



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 14944 OF 2023

GOBA LALCHAND PAWAR DIED THROUGH LRS NARAYAN
GOBA PAWAR AND ANOTHER
VERSUS
VITHABAI SHANKAR BHOJANE DIED THROUGH LRS
SAHEBRAO SHANKAR BHOJANE AND OTHERS

...
Advocate for Petitioner : Mr. K.F.Shingare
Adv h/f : Mr. Satyajit S. Bora
Advocate for Respondent : Mr. Yogesh D. Kale
...

CORAM : SHAILESH P. BRAHME, J.

DATE : 18th DECEMBER, 2023

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith with the consent of the parties. Heard this matter finally.
2. Heard learned counsel Mr. K.F.Shingare for the petitioner and learned counsel Mr.Satyajit S. Bora holding for Mr. Yogesh D.Kale actually for the respondent No. 1 who is contesting party. The respondent No.2 to 6 did not contest the applications. They are formal parties.
3. The petitioners are challenging common order dated 15.09.2023 passed by learned joint civil judge junior division of Kannad, Dist. Aurangabad below Exh-159,162 and 165 in Regular Darkhast No. 10 of 2004. By the impugned order, the application of the decree holder (Exh.159) is partly allowed whereas applications Exh-(162,165) of the judgment debtors are rejected.

4. The petitioners are judgment debtors and the respondent No. 1 is decree holder. The remaining respondents are the judgment debtors. The respondent No. 1 had filed RCS No. 155 of 1999 for declaration, possession and injunction and it was decreed on 02.08.2003. Against that, RCA No. 112 of 2009 was preferred but it was dismissed. Then, second appeal No. 406 of 2011 was filed but it was also dismissed. The decree was confirmed by the Supreme Court also.

5. The Respondent No.1 filed Regular Darkhast No. 10 of 2004 which is pending before the civil judge junior division, Kannad. The petitioners filed Exh-162 under section 47 of CPC raising objection for the execution of the decree and for recalling an order of 'Possession warrant'. Another application Exh-165 was filed by the petitioner seeking permission to lead evidence in support of objections to execution.

6. The respondent No. 1 filed application Exh-159 for 'Possession warrant' and appointment of the Deputy Superintendent of land record for fixing the boundaries for handing over of the possession. The above applications are contested by adversaries. By impugned order, application Exh-159 was partly allowed appointing Taluka Inspector of land record as 'Court Commissioner' for conducting measurement and handing over of the possession. The applications Exh-162 and 165 are rejected.

7. The learned counsel for the petitioner submits that the executing court committed perversity in rejecting the application Exh-162 and 165 and allowing application Exh-159. The learned judge overlooked the subsequent events of alienation effected by legal heir of the respondent No.1, Sahebrao. No land is left for the execution. It is contended that the decree is unexecutable and the respondent No.1/decreed holder is taking disadvantage of the decree.

8. Learned counsel would submit that there is no proper identification of the boundaries of the suit land. The land in possession of the petitioner bearing Gut No. 129 is sought to be grabbed by the respondent No. 1. The possession warrant which is at the Exh-158 is for entire 21 acre and 17 gunthas, but the respondent No. 1 is entitled to half of the portion only.

9. Learned counsel further submits that there are serious objections for which evidence is necessary. Against rejection of application under section 47 there is remedy of appeal and hence it is submitted that liberty may be granted to prefer the appeal. He would submit that impugned order is unsustainable as the contentions raised by the petitioners have not been dealt with. He seeks to rely upon judgment of the Supreme Court in the matter of *Jini Dhanrajgir and another Versus Shibu Mathew and another etc.*, **2023 SCC OnLine SC 643** and judgment in *Writ Petition No. 4427 of 2019* passed by Nagpur Bench in the matter of *Pradeep Ramgopal Gupta Versus Rukminibai Rammanohar Shahu and others*.

10. *Per contra*, learned counsel for the respondent No.1 submits that there is no confusion regarding identification of the suit land. The decree for possession is passed in respect of land Gut No. 126. The land gut No. 129 is attached to recover the cost. A confusion is tried to be created by showing a boundary of gut no. 129 to mislead this court by the petitioner. The respondent is not seeking possession of land in gut no. 129.

11. Learned counsel submits that legal heir of respondent No.1, Sahebrao assigned the decree to his family members without handing over possession. No prejudice can be said to be caused to the petitioners. The execution is to the extent of 4 hectare of land in gut no. 126. The respondent No. 1 together with the respondent No. 6 & 7 are decree holder.

12. Learned counsel for the respondent has vehemently submitted that the decree passed by the trial court is confirmed upto Supreme Court. On previous occasion also the High Court refused to interfere in the orders passed by the executing courts emanating from rejection of the objection of the petitioners. The petitioners have protracted the execution and made every attempt to dodge possession. He would submit that the petitioners are bound by the decree and it has to be executed as it is.

13. I have considered the submissions of rival parties canvassed across the bar. The petitioners were directed to place on record common order dated 20.05.2023 passed below Exh-134,148 and 151 in self same execution proceedings. There is a reference of this common order in the impugned order. The applications and the common order are placed on record. There is another common order dated 06th December,2018 passed by the High Court in Writ Petition No. 5338 of 2014, 3854 of 2014 and 5339 of 2014.

14. The judgment and decree dated 02.08.2003 passed by trial court in RCS No. 1551 of 1999 in favour of the respondent No. 1 is confirmed up to Supreme Court. The petitioners are party to the proceedings. They are bound by the decree. They are only entitled to raise objection under section 47 of the CPC. The objections as contemplated by Order 21 Rule 97 to 102 are not permitted to be raised by them. The third party who is in possession, the decree holder or the third party who is claiming possession are only entitled to file proceedings under Order 21 Rule 97 to 102. In that contingency, only the permission to lead evidence can be granted to determine independent right, title or interest. Such is not the position in the present matter. Therefore, application Exh-165 is rightly rejected.

15. The learned counsel for the petitioner sought reliance on judgment rendered in **Jini Dhanrajgir & Anr. v/s. Shibu Mathew & Anr. Etc.** by Supreme Court. In that matter, application was filed before

the executing court under section 47 read with order 21 Rule 97 of CPC. There the objectors were third parties. The facts of the case in hand are totally different. The ratio is not applicable. Similarly, in the judgment rendered by Nagpur Bench in the matter of **Pradeep Ramgopal Gupta v/s. Rukminibai Rammanohar Shahu and others**, the application was filed under section 47 read with Order 21 Rule 97 of CPC whereas in the present matter there is no application under Order 21 Rule 97 of CPC. Hence, the ratio laid down in that judgment is not applicable.

16. It reveals from the record that legal heir of respondent No. 1, Sahebrao partitioned the land in favour of the Kantabai, Dilip and Shrikant by partition deed dated 12.08.202. That can be said to be assignment of decree under Order 22 Rule 10 of CPC. The possession has not been handed over. The decree holder is yet to get the possession from the judgment debtor. Therefore, the submissions of the petitioner/judgment debtor that no land is left for execution is devoid of merits.

17. The decree of possession is sought to be executed in respect of the land gut no. 126. The land gut No. 129 is belonging to the petitioner which is attached for recovery of cost only. The petitioners are misleading the executing court by showing boundaries of land gut no. 129 with the boundaries of gut no. 126. In fact, there is no confusion.

18. It reveals from the record that the petitioners raised various objections previously also. Application Exh-134 was filed for issuing warrant of possession, application Exh-136 was filed for objection under section 47 and application Exh-151 was filed by petitioners for leading evidence. By common order dated 20.05.2023, application Exh-134 filed by the respondent No. 1 was allowed. The application Exh-136,148 and 151 were rejected. The executing court rightly referred to this common order to hold that repetitively the petitioners are raising objections to the execution of the decree.

19. It has been brought on record that Writ Petition No. 5338 of 2014, 3854 of 2014 and 5339 of 2014 were filed by the petitioners against the rejection of their applications. The following are the findings recorded by the High Court in the common order dated 06th December, 2018 for rejecting the Writ Petition.

“6) In both these petitions, the learned Civil Judge has referred to appointment of the Court Commissioner passed below Exh 37. The Court Commissioner filed his report vide Exh.65 along with the map. The Court Commissioner also submitted a report at Exhibit No. 85. The petitioner has sought to contend that the boundaries in the report of the Court Commissioner and the boundaries in the decree and execution do not match with each other. The learned Civil Judge has rightly criticised this contention as an attempt to postpone the execution proceedings. Merely by creating some suspicion about identity of the property, the execution of decree passed in the year 2003, cannot be

deferred. The learned Civil Judge has looked into this contention. He has also looked into the report of the Commissioner and the map. The suit property is categorically identified and some of the names in the report are of unauthorised occupants. The learned Counsel for the respondent/plaintiff has pointed out that the execution application is in consonance with the decree and the description of the property is in the plaint.

7) Apart from this position, it is settled that the decree will have to be executed as it is and as per the schedule. The application to call the Commissioner again to ascertain identity of the property, has been correctly rejected by the learned Civil Judge on the ground that it is only to prolong the matter. The order passed on the possession warrant was kept in abeyance and in furtherance of the same, the order was passed on 21 February 2014.

8) Notices were issued in these petitions in the year 2014. Since various respondents could not be served, the petitions have remained pending and the decree has not been executed.

9) In these circumstances, there is no merit in any of the petitions filed by the judgment debtor. These petitions are nothing but attempt to deprive the respondent/plaintiff from fruits of the decree, after having succeeded throughout in the proceedings upto the Supreme Court. The writ petitions are rejected.

10) Needless to clarify that the learned Civil Judge will ensure that the decree is executed as per the description in the execution application.”

20. In the wake of the observations in earlier round of litigation especially in paragraph No. 9 as stated above, I hold that the applications of the petitioners are successive attempts to protract the execution of the decree under one pretext or the other. Their conduct is deprecated. There is absolutely no merit in the petition.

21. The learned executing court has taken abundant precaution by appointing the commissioner to measure the land, to fix the boundaries and thereafter to hand over the possession. Considering the history and the conduct of the petitioners, the impugned order is appropriate and reasonable. I do not find any substance in the submission of learned counsel for the petitioner for granting them liberty to file the appeal. The decree is executable and all rights of the petitioners have been adjudicated.

22. There is no perversity or any patent illegality in the impugned order. Writ Petition is dismissed with costs.

[SHAILESH P. BRAHME, J.]