor. When the decree-holder moved an application for issuance of possession warrant, the learned Civil Judge, Senior Division, Pune, on 22/02/2021, rejected the said application by recording that,

“4. The possession warrant issued in this matter on dated 01/04/2019 by the learned predecessor of this court was returned back as unserved as on the suit property, a company name Offshore Infrastructure Ltd. Is functioning by having 60 to 70 workers in it. The bailiff furthermore opined that the possession of the suit property as per the possession warrant can't be handed over to D.H. without having the boundaries measured by a Government Surveyor. The said report is of dated 08/04/2019.

5. In view of the aforesaid report subsequent warrant of possession of the suit property can't be issued as prayed by D.H.

6. The obstructionist no.1 to 3 who are claiming title through J.D.. The sale deed standing in favour of obstructionist no. 1 is of dated 14/07/2006 and they have further sold 75% of the suit property to Shri. Gurupeet Singh Jaspal Singh. Later on obstructionist no.2 and 3 purchased the same from on 20/04/2012. In this way, obstructionist no.1 to 3 are claiming to have title in possession over the suit property. No doubt, the said transaction of sale deeds in favour of obstructionist no.1 to 3 are after the passing of decree dated 26/07/2004 in R.C.S.no.96/1999. Therefore, the burden to prove the obstruction over the suit property

is upon the J.D. no.1 and 2 and not upon the obstructionist no.1 to 2. Hence, the following order is passed.

**: ORDER :**

1. The prayer of issuance of possession warrant as per the decree passed in S.D.No.05/2011 in respect of suit property can't be granted at this moment.

2. J.D.No.1 and 2 and plaintiffs/D.H. are directed to lead their respective evidence thereby showing their legal title and possession over the suit property.”

7. The petitioners, aggrieved by the said order, instituted the present Writ Petition apprehending that respondent Nos.10 to 12, who have purchased the land after passing of decree, are likely to transfer the same and create third party interest.

8. On 28/06/2021, this Court, in the backdrop of the facts placed before it, deemed it fit to restrain the defendants from creating third party right in respect of the suit property till the next date of hearing and notice was issued to respondent Nos.10 to 12. The said respondents put their appearance on 11/08/2021. After hearing them, this Court passed the following order.

“1. Heard.

2. The obstructionist under Order XXI, Rule 97 of Code of Civil Procedure is claiming his rights through sale-deed dated 13<sup>th</sup> September 2011, whereas the decree under execution is of 26<sup>th</sup> July, 2004. The obstructionist claimed to have stepped into shoes of the judgment debtor and as

such the obstructionist cannot claim better right than the judgment debtor.

3.A Prayer for issuance of warrant of possession in execution proceedings is rejected based on the absence of demarcation of the property mentioned in the decree.

4.In response to above, learned counsel for the decree-holder/ Petitioner submits that he shall ascertain said fact and shall make statement by tomorrow. Stand over to **12<sup>th</sup> August, 2021.**

5.Affidavit tendered by the Obstructionist is taken on record.”

Further, on 23/08/2021, the Court passed the following order.

“1. Counsel appearing for the Petitioners submits that the land in regard to which decree was passed on 26<sup>th</sup> July, 2004 got demarcated through the revenue authorities on 19<sup>th</sup> December, 2012. He intend to place on record affidavit in support of the said contention, thereby placing on record the demarcated map.

2. Let affidavit be filed within two weeks from today with an advance copy to the learned counsel appearing for the Respondents.

3. Matter to come up for consideration on 8<sup>th</sup> September, 2021.”

9. In furtherance of the said order, the affidavit is filed by the petitioners on 26/08/2021 where the following statement is made.

“I further state that Suit Property is already demarcated on 19/12/2012 by City Survey Officer. Hereto annexed and marked as “Exhibit-A” is the copy of the demarcation sketch/Map of the suit property.”

Alongwith the said affidavit, demarcation by the City Survey Officer is placed on record, which categorically reflect the boundaries of the suit property being Plot No.110.

10. Respondent Nos.10 to 12 opposed the said affidavit by stating that the demarcation, which is put forth, was not the part of the original pleadings and, therefore, same cannot be considered by this Court at this stage. It is also pleaded by respondent Nos.10 to 12 that they are in possession of the suit property from the year 2011 and have acquired the adjoining land by way of registered sale deeds and the names of respondent Nos.10 to 12 are mutated against the aforesaid lands. The sale deeds are also placed on record. A defence has thus been set forth that since they are in possession of the suit property, purported demarcation cannot be relied upon unless a fresh survey is carried out, demarcating the land.

11. Pertinent to note that by virtue of Order XXI Rule 35 of the Code, where a decree is for delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property. It is the duty of the Executing Court to ensure that the decree-holder is put in possession of the

property in furtherance of the decree and if necessary, the person who is bound to deliver the possession shall be removed, in case he refuses to vacate the property. Taking recourse to the said provision, the Executing Court ought to have cleared the obstruction caused by respondent Nos.10 to 12, only on the premise that they are the subsequent purchasers and they claim their title through the judgment debtor. In any case, the rights of respondent Nos.1 to 12 are subservient to the rights of respondent Nos.1 and 2 and merely because the obstructionists claim that they are in possession of the property, issuance of possession warrant, which has been declined by the impugned order, is not the right course to be adopted.

The reason given for refusal of issuance of a fresh possession warrant is to the effect that without the boundaries being measured by a Government Surveyor, the possession cannot be made over to the decree-holder. In the affidavit which has been brought before this Court in pursuance of the order passed on 11/08/2021, the petitioners have placed on record a demarcation map of the suit property, which is prepared by the City Survey Officer on 19/12/2021<sup>2</sup>, which clearly show the demarcation of the suit property, which is identified in the plaint as property located in Survey No.110, Hissa No.1-B admeasuring 0.74.4 R and the boundary being clearly stated to be in form of Survey No.109/1, 108/1A, 110/1A, 103/7. If the sketch map dated 19/12/2012 is looked into, the suit property can be easily identified and when the decree has declared that the sale deed by defendant No.2 in favour of defendant No.1 is illegal, null and void any not binding on the plaintiffs and defendant Nos.3 to 9, subsequent

sale of the property in favour of respondent Nos.10 to 12 shall necessarily meet the same fate.

In any case, the petitioners/plaintiffs cannot be made to await indefinitely for enjoying the fruits of the decree and it should be endeavor of the Executing Court to expeditiously execute the decree.

12. Recently, the Hon'ble Apex Court in case of **Rahul S. Shah Vs.Jitendra Kumar Gandhi & Ors.**<sup>1</sup>, took the cognizance of the troubles of a decree-holder in not being able to enjoy the fruits of the litigation on account of inordinate delay caused in process of execution of decree and proposed certain suggestions to reduce the delay. The following observations made by their Lordship need a reproduction :-

“25. These provisions contemplate that for execution of decrees, Executing Court must not go beyond the decree. However, there is steady rise of proceedings akin to a re-trial at the time of execution causing failure to realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the Executing Court and the decree holder is deprived of the fruits of the litigation and the judgment debtors, in abuse of process of law, is allowed to benefit from the subject matter which he is otherwise not entitled to.

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the Courts first issue show cause notice asking the judgment debtor as to why the decree should not be executed as is

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given under Order XXI Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgement debtor sometimes misuses the provisions of Order XXI Rule 2 and Order XXI Rule 11 to set up an oral plea, which invariably leaves no option with the Court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely.”

In the ultimate paragraphs, their Lordships have issued several directions, which are worth to be noted.

“11. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

12. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.

13. ... ..

14. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.”

13. The Writ Petition is allowed in the aforestated terms.

( SMT. BHARATI DANGRE, J.)