



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2379 OF 2018
WITH
CIVIL APPLICATION NO. 1187 OF 2025
IN
WRIT PETITION NO. 2379 OF 2018

1. Smt. Reshmabai Shiva Bhil (More)
Age: 67 years, Occupation: Household
2. Smt. Shanubai Shravan Bhil (Pawar)
Age: 55 years, Occupation: Household
Both residents of: At Walwadi,
Taluka and District Dhule

...PETITIONERS
[J.D. Nos. 2 & 3]

VERSUS

1. Shri Vitthal Zipru Patil
Age: Major, Occupation: Agriculture
Resident of: Plot No. 154, Jaihind Colony,
Deopure, Dhule.
2. Shri Gopichand Budha Patil
Age: Major, Occupation: Agriculture
Resident of: At Bhokar,
Taluka and District Dhule
[Alleged Assigness of Decree Holder
Shri Krishna Mahadu Patil]

...DECREE HOLDERS
[alleged]

3. Smt. Kasubai Goba Bhil
Deceased
4. Shri Waman Chindha Bhil
Deceased
5. Shri Shravan Daji Bhil
Age: Major, Occupation: labor
Resident of: Near Water Tank, Mohadi,
Taluka and District Dhule

6. Smt. Sonabai Rana BhilJ.D. No. 1, 4, to 5
Age- Major, Occupation: Labor
Resident of: At Walwadi,
Taluka and District Dhule ...RESPONDENTS

Mr. Mukul Kulkarni, Advocate for petitioners
Mr. P.V. Mandlik, Senior Advocate i/b. Mr. Tapan Sant, Advocate
for respondent No. 1 and 2

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CORAM : MANJUSHA DESHPANDE, J.

DATE : 13th FEBRUARY, 2025

ORDER :

1. Petitioners are challenging the judgment and order dated 15.09.2017 passed by Joint Civil Judge, Senior Division, Dhule, below Exhibit-27 in Regular Darkhast No. 43 of 2008, whereby application of petitioners challenging maintainability of execution proceeding has been dismissed.

2. The facts in brief that needs to be considered for consideration of the impugned order are that;

One Krishna Mahadu Patil had filed suit seeking specific performance of agreement, against petitioners and others in Regular Civil Suit No. 359 of 1992. The suit was decreed by the Trial Court vide judgment and decree dated 26.06.1998. The subject matter of the suit was agreement dated 09.01.1985 whereby land admeasuring 7 Acres 13 Are from 4

Hectares 43 Are was agreed to be sold in favour of Krishna Mahadu Patil by two persons namely Goba Chindha Bhil and Waman Chindha Bhil for consideration of Rs. 10,000/-. While decreeing the suit defendants were directed that they shall obtain permission to sell the land in favour of plaintiff from Collector, Dhule and after getting the permission shall execute the sale deed in favour of plaintiffs, as per terms of agreement dated 09.01.1985.

3. The Plaintiff Krishna Mahadu Patil filed execution bearing Regular Darkhast No. 09 of 1999 on 28.01.1999. During pendency of execution proceeding, original Defendant No. 4 Waman Chindha passed away on 03.03.2000. Therefore, application was filed for bringing legal heirs of Waman Chindha on record by the decree holder. The present respondents No. 1 and 2 i.e. Vitthal Patil and Gopichand Patil filed an application Exhibit-28 in the execution proceeding seeking permission to bring this on record contending that original decree holder Krishna Patil had executed an agreement (Bechan Patra) transferring his rights in favour of respondents No. 1 and 2.

4. On the basis of Bechan Patra they prayed that their names should be impleaded in the execution as decree holders. Vakalatnama was also filed on behalf of two decree holders which is at Exhibit-27. Original defendant Krishna Mahadu Patil passed away on 03.06.2006. During his life time, application Exhibit-28 seeking impleadment of present respondents No. 1 and 2 was not decided. In Regular Darkhast No. 9/1999 application Exhibit-28 came to be filed on behalf of judgment debtor/defendant No. 1 to 3, wherein it is contended that there is compromise arrived at between the plaintiffs and defendants i.e. Vitthal Patil and Gopichand Patil and therefore defendants are ready to execute sale deed in accordance with decree and they are ready to bear expenses as well as obtained necessary permission as per decree passed by the Trial Court. Regular Darkhast No. 9/1999 was dismissed for want of prosecution on 30.01.2009.

5. Shri. Mukul Kulkarni learned advocate for petitioners contends that after the regular darkhast was dismissed for want of prosecution on 30.01.2009, the decree holders have not filed any application seeking restoration of darkhast which was dismissed in default, but has filed independent execution

proceeding bearing Regular Darkhast No. 43/2008. Placing reliance on copy of Regular Darkhast No. 43/2008 it is contended by him that in the third column of regular darkhast under the caption date of decree, it is mentioned as 17.08.2004, when in fact there was no such decree passed on 17.08.2004. The decree of which execution has been filed has been passed on 29.06.1998. It is further contended that the name of Waman Bhil has been shown as defendant in the execution which was filed on 19.06.2008, though he had passed away and application for bringing legal heirs of Waman was filed by decree holders in the earlier proceedings. Therefore, without bringing legal heirs of Waman his name was shown as it is in Regular Darkhast No. 43/2008, which was filed on 19.06.2008.

6. In view of above mentioned circumstances, petitioners have filed application Exhibit-25 with a prayer to quash execution filed by decree holders. It is contended in the application that said execution has been filed by playing fraud on the Court and therefore, deserves to be quashed. Petitioners have raised various objections to the regular darkhast.

7. It is the contention of the petitioners that on 11.09.2008 vakalatnama in the name of present petitioners and

other judgment debtors including deceased judgment debtor No. 4 was presented before the Executing Court. It is allegedly signed by the power of attorney holder of judgment debtors Shri. Vijay Vitthalrao Deore. According to learned advocate for petitioners Vijay Deore is son of respondent No. 1 Vitthal Patil who is shown to be decree holder No. 1 in Regular Darkhast No. 43/2008. Power of attorney which is alleged to be executed on 17.03.2006 has given the authority to Vijay Deore for appearing in Regular Darkhast No. 9/1999, however, same was utilized for appearing in Regular Darkhast No. 43/2008.

8. It is also alleged that on the basis of bogus power of attorney, say was submitted in the execution proceeding wherein it was admitted that decree is assigned in favour of respondent No. 1 and judgment debtors are ready to execute the sale deed. A say on behalf of judgment debtors by son of decree holder No. 1 was submitted in the Court on 13.10.2008. Even compromise purshis was submitted at Exhibit-11 on 28.01.2009.

9. An application was filed before Executing Court seeking appointment of Court Commissioner for execution of sale deed as per decree. Only when Court Commissioner came to be appointed, petitioners came to know about pendency of present

proceedings. Hence, they have caused appearance on 09.11.2012 and they have filed application at Exhibit-25 on 22.02.2013 raising various objections. In the application it is further alleged that though defendant No. 1 Kasubai had expired on 20.02.2010, she was shown to be alive in darkhast and darkhast proceeded on the presumption that she is alive. Since darkhast is against the dead person it is not maintainable.

10. The objection regarding maintainability of proceeding against dead defendant No. 4 Waman was also raised. It was alleged that execution proceeding suffer from fraud and misrepresentation by the decree holders. Petitioners have also raised objection about tenability of Regular Darkhast No. 43/2008 on the ground that though earlier Regular Darkhast No. 9/1999 was dismissed for default, without seeking restoration of that darkhast, decree holders have filed fresh darkhast which is not tenable. Darkhast is not filed within a period of 12 years, therefore, it is not maintainable. Application Exhibit-25 was filed on 22.02.2013.

11. Thereafter, petitioners have again filed application Exhibit-27 on 22.07.2013 invoking Section 151 and Order 21 Rule 26, 58, 69 and 97 of Code of Civil Procedure. In the

application, a prayer was made for staying execution of decree as it was not tenable. In the application, prayer was made to frame an issue whether darkhast is maintainable? In the said application, it was claimed that though there was no decree passed on 17.08.2004, however, in the regular darkhast the date of decree is mentioned as 17.08.2004. Therefore, on this ground the decree suffers from misrepresentation and therefore, it does not deserve to be allowed.

12. Petitioners have also raised objection to the appointment of Shriram Hari Patil as power of attorney holder, which was not registered document, therefore, he could not prosecute matter on behalf of Krishna Mahadu Patil. It is alleged that Shriram Hari Patil who is claimed to be power of attorney holder of Krishna Mahadu Patil is not authorized person since the power of attorney is not registered. Therefore, power under un-registered document has no validity.

13. The other objection which is raised by petitioners is that the decree holder has projected that judgment debtors have appointed Vijay Deore as their power of attorney holder, which is totally incorrect since they have never appointed Vijay Deore as their power of attorney holder. Since Vijay Deore is the son of

Vitthal Patil, therefore, relationship between Vijay Deore and Vitthal Patil itself disclosed that there is ulterior motive and with intention to grab the property and any how to get the decree executed in connivance of the parties.

14. Respondents have manipulated the proceedings and papers in order to obtain the decree. It is also suppressed by the decree holders who claimed to be assignee of Krishna Mahadu Patil that earlier darkhast was filed and it was dismissed for default. Therefore, the execution petition suffers from suppression of material facts.

15. The decree holders have filed say to the application filed by petitioners and it is stated that decree of Court can be purchased as per Section 49 and Order 21 Rule 16 of CPC. Therefore, objection of the judgment debtors to the execution filed by decree holders as assignee of original decree holders does not hold good. Hence, his objection to the tenability of application filed by decree holder No. 2 and 3 does not survive. It is contended that they have not suppressed any facts from the Court. They have purchased the decree on 17.08.2004. The allegation of the judgment debtors that Vijay Deore power of attorney holder is the son of Vitthal Zipru Patil and therefore,

proceedings are manipulated by decree holder are denied by the decree holders in their say. Even the allegation made in para 7 that defendant No. 1 Kasubai Goba Bhil has expired on 22.02.2010 yet she is shown to be party to the execution proceeding and execution proceedings are not capable of being proceeded against dead person is also denied being false, frivolous and bogus. It is the objection in para 8 that judgment debtor No. 4 Waman Bhil who has expired on 03.03.2000 has been shown as judgment debtor in darkhast which was filed on 19.06.2008. Even though mutation entry No. 1028 note of death of Waman Bhil has already been taken. In response to to para 8 there is mere denial of the allegation. It is stated in the say that decree holders have opposed the prayer for granting stay to the execution on the ground that irreparable loss would be caused to the decree holders and all the contentions raised in the application are false, frivolous and bogus and are made with intention to divert the Court from the issue of execution and avoid the decree. Therefore, all the allegations made in the application are denied by the decree holders. It is stated that no cause of action has arisen for the judgment debtors to file said application. Merely in order to create legal impediment, the judgment debtor No. 2 and 3 are filing false and frivolous

application. In fact according to Order 22 Rule 6 and 7 of CPC darkhast never abets. The execution application has been filed adhering to all the rules and regulations in respect of execution has provided under CPC. When Court is about to pass final order in the execution proceeding, in order to avoid the execution of decree and prolong the matter, present application taking objection has been filing.

16. Learned Senior Advocate Shri. Mandlik, appearing for respondents No. 1 and 2 contends that application has been filed by petitioners in order to avoid execution of decree and prolong the matter. Though decree is finalized in the year 1998, the judgment debtors are trying to avoid the decree. According to him, the objection raised by judgment debtors are frivolous and not at all maintainable. In fact as per Order 21 Rule 16 the interest in decree is capable of being transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Respondents No. 1 and 2 in the present writ petition are the assignee of the decree holders. The assignment of

respondents No. 1 and 2 is legal and proper and it cannot be questioned. It is contended that on one hand, judgment debtors are filing application to prolong the execution and on the other they are alienating the property, which is subject matter of execution proceedings.

17. The respondents No. 1 and 2 have filed an application before this Court bearing Civil Application No. 1187/2025 wherein they have prayed to vacate the interim stay granted by this Court on 05.03.2018. In the application it is contended that after granting of stay by this Court to the order passed by Joint Civil Judge, Senior Division, Dhule on exhibit-27, despite the order of stay, petitioners have executed the sale deed in favour of one Akash Pawar of the suit property, which clearly shows that they are trying to create third party interest in the suit land violating the stay order passed by this Court. Learned Senior Advocate for respondents No. 1 and 2 has drawn my attention to the sale deed executed by petitioner Reshmabai Shiva More and Ukha Waman Bhil in respect of land Gut No. 42 to the extent of 1 Hectare 60 Are, which is executed on 11.07.2024.

18. Learned Senior Advocate for respondents No. 1 and 2

has placed reliance on judgment of this Court in ***Ellora Chemicals and Others vs. Panchavati Co-operative Housing Society Limited***, 2011 CJ (Bom) 574, wherein this Court has observed that, “*application under Order 21 Rule 22 of CPC is only restricted to the executability of decree and not its validity. The Executing Court is obligated to execute decree as it stands. If it is case of judgment debtors that decree has been passed on account of fraud it is for them to file appropriate proceeding, said issue cannot be agitated in application filed under Order 21 Rule 22 of CPC.*”

In short, contention of learned Senior Advocate is that the Executing Court cannot entertain the objection regarding manner in which the decree has been obtained. It can only entertain the issues regarding execution of decree. So far as validity is concerned, it has to be challenged in appropriate proceedings.

19. Learned advocate Shri. Mukul Kulkarni in response to the allegations made by learned Senior Advocate submits that the property which is sold is not subject matter of present execution petition. He tried to demonstrate that subject property though lies in same gut number is admeasuring 7 Acres and 13

Are from 4 Hectare 43 Are, therefore, the property which is subject matter of execution proceeding is not sold.

20. I have heard Shri. Mukul Kulkarni, learned advocate for the petitioners and Shri. P.V. Mandlik, Senior Advocate for respondents No. 1 and 2 and have also perused the documents annexed with the writ petition.

21. After filing of say of respective parties, order has been passed by Civil Judge, Senior Division, Dhule on 15.09.2017, whereby application filed by judgment debtor has been rejected.

22. The application Exhibit-27 have been filed under Order 21, Rule 26, 58, 69 and 97 of CPC. Referring to above provisions in the application, the Executing Court has one by one dealt with provisions of CPC, which have been quoted in the application by judgment debtors. While deciding the issue which is raised by judgment debtor about *locus standi* of assignee who are respondent No. 1 and 2 in the present writ petition, the Executing Court has observed that as per Section 49 of CPC as well as Order 21 Rule 16, a decree can very well be purchased and he is having equal right to that of decree holders. Therefore,

Civil Judge, Senior Division, Dhule refused to entertain objection of the judgment debtors regarding tenability of execution application.

23. It is also observed that since judgment debtors have not filed any appeal against judgment and decree passed in Regular Civil Suit No. 359/1992 dated 29.06.1998, the decree has become final. It is further observed that execution has been filed within limitation, therefore, objection regarding limitation raised by judgment debtor would not survive.

24. One by one objections regarding invoking provisions mentioned in the application has been dealt with by Civil Judge, Senior Division, Dhule.

25. So far as Order 21 Rule 26 is concerned it is regarding stay of execution. According to Civil Judge, Senior Division, Dhule, even though it is claimed by judgment debtors that decree is obtained by fraud, the remedy available to the judgment debtors lies elsewhere. The judgment debtors can file separate suit for challenging the decree. Only upon sufficient cause being shown the execution of decree can be stayed for a reasonable time and judgment debtors have not made out

sufficient cause for stay to the execution.

26. As regards order 21 Rule 58 which is in respect of adjudication of claims to, or objections to attachment of property is concerned, it is observed that execution is filed by decree holders for execution of decree for specific performance and subject matter is not attachment of any property. Therefore, Order 21 Rule 58 will not be attracted in the present case.

27. Order 21 Rule 97 of CPC deals with resistance or obstruction to possession of immovable property. So far as present case is concerned, since it is a decree for specific performance even obstruction to possession would not be applicable. After dealing one by one with the provisions which have been mentioned in the title of application, the Executing Court has refused to interfere with the execution proceeding.

28. The short issue which is involved in this matter is whether application filed by judgment debtors has been properly decided by the Executing Court. After going through the application Exhibit-27 filed by judgment debtors, though title of the application reads as application under Section 151, Order 21 Rule 26, 58, 69 and 97 of CPC, however, petitioners have raised

various other objections apart from other objections under above mentioned provisions, which are quoted in the title of the application. It is the allegation made against the assignee Vitthal Zipru Patil and Gopichand Budha Patil that they have obtained Bechan Patra fraudulently and on the basis of that Bechan Patra they have filed the execution. The judgment debtor has referred to the date in the execution application which shows that the decree is obtained on 17.08.2004, when in fact no decree has been passed on 17.08.2004. Judgment debtors have raised an objection to the power of attorney holder which is allegedly executed in favour of Shrihari Patil by decree holder Krishna Mahadu Patil. According to them, said document is bogus and it does not hold any value since it is un-registered document. On the basis of un-registered power of attorney, the assignee Vitthal Patil and Gopichand Patil have filed execution application. It is further alleged in the execution petition that Vijay Deore is shown to be appointed as power of attorney on behalf of judgment debtors. The judgment debtors has never appointed Vijay Deore at any point of time. It is also alleged that Vijay Deore is son of decree holder Vitthal Patil. Further objection regarding continuance of name of Kasubai Bhil and Waman Bhil in the execution proceeding though they have expired long ago

is also raised on the ground that execution proceeding cannot be proceeded against dead persons. Therefore, on going through the application as well as order passed on Exhibit-27, I find that though the Executing Court has dealt with sections one by one which have been referred in the title clause of the application, but some of the objections which have been raised in the application are not at all adverted by the Executing Court and order impugned is passed without even referring to those.

However, I do not find any error so far as objections made and findings recorded by Executing Court qua the provisions quoted in the title clause, therefore I do not find that there is any case for interference made out. However, the issues which have been raised and have not been addressed by the Executing Court regarding objections raised by judgment debtors in the application which do not amount to raising doubts about validity of decree or which impinge the validity of decree, is required to be decided by Executing Court. The objections of petitioners regarding continuance of proceeding against dead person, as well as the other objections which have been raised by petitioners should be decided with by the Executing Court by passing a reasoned order.

29. In view of the observations made hereinabove, I proceed to pass following order:

ORDER

- (i) Writ Petition is partly allowed.
- (ii) Order dated 15.09.2017 passed by Joint Civil Judge, Senior Division, Dhule, below Exhibit-27 in Regular Darkhast No. 43/2008 is quashed and set aside and the matter is remanded back to the Joint Civil Judge, Senior Division, Dhule for passing appropriate orders on the issues which have been raised but not addressed while passing the order dated 15.09.2017.
- (iii) It is made clear that so far as observations made in the order dated 15.09.2017 are not interfered with by this Court. The matter is remanded only for passing reasoned order on the objections raised by petitioners in application at Exhibit-27 which are not decided by passing reasoned order.
- (iv) The respective parties shall remain present before the Executing Court on 04.03.2025 and thereafter Executing Court shall decide the application within four weeks thereafter and decide R.D. No. 43/2008 as early as possible.
- (v) It is also made clear that this Court has not expressed any opinion regarding merits of the matter.

- (vi) Writ Petition stands disposed of.
- (vii) In view of disposal of writ petition, pending civil application stands disposed of.

(MANJUSHA DESHPANDE, J.)