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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8759 OF 2017

Hirabai Bansilal Bagdiya (Died) LRs & Others PETITIONERS

VERSUS

Ramniwas Bansilal Lakhotiya (Died) LRs & Ors. RESPONDENTS

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Mr. Milind K. Deshpande, Advocate for the petitioners

Mr. P. R. Katneshwarkar, Advocate for respondents No.1a and 1b

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 20th JULY, 2022

ORDER :

1. The petitioners are aggrieved by the order dated 4th March, 2017 passed by the learned Ad Hoc Additional District Judge-3, Jalna below Exhibit-4 in Regular Civil Appeal No. 166 of 2016.

2. The petitioners filed objection petition (Exhibit-31) in Special Darkhast No. 23 of 2011, under Order XXI, Rule 97 read with Rule 101 of the Civil Procedure Code. Subject matter of the objection petition is the suit house bearing Municipal House No. 3486 (old) and 3536 (new). The Executing Court, after recording the evidence, by a detail order, dismissed the objection petition filed by the petitioners.

3. As per the decree passed in Regular Civil Suit No. 48 of 1971, the predecessor in title of the decree holder – respondent, was declared as owner of the suit property. This decree was challenged by the daughters of original owner and possessor of the suit property, Late Motilal Gajbi, by filing Regular Civil Suit No. 376 of 1975. The relief of partition and declaration that the decree in Regular Civil Suit No. 48 of 1971 is not binding on them was sought in RCS No. 376 of 1975. The daughters of deceased Motilal Gajbi were not parties to the RCS No. 48 of 1971. RCS No. 376 of 1975 was dismissed and the said order of dismissal is confirmed by the High Court and Special Leave Petition No. 31350 of 2009 was pending before the Hon'ble Apex Court, hence the objection petitioners filed objection in Special Darkhast No. 23 of 2011 contending that unless the special leave petition is decided, the decree cannot be executed. It is further contended that since the objection petitioners were not parties to the suit in which the decree under execution has been passed, the decree is not binding on them. It is further claimed that the objection petitioners filed RCS No. 136 of 1991 against deceased Shankarlal Gajbi for perpetual injunction. RCS No. 136 of 1991 was dismissed by the Trial Court. Regular Civil Appeal No. 131 of 2000 filed by the objection petitioners was allowed and

injunction has been granted against deceased Shankarlal. The petitioners, therefore, prayed for dismissal of the Execution Petition.

4. After recording the evidence, the Executing Court, by a detail judgment, dismissed the objection holding that the decree under execution is the decree between licensee and licensor, the petitioners are not parties to the decree. When such decree is put in question, if any third party claims ownership by denying ownership of the licensor, the third party has an option to file suit and get their right declared and get possession of the property from the licensor. The Executing Court further held that the objection petitioners have not prayed for adjudication of their rights, but have claimed that as they have filed special leave petition in the Hon'ble Apex Court and as possession has been handed over by the judgment debtor Shankarlal to them, by way of a letter, the Execution Petition be dismissed. Therefore, since the objection petitioners are not praying for their right or title, the present application is not maintainable. By referring to Order XXI, Rule 104 of the CPC, the Executing Court has held that every order made under Rules 101 or 103 of the CPC shall be subject to the result of any suit. Since RCS No. 376 of 1975 is decided against the petitioners and the decision is confirmed up

to the High Court, the challenge is pending before the Hon'ble Apex Court, if the objection petitioners succeed in their special leave petition, they have every right to get the decree executed and that judgment will be binding on the respondent – decree holders also. Therefore, two simultaneous proceedings are not maintainable and the objection petitioners have no right to file application, when they have already availed the remedy of filing suit to get declaration of their right.

5. Being aggrieved by the order of the Executing Court rejecting their objection, the petitioners preferred Regular Civil Appeal No. 166 of 2016. The petitioners filed application Exhibit-4 in the said appeal seeking stay to the Special Darkhast No. 23 of 2011, till the decision of the appeal. Rejection of application Exhibit-4 is impugned in this petition.

6. Heard learned advocate for the petitioners and learned advocate for the respondents.

7. It is a matter of record that Special Civil Suit No. 43 of 1981 was decreed on 29th June, 1983 and Special Darkhast No.23 of 2011 is filed for execution of the said decree. It is also a matter of record that challenge raised by the petitioners to the said decree is negated up to the Hon'ble Apex Court by

dismissal of the Special Leave Petition No. 31350 of 2009. Even the Review Petition No. 1081 of 2020 filed by the petitioners is dismissed by the Hon'ble Apex Court.

Now, the petitioners claim stay to the Execution Petition on the ground that Curative Petition filed by them is pending before the Hon'ble Apex Court.

8. Learned advocate for the petitioners submits that the Curative Petition filed by the petitioners is pending before the Hon'ble Apex Court and, therefore, the application (Exhibit-4) filed by the petitioners in Regular Civil Appeal No. 166 of 2016 should have been allowed by the Appellate Court.

9. Admittedly, the petitioners were not party to the decree in Regular Civil Suit No. 48 of 1971. Challenge raised by the petitioners to the decree in Regular Civil Suit No. 48 of 1971 has failed till the Hon'ble Apex Court. Even the Review filed by the petitioners is dismissed by the Hon'ble Apex Court.

10. It is a matter of record that the decree passed in the year 1983 is yet to be executed and the petitioners and other judgment debtors are successful in not permitting the decree holder to execute the decree for more than three decades.

11. The order passed by the Appellate Court is a reasoned order. The petitioners have failed to show that substantial loss may result if the execution is not stayed. The petitioners have failed to make out any case for interference in the extraordinary writ jurisdiction of this Court.

12. No illegality or perversity is found in the order impugned in the present writ petition. Writ petition, being devoid of merits, is dismissed. No costs.

13. At this stage, learned advocate for the petitioners requests that the stay granted by this Court vide order dated 11th July, 2017 may be continued for a period of four weeks, so as to enable the petitioners to approach the Hon'ble Apex Court. Stay granted vide order dated 11th July, 2017 shall continue to operate for a period of four weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE