

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4009 OF 2019

Syed Shafiyoddin S/o Yed Bashiroddin
Age 50 years, Occu.: Agriculture,
R/o Saigaon, Tq. Ambajogai,
Dist. Beed.

.... Petitioner

VERSUS

1. Syed Taheroddin S/o Syed Gaus Modiyoddin,
Age 60 years, Occu.: Agriculture,
R/o Saigaon, Tq. Ambajogai,
Dist. Beed.

2. Syed Naimoddin S/o Syed Bashiroddin
Age 50 years, Occu.: Agriculture,
R/o Saigaon, Tq. Ambajogai,
Dist. Beed.

.... Respondents

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Dr. R.R. Deshpande, Advocate h/f Ms. Priyanka R. Deshpande,
Advocate for the Petitioner
Mr. V.V. Bhavthankar, Advocate for Respondent No.1
Mr. R.D. Bhise, Advocate for Respondent No.2

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 14th JUNE, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned advocates for the parties. Perused the documents placed on record.

2. The petitioner is aggrieved by the order passed by the learned Civil Judge, Senior Division, Ambajogai below Exhibit 54 in R.D. No. 2 of 2016, thereby rejecting the application filed by the petitioner under Order XXI Rule 97, 98 and 99 and Section 47 of the Code of Civil Procedure.

3. By filing the said application, the petitioner/judgment debtor contended that the suit property comes under the provisions of consolidation scheme and therefore the decree passed in Regular Civil Suit No.157 of 2013 is without jurisdiction. The petitioner, therefore, requested by the said application to frame the issue as to whether the Darkhast, original suit and the prayer made in the said suit comes within the jurisdiction of the trial Court/executing Court and to take evidence on that issue and dismiss the Darkhast.

4. The said application was opposed by the decree holder/respondent No.1. The executing Court rejected the application holding that since the judgment and decree passed by the trial Court is confirmed up to this Court in Second Appeal No.727 of 2016, and the judgment debtor has not taken such objection about jurisdiction earlier, at this stage, the judgment debtor has no right to take objection that the decree passed in Regular Civil Suit No. 157 of 2013 is beyond its jurisdiction.

The executing Court, therefore, refused to frame the issue of jurisdiction and rejected the application.

5. It is not in dispute that the petitioner is entitled to question the jurisdiction in the execution proceedings, in terms of Order XXI Rule, 97, 98 and 99. If such objection is raised, it is the duty of the executing Court to record the evidence and frame the issue and to decide the same as if it is deciding the suit. The impugned order since is contrary to the provisions of Order XXI Rule, 97, 98 and 99, the same is unsustainable in law and the facts of the case.

6. In the result, following order is passed :-

ORDER

- (I) The Writ Petition is allowed.
- (II) The impugned order passed below Exhibit 54 in R.D. No. 2 of 2016 passed by the Civil Judge, Senior Division, Ambajogai is hereby quashed and set aside.
- (III) The executing Court is directed to frame issue of jurisdiction and after recording the evidence, the same shall decide within a period of three months from the date of receipt of this order.
- (IV) Rule is made absolute in above terms. No costs.

8. At this stage, it is informed by the learned advocate for the respondent No.1 that the possession warrant is issued in the matter. If the above exercise is carried out, the possession warrant shall remain stayed.

**[NITIN B. SURYAWANSHI]
JUDGE**

S.P. Rane