

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1449 OF 2018

Karbhari Pandu Bodke and ors

..... Petitioners

Vs.

Rangnath Narayan Bhise and ors

..... Respondents

Ms. Rukmini Khairnar i/b. Mr. Pramod Narayan Joshi for the
Petitioners.

None for Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 21 JULY 2023.

P. C.

1. The challenge in the Petition is to the order dated 4 September 2017 passed by the executing Court rejecting the petitioners' Application under Section 47 of the Civil Procedure Code, 1908 (for short "CPC") raising objection to the execution of the decree passed in RCA No.90 of 1982 whereby the judgment-debtors were ordered to delivery possession of encroached portion shown in map.

2. Heard Ms. Rukmini Khairnar, learned counsel for the petitioners.

3. The office record indicates that the respondents had refused to accept the service. Learned counsel appearing for the

petitioners submits that the notice of today's hearing was served upon the respondents. However, the respondents have refused to accept the service. As such this Court has proceeded with the hearing of the Petition.

4. Learned counsel appearing for the petitioners submits that the Suit which was instituted by the respondents was for recovery of possession of land ad-measuring 0.99R stated to be encroached upon by the petitioners who are the owner of Gut No.304. The encroachment pleaded was in respect of the respondents' land which is Gut No.281. She would further submit that the Suit was dismissed as against which an Appeal was preferred being RCA No.90 of 1982 in which the dismissal came to be reversed and the judgment-debtors were ordered to deliver the possession of encroached portion shown in map at Exh.44 which was annexed to the decree. She would submit that before the executing Court, the Application came to be filed under Section 47 of the CPC in view of the report of the Court Commissioner who was appointed by the executing Court as the executing Court had formed an opinion that the map which was annexed to the decree did not reflect the correct position. She would submit that as per the Court Commissioner's report and the map which was annexed

at page 22 to the Petition, the encroached portion is shown to be to the extent of 24R. She would contend that the objection to the position of 0.99R has been rejected by the executing Court on the ground that the executing Court cannot go beyond the decree.

5. Considered the submission.

6. The Suit in question sought recovery of possession of 0.99R and it was the executing Court itself which had directed the appointment of the Court Commissioner to ascertain the area of encroachment as according to the executing Court the map annexed to the decree did not reflect the correct position. Having done so, it was incumbent upon the executing Court to take into consideration the map prepared by the Court Commissioner which shows that upon the re-measurement of lands by Surveyor only 24R are found to be encroached. Learned counsel for the petitioners has pointed out that the subsequently the respondents had sold part of their land to the third party and the same may be the reason for decline in the encroached portion. Under the provisions of Order 21 Rule 101, all questions including questions regarding the right, title and interest in the property arising between the parties and relevant to the adjudication of the application is required to be determined by the executing Court.

The executing Court had refused to go into the issue raised by the petitioners on the solitary ground that the executing Court cannot go beyond the decree. As the executing Court itself has directed the appointment of the Court Commissioner to ascertain the boundaries, the report of the Court Commissioner is required to be taken into consideration before the decree is executed, particularly so, when subsequently the part of the Gut No.281 has been sold by the respondents to the third party.

7. As the executing Court has failed to exercise the jurisdiction vested in it under the provisions of Order 21 of the CPC, in my opinion, the impugned order is required to be quashed and set aside and the objection raised to the execution Application under Section 47 of the CPC is restored to file. The trial Court is directed to decide the said Application by taking into consideration the subsequent map of the Court Commissioner and thereafter to adjudicate the objection raised to the execution Application.

8. This Writ Petition stands allowed in the aforesaid terms.

SHARMILA U. DESHMUKH, J.