

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1682 OF 2022

Rajendra Sampat Khatal
Age- 47 years, Occ- Agriculture,
R/o. Dhandarphal (Kd), Tal- Sangamner,
Dist. Ahmednagar.

PETITIONER
[Judgment Debtor]

VERSUS

1. Babaji Dada Jadhav
Age- 83 years, Occ- Agriculture.

2. Shyamrao Babasaheb Jadhav
Age- 62 years, Occ- Agriculture.
No. 1 and 2 R/o. Songaon,
Tal- Rahuri, Dist. Ahmednagar.

RESPONDENTS
[Decree Holder]

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Mr. Vinod Bhide, Advocate for Petitioner.
Mr. Hemant Dhage, Advocate for Respondents.

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 31st MARCH, 2022.
PRONOUNCED ON- 22nd APRIL, 2022.

ORDER :

1. This petition filed under article 227 of the Constitution of India, challenges the order passed by the 2nd Joint Civil Judge Senior

Division, Sangamner, below Exhibit-35 in Regular Darkhast No. 5/2019, thereby allowing the application filed by the decree holder for appointment of commissioner.

2. The Respondent No. 1 filed Regular Civil Suit No. 18/2010 against 18 defendants for permanent injunction in respect of land Survey No. 151 situated at village Dhandarphal, Taluka-Sangamner, District- Ahmednagar, also seeking relief of measurement of sub divisions and for fixation of boundaries of his pothissa Survey No. 151/10/1. A prayer is also made that in case during the measurement if any encroachment is found the same be shown in the measurement map and mesne profit of such encroachment be determined. The suit was partly decreed by granting relief of injunction against the petitioner/original defendant No. 18.

3. Regular Darkhast No. 5/2019 is filed by the respondents/decree holders for execution of the decree in Regular Civil Suit No. 18/2010. In the said darkhast, the respondents filed application Exhibit-35 for interim injunction, which was subsequently not pressed.

4. Thereafter, the respondents filed application Exhibit-25 for joint measurement of lands of petitioner and respondents and other judgment debtors by appointing court commissioner. The said application was opposed by the petitioner. The Executing Court has allowed the said application. This order is challenged in the present petition.

5. Heard the learned advocate for the petitioner and learned advocate for the respondents.

6. The learned advocate for the petitioner submits that the impugned order is passed by the Executing Court by exceeding its jurisdiction under Order 21 Rule 32(5), Order 21 Rule 97 read with Section 47 and Section 141 of the Code of Civil Procedure, 1908. The petitioner is likely to be deprived of ownership right of his own immovable property, if the impugned order is implemented. He submits that the description of the suit property in the plaint and in the execution application is different. The respondents are not sure about four boundaries of their property and that of the properties of the petitioner and other original defendants. According to him as the

Executing Court was dealing with the objection regarding possession of the suit property, considering the rival contentions of the decree holders and judgment debtors, the Executing Court ought to have permitted the parties to lead evidence. He therefore, submits that the impugned order is unsustainable and the same is liable to be quashed and set aside. In support of his contentions, he placed reliance on Tajmulhussain Mulla Mumtaz Hussain Vs. Satish Bhanudas Chavan (1994 (1) Mh.L.J. 664), Manohar Mahadeorao Pagrut Vs. Sau Sunanda Ramdas Tharkar (2008 (4) ALL MR 718) and Smt. Niranjanbai w/o Chandrakant Vira Vs. Pramilabai w/o Balkrishna Zade & Anr. (2004 (3) ALL MR 619).

7. The learned advocate for the respondents on the other hand supported the impugned order. According to him, there is no question of leading evidence and cross examination in the execution proceedings. He therefore, submits that there is no substance in the petition, the petition may be dismissed.

8. As per the record it is the contention of the respondents/decreed holders that the petitioner by illegally encroaching

on the suit property has constructed a house, in spite of the fact that permanent injunction was operating against him. The suit property was measured on 27.01.2020, as per the directions of Executing Court. In the said measurement, encroachment by the petitioner is marked in violet color. It is not in dispute that after hearing the petitioner, the Executing Court ordered measurement of the suit property by order dated 30.04.2019. Pursuant to it, measurement report was submitted to the Executing Court on 28.02.2020. The petitioner was called upon to submit his say on the measurement report, however, the petitioner has failed to take any objection on the said measurement report. The petitioner has not challenged the measurement report.

9. It appears from the record that before the petitioner purchased his property, the respondent is in possession of the suit property. Therefore, it was incumbent on the part of the petitioner to measure the land before taking possession of the same. Nothing is produced by the petitioner to show that he got the measurement done before taking possession of his portion of suit land.

10. In the facts of the present case, the Executing Court was

justified in passing the impugned order of appointment of Court Commissioner. Thus, Executing Court has passed a well reasoned order, which need not be interfered in the extra ordinary writ jurisdiction.

11. In *Tajmulhussain Mulla Mumtai Hussain* (supra), the appointment of court commissioner during trial was in question. The learned Single Judge of this Court held that “*if there is dispute regarding demarcation of piece of land, the Court should appoint commissioner preferably a trained surveyors to get his assistance for resolving the controversy*”.

12. In *Manohar Mahadeorao Pagrut* (supra), similar view is taken by the learned Single of this Court.

13. In the case in hand since the petitioner has failed to raise any objection to the order dated 30.04.2019 for appointment of court commissioner and to the measurement report dated 28.02.2020, the petitioner is not entitled to question the said measurement report.

14. For the aforestated reasons, the Executing Court is right in allowing the application Exhibit-35 filed by the respondents. No case is made out by the petitioner to exercise extra ordinary writ jurisdiction. The petition being devoid of substance, is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE