



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9871 OF 2023
WITH CA/13813/2023

Eknath Vishwanth Markad, Died
through Lrs and Others ...Petitioners

Versus

Balu Babasaheb Kute and Ors ...Respondents

...
Mr. S. V. Deshmukh, Advocate for Petitioners
...

CORAM : R.M. JOSHI, J
DATE : JULY 23, 2024

PER COURT :

1. Petitioner being aggrieved by order dated 31.01.2022 passed below Exh. 43 in R.D. No. 07/2019 and order dated 11.01.2019 passed below Exh. 126 in M.A. No. 01/2004 by Civil Judge, Senior Division, Bhoom directing Petitioner to deliver possession and issuance of possession warrant against Petitioners who are legal heirs of Petitioners, preferred this Petition.

2. The facts which led to filing of this petition can be narrated in brief as under:

Plaintiff/Eknath had filed Regular Civil Suit No. 34/1984 against Defendants claiming right of

preemption contenting that original owner of the suit land has sold 1/4th share in Survey Nos. 16A and 17A to Defendant No. 5 – Ramling and Defendant No. 6 – Trimbak by sale deed dated 16.06.1969. Further, the owner, Maruti, sold half share from the southern side of same property to Plaintiff/Eknath and Defendant No. 7 – Mhadu by sale deed dated 24.08.1970. It is claimed that Defendant Nos. 5 and 6 have sold their 1/4th share from same property to Defendant Nos. 1 to 4 by sale deed dated 20.01.1984. It is his case that village Songiri was part of the Hyderabad State ruled by Mohammadan ruler and according to the customs of preemption, he has preferential right to purchase share of Defendant Nos. 5 and 6. It is his further contention that he along with Mhadu is in possession of the suit land prior to execution of sale deed.

3. In the said suit, no written statement order was passed against Defendant Nos. 2, 5 to 7 and 9. The said suit was decreed by judgment and order dated 11.03.1992. Defendant Nos. 3/Balu and 4/Sunil have challenged the said decree by filing RCA No. 11/1992. It is claimed that the other Defendants did not file

appeal against decree in favour of Plaintiff and as such, decree against them has attained finality. The appeal filed by Defendant Nos. 3 and 4 is allowed by order dated 03.12.2002. Second Appeal bearing no. 484/2003 filed by Plaintiff against the said order came to be dismissed on 07.09.2007. Thereafter, application under Section 144 of CPC seeking repossession of property by Defendant Nos. 1, 2 and 10 is filed. In this proceeding, impugned order came to be passed. Hence, this Petition.

4. Learned Counsel for Petitioners submits that there is a decree which has attained finality against Defendant Nos. 1, 2 and 10 as they did not challenge the decree passed in RCS No. 34/1984. It is his submission that in absence of same being set aside against these Defendants, the question of they filing any application for execution and/or application under Section 144 CPC, does not arise. It is his submission that in ignorance of these facts, learned Trial Court has passed impugned order and hence, interference is called for therein.

5. Perusal of the record indicates that in RCA

No.11/1992 entire judgment and decree passed in RCS No. 34/1984 dated 11.03.1992 came to be set aside. Operative part of the said judgment clearly indicates so. The operative part of the RCA reads thus:

ORDER

1. The appeal is allowed.
2. The judgment and decree passed by the trial Court is set aside.
3. The sit is dismissed with costs.
4. The plaintiff shall pay costs of the appellants and bear his own.
5. Decree be drawn up.
6. Perusal of the operative part of the judgment passed in RCA No. 11/1992 shows that not only judgment and decree passed by the Trial Court is set aside but also suit is also dismissed with costs. Meaning thereby, judgment passed against other Defendants also stood set aside and suit as a whole is dismissed. Pertinently, Second Appeal being No. 484/2003 filed against this judgment is dismissed. The order of First Appellate Court has attained finality. Once the suit is

dismissed and the there is obtainment of possession of the property of the Defendants on the basis of decree passed in such suit, Section 144 CPC would come in play.

7. Section 144 of CPC reads thus:

Section 144 - Application for restitution

(1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled in any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

Explanation.--For the purposes of subsection (1) the expression "Court which passed the decree or order" shall be deemed to include,--

(a) where the decree or order has been varied or reversed in exercise of appellate

or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute, it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit]

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

8. Admittedly, Petitioners are the legal heirs of Original Plaintiff in RCS No. 34/1984. Pursuant to the judgment and decree passed therein on 11.03.1992 they are in possession of the property belonging to Defendant Nos. 1, 2 and 10. Once the suit is dismissed, Plaintiff has no right to retain the possession of the suit property. In view of this, application filed by these Defendants under Section 144 CPC certainly tenable. There is no successful challenge to the dismissal of the entire suit though Appeal has been

filed by the original Defendant Nos. 3 and 4 against judgment and decree passed in RCS No. 34/1984. It is, therefore, not open for the Petitioners now to agitate the said issue before this Court.

9. Having regard to the aforestated facts, no perversity found in the impugned order and as such, this Court is not inclined to interfere therein in exercise of writ jurisdiction. Hence, Petition stands dismissed. Pending application is also disposed of.

(R. M. JOSHI, J.)

Malani