

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2772 OF 2022

Shaikh Rauf Shaikh Razzak

PETITIONER

VERSUS

Shaikh Ahmed Shaikh Ramjan (Died) LRs & Ors. RESPONDENTS

.....
Mr. Milind Madhukar Patil, Advocate for the petitioner
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 24th FEBRUARY, 2022

ORDER :

1. The petitioner is aggrieved by the decision of the learned Civil Judge, Junior Division, Raver below Exhibit-109 in Regular Darkhast No. 8 of 2011, thereby rejecting the application filed by the petitioner under section 47 of the Code of Civil Procedure (hereinafter for short "CPC").

2. Regular Civil Suit No. 31 of 1993 was filed by the respondent – plaintiff seeking possession of the suit property and for means profit. The suit came to be decreed on 1st July, 2004. The petitioner unsuccessfully challenged the judgment and decree in first appeal as well as in second appeal before this court.

3. The respondents – decree holders, thereafter filed Regular Darkhast No. 8 of 2011. The petitioner appeared in the same and has resisted the said decree by raising various objections. When the executing court was about to issue possession warrant, application Exhibit-109 is filed by the petitioner under section 47 of the CPC, claiming that he is possessing the suit property as a tenant and unless and until the tenancy is terminated, he is entitled to keep the suit property in possession. He is also entitled under section 320 of the Bombay Tenancy and Agricultural Lands Act, 1948 to purchase the suit property for which he has filed a separate proceedings. The application Exhibit-109 came to be rejected. Hence the present writ petition.

4. Heard learned advocate for the petitioner. He strenuously submits that in view of pleadings in the suit, the trial court ought to have referred the matter for deciding the issue of tenancy to the competent authority. According to him, in terms of decision of the Apex Court in *"Noor Mohammad Khan Ghouse Khan Soudagar V/s Fakirappa Bharmappa Machenahalli"* 1978 (3) SCC 188 and of this court in *"Jagannath Vithu Jadhav V/s State of Maharashtra and Others"* 2013 (3) B.C.R. 439, the issue of tenancy ought to have been referred by the executing court to

the competent authority. He further assails the order passed by the executing court thereby issuing possession warrant and dismissal of his application Exhibit-116 by which he raised an issue of tenancy.

5. It is clear from the perusal of the documents annexed with the writ petition that the petitioner's specific defence in the written statement was that the suit property was in his possession as a owner. When the petitioner claims to be owner of the suit property, he cannot claim to be a tenant. At no point of time, the issue of tenancy was ever raised by the petitioner / judgment debtor either during the pendency of the suit, in the first appeal or in the second appeal. For the first time, it appears that the petitioner has raised this issue after almost 29 years, when the executing court was about to issue possession warrant. It is, therefore, clear that the petitioner is trying to avoid and / or stall the execution of the decree and is thereby depriving the decree holder from enjoying the fruits of the decree, which is passed in the year 2004. In spite of lapse of more than 18 years' period, the decree is yet to be executed. In that view of the matter, no substance is found in the contentions of the petitioner in application Exhibit-109.

6. The executing court is justified in rejecting the said

application by giving cogent reasons and recording a finding that issue of tenancy was never raised earlier and after almost 29 years, such issue cannot be raised by the petitioner. The petitioner has lost the opportunity to raise the said issue during pendency of the suit and, therefore, the application filed by the petitioner raising the issue of tenancy at this stage cannot be entertained. The trial court has also referred to the specific defence taken by the petitioner in the written statement that he was in possession of the suit property as a owner and, therefore, he cannot claim to be tenant of the same. No fault can be found with the order impugned in the present writ petition.

7. There cannot be any dispute about the ratio of the citations relied on by the petitioner, however, they are not applicable to the facts of the present case.

8 In view of aforesaid, there is no merit in the writ petition. The writ petition, therefore, is dismissed. No costs.

9. It is made clear that the observations in this order shall not influence the tenancy authority while deciding the proceedings filed by the petitioner.

[NITIN B. SURYAWANSHI]
JUDGE