

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

WRIT PETITION NO. 3338 OF 2022

- 1] Chandanmal Chunilal Oswal
Deceased through LRs.
- 1-A] Nirmalabai Chandanmal Oswal
Deceased.
- 1-B] Sharad Chandanmal Oswal
Age 63 years, Occ. Business,
R/o 61, Mayur Coloney, Deopur,
Dhule, District Dhule.
- 1-C] Pushpa Parasmal Kothari
Age 70 years, Occ. Business,
R/o B-64, Heritage Society,
D N Road, Mumbai (W).
- 1-D] Usha Anilkumar Darda
Age 65 years, Occ. Household,
R/o Bansilal Nagar, Opp. Saket
Prakeshan, Aurangabad,
District Aurangabad.

... PETITIONERS
(Orig. Plaintiff No.1)

VERSUS

- 1] Nandini Dilip Gaikwad @
Nita Dilip Gaikwad,
Age 60 years, Occ. Household,
R/o CTS No.1440/3, Agra Road,
Ta. and District Dhule
- 2] Ravindra Govardhandas Disa
Deceased through LRs.
- 2-A] Asha Ravindra Disa
Age 75 years, Occ. Household,

R/o 13 Shyamsundar Society,
Dattawadi, Pune_411030 and
Shivnandan Sadashiv Peth,
Tilak Road, Pune.

2-B] Deepak Ravindra Disa
Age 52 years, Occ. Business,
R/o 13 Shyamsundar Society,
Dattawadi, Pune_411030 and
Shivnandan Sadashiv Peth,
Tilak Road, Pune.

2-C] Nayna Nitin Gujrathi
Age 48 years, Occ. Household,
R/o C/o Dr. S. H. Gujrathi,
Plot No.1, Wallabh Nagar,
Near Agarwal Nagar, Dhule.

3] Kasturbai Govardhandas Disa
(Died).

4] Chhabuben Amrutlal Gujrathi,
Age 86 years, Occ. Household,
R/o Near Sitamata Mandir,
Gujrathi Galli, Chopda, District Jalgaon.

5] Vasant Govardhandas Disa
Deceased through LRs.

5-A] Padmawati Vasantlal Disa,
Age 69 years, Occ. Household,
R/o Manbhavan, Mayur Coloney,
Kothrud, Pune_411029.

5-B] Kalpana Chandrakant Gujarathi
Age 52 years, Occ. Household,
R/o Omkar Nagar, Ashis Society,
Mahsru, Nashik_4.

5-C] Manisha Bhupendra Khatri,
Age 52 years, Occ. Household,
R/o Manbhavan, Mayur Coloney,
Kothrud, Pune_411029.

- 5-A] Bhavana Vasantlal Disa
Age 52 years, Occ. Household,
R/o Manbhavan, Mayur Coloney,
Kothrud, Pune_411029.
- 6] Madanmohan Govardhandas Disa
Deceased through LRs.
- 6-A] Sadanand Madanmohan Disa
Age 45 years, Occ. Service,
R/o Bhusari Coloney, Bashwaraj,
Apartment, Pond Road,
Kothrud, Pune_411029.
- 6-B] Parmanand Madanmohan Disa
Age 43 years, Occ. Service,
R/o Bhusari Coloney, Bashwaraj,
Apartment, Pond Road,
Kothrud, Pune_411029.
- 6-C] Anuradha Prasannakumar Wagholikar
Age 40 years, Occ. Household,
R/o Bhusari Coloney, Bashwaraj,
Apartment, Pond Road,
Kothrud, Pune_411029.
- 7] Vijay Govardhandas Disa
Deceased through LRs.
- 7-A] Savita Vijay @ Vijaylal Disa
Age 70 years, Occ. Household,
R/o A-2/9, Rambag Coloney,
Pune_411030.
- 7-B] Kumar @ Ravikumar Vijay @ Vijaylal Disa
Age 70 years, Occ. Business,
R/o A-2/9, Rambag Coloney,
Pune_411030.
- 7-C] Shubhada Tribhuvandas Shah
Age 52 years, Occ. Household,
R/o A-2/9, Rambag Coloney,
Pune_411030.

- 8] Lataben Girdharilal Gujrathi
Deceased through LRs.
- 8-A] Shrikant Girdharilal Gujrathi
Age 54 years, Occ. Business,
R/o 1583, Sadashiv Peth,
Shivnandann Society, Tilak Road,
Pune_411030.
- 8-B] Jyotshana Rameshlal Shah
Age 54 years, Occ. Household,
R/o Sangam Park, Maharshi Nagar,
Pune_411030.
- 8-C] Sharmila Subhashlal Shah
Age 47 years, Occ. Household,
R/o Shyamsundar Society,Dattawadi,
Pune_411030.
- 9] Ashok Govardandas Disa
Age 73 years, Occ. Service,
R/o Gourav Apartment, Kothrud,
Pune.
- 10] Bharat Govardandas Disa
Age 65 years, Occ. Service,
R/o Parvati Nagar, Pune.
- 11] Shrikant Govardandas Disa
Age 63 years, Occ. Service,
R/o 938, Sadashiv Peth (Old)
Second Floor, Near Vijay Talkies,
Bus Stop, Laxmi Road, Pune_30.
- 12] Dilip Gopalrao Gaikwad
Age 65 years, Occ. Business,
R/o Bhagwati Roadways, School No.1,
Gurushishya Samarak,
Sakri Road, Dhule. (R-1 to 12 Orig. Defendants)
- 13] Rajendra Chandanmal Oswal
Age 45 years, Occ. Business,
R/o 74, Jayhind Coloney, Deopur,
Dhule, District Dhule.

14] Prakash Chandanmal Oswal
Deceased through LRs.

14-A] Kalpana Prakash Oswal (Khivsara)
Age 3045 years, Occ. Business,
R/o 501, Princetine Konstelation,
55/2, Jagdish Agar, Sadhu Vaswani
Nagar, Ganesh Khind, Aoundh,
Pune_411007.

14-B] Dhanesh Prakash Oswal (Khivsara)
Age 30 years, Occ. Business,
R/o 501, Princetine Konstelation,
55/2, Jagdish Agar, Sadhu Vaswani
Nagar, Ganesh Khind, Aoundh,
Pune_411007.

14-C] Nilesh Prakash Oswal (Khivsara)
Age 27 years, Occ. Business,
R/o 130, Shivilas Society, Senapati
Bapat Road, Bahiratwadi, Ghokle
Nagar, Pune_411016.

14-D] Shreyansh Prakash Oswal (Khivsara)
Age 24 years, Occ. Business,
R/o 501, Princetine Konstelation,
55/2, Jagdish Agar, Sadhu Vaswani
Nagar, Ganesh Khind, Aoundh,
Pune_411007.

... RESPONDENTS

(Respondent No.13 and 14 formal
party, i.e. Orig. Plaintiff No.2 and 3

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Mr. N. L. Choudhari, Advocate for Petitioners.

Mr. Y. G. Gujarathi, Advocate for Respondent Nos.1 & 12.

Mrs. Charuta S. Deshmukh, Advocate for Respondent Nos.2-A to 2-C,
5-A, 5-B, 6-A to 6-C, 7-A to 7-C, 8-A to 8-C, 10 & 11.

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CORAM : **SHRIKANT D. KULKARNI, J.**

RESERVED ON : 16th March, 2022.

PRONOUNCED ON : 28th March, 2022.

J U D G M E N T :

. Rule. Rule made returnable forthwith. Heard finally at admission stage with consent of both the sides.

2 By this petition, the petitioners are challenging the order passed by the learned 4th Joint Civil Judge, Senior Division, Dhule / Executing Court below Exhibits 49 and 51 and order of issuance of possession warrant in Special Darkhast No.43 of 2016.

3 The factual matrix in narrow compass is as under:

- i) Father of present petitioners (original plaintiff No.1) alongwith plaintiff Nos.2 and 3 had filed Special Civil Suit No.08 of 1991 before the Civil Judge, Senior Division at Dhule for specific performance of contract, delivery of possession, perpetual injunction and alternatively for refund of earnest money and damages on account of breach of contract. The said special civil

suit filed by original plaintiff Nos.2 and 3 with plaintiff No.1 came to be decreed and direction was given to the defendants to pay jointly and severally sum of earnest money to plaintiff Nos.2 and 3 with interest. In the said suit, defendant No.12 has also filed counter claim wherein the description of the property is given. Counter claim is decreed as under:-

- (i) Plaintiffs nos.2 and 3 do hand over the possession of the portion of the suit property which is more particularly described in para. 26 of the counter claim to defendant No.12.
 - (ii) Claim of mesne profits is dismissed.
- ii) Feeling aggrieved by the judgment and decree passed by the Trial Court, deceased Chandanmal Oswal (plaintiff No.1) and plaintiff Nos.2 and 3 had filed Civil Appeal No.33 of 2013 before the District Court at Dhule. In the said civil appeal, defendants had also filed cross-objection. The said civil appeal and cross-objection came to be dismissed at the hands of the learned District Judge, Dhule vide judgment and order dated 29th December, 2015. The District Judge was

pleased to confirm the judgment and decree passed by the Trial Court in Special Civil Suit No.08 of 1991. Feeling aggrieved by the judgment and order passed by the lower Appellate Court, the petitioners and plaintiff Nos.2 and 3 had filed Second Appeal No.314 of 2016 before this Court. This Court vide judgment and order dated 19th July, 2016 was pleased to dismiss Second Appeal No.314 of 2016 and the judgment and decree passed by the Trial Court and the lower Appellate Court came to be confirmed.

- iii) Original Defendant No.12 filed execution petition before the Executing Court vide Special Darkhast No.43 of 2016. The present petitioners moved applications vide Exhibits 49 and 51 in the said Special Darkhast and raised objection about maintainability of the execution proceedings by raising various issues.
- iv) The learned Executing Court after hearing both the sides and considering the decision passed by the Trial Court, which is upheld upto the High Court, was pleased to turn down the objection raised by the present petitioners and issued possession warrant

against the present petitioners and others.

- v) Feeling aggrieved by the rejection of objections and issuance of possession warrant passed by the Executing Court, the petitioners have challenged the impugned order by this petition under Article 227 of the Constitution of India.

4 Heard Mr. N. L. Choudhari, learned counsel the for Petitioners, Mr. Y. G. Gujarathi, learned counsel for the Respondent Nos.1 and 12 and Mrs. Charuta S. Deshmukh, learned counsel for Respondent Nos.2-A to 2-C, 5-A, 5-B, 6-A to 6-C, 7-A to 7-C, 8-A to 8-C, 10 and 11.

5 Perused the impugned order passed by the Executing Court below Exhibits 49 and 51 by way of common order, copy of judgment passed by the Trial Court in Special Civil Suit No.08 of 1991, copy of judgment and order passed in Civil Appeal No.33 of 2013 and copy of judgment and order passed in Second Appeal No.314 of 2016 by this Court.

6 It is undisputed position that the judgment and decree

passed by the Trial Court in Special Civil Suit No.08 of 1991 came to be confirmed upto the High Court. The question is about execution of decree passed by the Trial Court, which is confirmed upto the High Court.

7 Mr. N. L. Choudhari, learned counsel for petitioners invited my attention to the copy of counter claim filed by defendant No.12 in Special Civil Suit No.08 of 1991 more particularly description of the suit property. He pointed out that the description of the suit property mentioned in the counter claim paragraph 30 clause (ख) and the description of the suit property given in the execution proceedings substantially differs. As such, the decree cannot be executed in the background of incorrect description of the suit property. The order of possession warrant passed by the Executing Court is bad in law in the background of defective description of the suit property.

8 Mr. N. L. Choudhari, learned counsel for petitioners further invited my attention that while allowing the counter claim, direction was given to plaintiff Nos.2 and 3 to handover the possession of the portion of the suit property, which is more particularly described in paragraph 26 of the counter claim to defendant No.12/decreed holder, who has filed the execution. There was no direction to original plaintiff

No.1 to handover the possession. As such, the decree holder cannot execute the decree against the petitioners, who happened to be the legal heirs of original plaintiff No.1. Mr. N. L. Choudhari, learned counsel for petitioners submitted that the impugned order passed by the Executing Court is bad in law and liable to be quashed and set aside. The Executing Court cannot go behind the decree. He, therefore, urged to quash the common order passed by the Executing Court as well as the order of possession warrant by allowing this petition.

9 Mr. Y. G. Gujarathi, learned counsel for the Respondent Nos.1 and 12 supported the impugned order passed by the Executing Court. He pointed out that during pendency of the suit, original plaintiff Chandanmal Chunilal Oswal died. His legal heirs were not brought on record within time and as such, suit came to be abated against plaintiff No.1. The legal heirs of original plaintiff No.1 had filed Writ Petition No.3758 of 2004 and challenged the order passed by the learned Civil Judge, Senior Division, Dhule thereby rejecting the application to bring on record legal heirs of original plaintiff No.1. He pointed out that this Court was pleased to allow Writ Petition No.3758 of 2004 under order dated 8th July, 2009 and pleased to set aside the order of abatement and directed the Trial Court to allow the remaining

plaintiffs to bring on record legal representatives of deceased plaintiff No.1/Chandanmal Chunilal Oswal in his place. Accordingly, the legal heirs of plaintiff No.1 are brought on record. They were party to the appeal before the District Court. They were also party to the second appeal. They cannot say at this stage that the said decree is not binding on them when they have throughout contested the matter. He submitted that the Executing Court has considered the objections raised on behalf of the petitioners and rightly turned down those objections. He submitted that the petitioners are playing tactics to delay the execution proceedings. There is no merit in the petition.

10 Mrs. Charuta Deshmukh, learned counsel for Respondent Nos.2-A to 2-C, 5-A, 5-B, 6-A to 6-C, 7-A to 7-C, 8-A to 8-C, 10 & 11 argued on similar lines.

11 I have considered the submissions of Mr. N. L. Choudhari, learned counsel the for Petitioners, Mr. Y. G. Gujarathi, learned counsel for the Respondent Nos.1 and 12 and Mrs. Charuta Deshmukh, learned counsel for Respondent Nos.2-A to 2-C, 5-A, 5-B, 6-A to 6-C, 7-A to 7-C, 8-A to 8-C, 10 and 11.

12 The dispute raised on behalf of the petitioners revolves

around two objections. One, improper description of the suit property and second, legal heirs of original plaintiff No.1 are unnecessary to the execution proceedings.

13 On perusing the copy of counter claim filed in Special Civil Suit No.08 of 1991, it is revealed that the description of the suit property is given in paragraph 26 as well as paragraph 30 clause (ख). In this context, I have also gone through the copy of execution proceedings more particularly description of the suit property. According to the description given in paragraph 30 clause (ख), city survey number of the suit property is shown as 14440, whereas city survey number of the suit property is shown as 1440 in execution proceedings. This seems to be the center of dispute in the execution proceedings. When it is a question of identification of the property, it is well settled that the Executing Court can make reasonable inquiry in that behalf and also look to the material on record of the suit itself. Even if number of the property is found incorrect, the boundaries would prevail. Except city survey number, rest of the description of the suit property is found to be consistent and the same as described in the counter claim. I do not find any force in the submissions of Mr. N. L. Choudhari, learned counsel for petitioners in this regard.

14 Now, coming to the second point, which relates to petitioners, who happened to be legal heirs of original plaintiff No.1 stated to be unnecessary party to the execution proceedings. It is pointed out by Mr. Y. G. Gujarathi, learned counsel for the Respondent Nos.1 and 12 that the legal heirs of plaintiff No.1 were brought on record during the pendency of Special Civil Suit No.08 of 1991 as per the order passed by this Court in Writ Petition No.3758 of 2004 dated 8th July, 2009. The legal heirs of plaintiff No.1 were party before the lower Appellate Court as appellants. They were also party to the second appeal in the capacity of appellants. Certainly, the legal heirs of plaintiff No.1/Chandanmal Chunilal Oswal stepped into the shoes of Chandanmal, who have prosecuted the suit, appeal as well as second appeal. They were also contesting party before the Trial Court, lower Appellate Court and the High Court. Now, the petitioners cannot say that they cannot be made party to the execution proceedings simply because the order of possession pertains to plaintiff Nos.2 and 3. Be that as it may, plaintiff Nos.2 and 3 and the petitioners are the legal heirs of plaintiff No.1/Chandanmal Chunilal Oswal. The decree passed by the Trial Court, which is confirmed upto the High Court is certainly binding on the petitioners. They have no voice to say at this stage that they have no concern about the dispute and they are made unnecessary party to the execution proceedings.

15 It is well settled position of law that Executing Court cannot go behind the decree. In case of ***S.P. Misra and others Vs. Mohd. Laiquddin Khan and another***, reported in, ***(2019) 10 Supreme Court Cases 329***, it is held by the Honourable Supreme Court that in view of Section 47 and Order XXI of the Civil Procedure Code, 1908, the Executing Court cannot travel beyond the decree. In the case in hand, it is noticed that the Executing Court has not travelled beyond its jurisdiction and not gone beyond the terms of the decree. So far as payment of earnest money is concerned, the impugned order does not indicate whether that has been deposited by defendant Nos.1(a), 1(b), 3, 4(1) to 4(4), 5, 6(1) to 6(3) and 7 to 12. It is also not clear from the impugned order whether it is paid by them directly to the plaintiffs or deposited the same in the Executing Court. However, that point can be taken care of by issuing directions to the Executing Court. The Executing Court seems to have correctly issued possession warrant in respect of the suit property by overruling the objections raised on behalf of the petitioners. I do not see any manifest error on the part of the learned Executing Court. The litigation between the parties is going on from the year 1990. More than 30 years are over. The decree holder must get fruits of her decree. It is high time. I do not find merit in the petition. Hence, the

following order is passed:

ORDER

- I. The writ petition stands dismissed.
- II. Defendant Nos.1(a), 1(b), 3, 4(1) to 4(4), 5, 6(1) to 6(3) and 7 to 12 shall deposit Rs.50,000/- (earnest money) within four weeks from today with 9% interest per annum from 1st February, 1979 to the date of filing of the suit i.e. 5th December, 1990, if it is not earlier deposited or not directly paid to the plaintiffs as per the judgment and decree passed by the Trial Court dated 21st December, 2012. The petitioners may even recover the same by filing execution proceedings.
- III. There shall not be any obstacle to execute the possession warrant as per the decree passed in Special Civil Suit No.08 of 1991.
- IV. No order as to costs.
- V. Rule discharged.

VI. The writ petition is accordingly disposed of.

[SHRIKANT D. KULKARNI, J.]

16 At this stage, Mr. N. L. Choudhari, the learned counsel for petitioners seeks stay to the judgment and order pronounced today by this Court so as to challenge the same before the Apex Court.

17 Mr. Y. G. Gujarathi, learned counsel for the Respondent Nos.1 and 12 and Mrs. Charuta S. Deshmukh, learned counsel for Respondent Nos.2-A to 2-C, 5-A, 5-B, 6-A to 6-C, 7-A to 7-C, 8-A to 8-C, 10 and 11 opposed to stay the judgment delivered by this Court on the ground that the litigation is going on since more than 30 years and the successful party is deprived from getting the fruits of the decree.

18 The petitioners intend to challenge this judgment before the Apex Court. Hence, this judgment is stayed for four weeks from today.

[SHRIKANT D. KULKARNI, J.]