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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 3233 OF 2024

(Arun s/o Ramrao Fasale .vs. Gajanan s/o Anandrao Sontake and others)

Office Notes, Office Memoranda of Coram, Appearances, court's orders or directions and Registrar's orders	Court's or Judge's orders
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Dr. Mrs. Renuka S. Sirpurkar, Advocate for the
Petitioner.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : MAY 21, 2024.

. By this petition, the petitioner has challenged the order dated 18.4.2024 below Exh.85 passed by the learned Joint Civil Judge, Junior Division, Akot.

2. The learned counsel Mrs. Sirpurkar for the petitioner submitted that the petitioner is the owner and occupier of part of New Survey/Gat No.12 (old Survey No.3/1) to the extent of 3.4 H.R. out of the total area of 11.08 at Hanwadi, Tahsil-Akot, District-Akola. It was originally owned by one Pandurang Hanawati Fasale. The said land was part of an execution proceeding in Regular Darkhast No.170/1964. Said Pandurang Fasale was the original defendant in Regular Civil Suit No.121/1960 filed by

one Sitaram Sontake, which was decreed on 5.2.1962, thereby making a money decree executable against said Pandurang. One Sitaram instituted Regular Execution (Darkhast) No.170/1964 seeking execution of the said decree, which ultimately culminated into the sale of old Survey No.3/1 admeasuring in 11.08 H.R. on 28.10.1974. After the said Sitaram passed away, he was eventually replaced by his legal representatives i.e. Anandrao Sitaram Sontake and seven others. The regular execution was contested and executed by the legal representatives of Sitaram, including his son Anandrao and the auction purchaser of the property of the judgment debtor therein was in fact purchased by none other than Anandrao on 28.10.1974. A sale certificate to that effect was issued in favour of Anandrao as an auction purchaser on 18.6.1979. Said Anandrao as an auction purchaser filed proceedings under Order 21 Rule 95 of the Code of Civil Procedure to secure the possession of the auctioned property comprising of 11.08 HR of old survey no.3/1 situated at Hanwadi, Tahsil-Akot, District-Akola. The said proceedings were initially contested at Telhara and the possession could not be transferred to said Anandrao till the year 2018 for various reasons. On 11.10.2019 the property was effectively identified and found to be in the jurisdiction of Akot, whereafter the proceedings were renumbered as M.J.C.

No.215/2019 and transferred to the Court of Civil Judge, Junior Division, Akot.

3. The petitioner, who is aggrieved by the issuance of a possession warrant by the learned Civil Judge, Junior Division, Akot in M.J.C. No.215/2019, was challenged before this Court by this petition. It is submitted by her that in fact said possession warrant was issued against the dead person. She further submitted that the present petitioner approached to the executing court for adding the legal representatives as a parties, but they were not added as a parties. The said issue was also pending before this Court and this Court in Second Appeal bearing No.472/2022 framed the substantial questions of law, as under :

- (1) *Whether learned courts below right in rejecting objection without following procedure under Order 21, Rule 97 of the Code of Civil Procedure?*
- (2) *Whether entire proceeding is vitiated in view of the pursis moved by the appellant below Exh.108 through which it is shown that the dead persons are impleaded as a legal representatives and vitiated for non-applicability of Order 22, Rules 3, 4 and 12 as well as Order 21, Rules 35 and 95 of the Code of Civil Procedure?*

4. Learned counsel further submitted that the said Second Appeal came to be dismissed for want of prosecution and, therefore, this substantial questions of law :

Whether Order 22, Rules 3, 4 and 12 of the Code of Civil Procedure are applicable or not in the execution proceeding?

remained unanswered.

5. Now the possession warrant is issued against the dead person. The symbolic possession is shown to be obtained in the said execution, but still physical possession is with the present petitioner. If the present petitioner is not protected, then he would lose the possession and the procedure adopted by the trial court by issuing the possession warrant against the dead person itself is to be answered and, therefore, the symbolic possession obtained by executing the possession warrant itself is illegal.

6. Hence, issue notice for final disposal to the respondents, returnable after vacation.

7. Considering the submissions made by the learned counsel for the petitioner, perused the entire record as well as the order passed by this Court, dismissing the appeal, also

perused the substantial questions framed by this Court which remained unanswered, at this stage, there is immediate threat of losing of the possession. In view of that, till appearance of the respondents, no coercive action shall be taken against the petitioner to obtain physical possession from the present petitioner.

8. Stand over after vacation. Hamdast granted.

JUDGE