



IN THE HIGH Court OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10973 OF 2023

Dnyandeo Zopadu Sarode

Since deceased through legal heirs

1. Bhushan Dnyandeo Sarode

Age: 44 years, Occu: Agri.

R/o. Old Nashirabad Road,

Vitthal Peth, Jalgaon,

Tq. & Dist. Jalgaon.

2. Smt. Latabai Dnyandeo Sarode

Age: 69 years, occu: Household,

R/o. As above.

...PETITIONERS

(Orig. Defendants)

VERSUS

1. Abhiman Shankar Pawar,

Since deceased through legal heirs.

1A. Shakuntala Abhiman Pawar

Deceased

1B. Vikas Abhiman Pawar,

Age: 51 years, Occu. Business,

R/o. Kisan Dairy, Nagar Palika

Shopping Complex, Jalgaon

Tq. & Dist. Jalgaon.

1-C Jagdish Abhiman Pawar

Since Deceased Through Legal Heirs

1-C i Mirabai Jagdish Pawar

Age: 45 Yrs. Occu. Household

1-C ii Ajay Jagdish Pawar

Age: 23 Yrs. Occu. Education

1-C iii Devendra Jagdish Pawar

Age: 19 years Occu. Household.

2. The Jalgaon City Municipal Corporation

Jalgaon Through its Municipal Commissioner,

Jalgaon City Municipal Corporation Jalgaon.

**...RESPONDENTS
(Orig. Defendant)**

Mr.Girish V. Wani, Advocate for the petitioners.

Mr. Prassana N. Kutti, Advocate for Respondent No. 1B, 1-C-i to 1-C-iii.

Mr.Mehul V. Navandar, Advocate for Respondent No.2 (through VC).

CORAM : KISHORE C. SANT, J.
RESERVED ON : 28th FEBRUARY 2025
PRONOUNCED ON : 26th MARCH 2025

PC :-

1. Heard the learned Counsel for the parties.
2. By consent of the parties, the petition is taken up for final disposal at the stage of admission.
3. The judgment debtor No.2 in Regular Darkhast No.269 of 2007 pending in the Court of learned 5th Joint Civil Judge, Junior Division,

Jalgaon, has approached this Court challenging rejection of his Application below Exh.112 in the said Darkhast seeking appointment of Commissioner.

4. The petitioners are the legal heirs of one, Dnyandeo Sarode, original defendant-judgment debtor. The Respondent No.1A and 1B are the legal heirs of original plaintiff decree holder. Respondent No.2 is the Jalgaon City Municipal Corporation original defendant No.2 in the suit.

5. The facts, in short, are that the decree holder filed a suit for declaration and injunction bearing Regular Civil Suit No.53 of 1999. The said suit came to be partly decreed only against defendant No.1 and was dismissed against defendant No.2-Corporation. The decree of injunction came to be passed against original defendant No.1. The said order became final. The plaintiff, therefore, filed Regular Darkhast. In Darkhast, decree holder filed an application below Exh.34 for appointment of Court Commissioner by giving name of one Advocate as a Commissioner. The judgment debtor did not raise any objection to the name of the Commissioner.

6. The Commissioner prepared a report on the basis of inspection. The learned Court on the basis of report of the Commissioner directed to attach the property of present petitioner by order dated 15th December 2014. In the meantime, there was even arrest warrant issued against judgment debtor and he was lateron released on bail on 16th February 2012. After receipt of earlier Commissioner's report, the Court even passed an order of seizure of the property for recovery of an amount of Rs.36 lakhs towards rent of suit shop and property tax etc.

7. The petitioner filed an application Exh.96 seeking appointment of Commissioner under Order 26 Rule 10(2) of the C.P.C. It is stated that the earlier application of appointment of Commissioner was filed only to create evidence. Said report is not prepared in transparent manner. The Commissioner was not allowed to properly record the events during the visit of Commissioner etc. The earlier Commissioner is not examined by the decree holder in the Court and the said report is not proved. The petitioners stated that, therefore, it is necessary to cross examine the Commissioner on report by issuing witness summons to the

Commissioner. Further it is prayed that, till then, the execution proceeding be stayed.

8. The petitioners also filed an application Exh.89 for review order passed below Exh.64 and 65 directing attachment of property. This application was objected by the decree holder stating that when earlier Commissioner was appointed, no objection was raised. Various opportunities were given to cross examine the Commissioner. However, the petitioner failed to avail those opportunities on 11 dates. There is no objection raised to the earlier Commissioner's report. The Court, therefore, proceeded on the basis of that Commissioner's report. The application is, thus, only for protracting the execution of the proceeding and it is prayed for rejection. The application Exh.96 came to be rejected with costs by order dated 17th February 2020.

9. The petitioner, thereafter, filed an application Exh. 109 objecting the Commissioner's report Exh.44. The said application came to be allowed on 7th March 2022 granting permission to the petitioner to file objection at Exh.44. It is, thereafter, the petitioner again filed an

application Exh.112 seeking appointment of Court Commissioner mainly on the ground that, the application Exh.44 Commissioner's report is not properly prepared and, therefore, it is necessary to appoint fresh Commissioner. The said application came to be objected by the respondent. The learned trial Judge on hearing the parties rejected the application by the impugned order and, thus, the petitioner is before this Court.

10. Mr.Wani, the learned Advocate for the petitioners vehemently argued that the earlier report of the Commissioner was objected by the respondent for valid reason as the Commissioner did not record all events during inspection. Thereafter, the applications were filed. Permission was granted to the judgment debtor to file objection to the Commissioner's Report. Thus, the petitioners had every reason to file a fresh application. The learned Court did not consider the application on merits. The petitioners had earlier approached this Court by filing Writ Petition No.4153 of 2021. That writ petition was withdrawn with liberty to file application before executing Court seeking permission to file

objection to the report. Thus, even this Court had allowed the petitioners to raise objection. The trial Court failed to appreciate this aspect. The learned trial Judge, thus, committed mistake and illegality while passing the order as application is not decided on merit. He prays for allowing the writ petition.

11. The learned Advocate Mr.Kutti appearing for Respondent vehemently opposed the petition. He submits that the Court has rightly recorded the reasons by observing the report. The conduct of the petitioner needs to be considered. The Court while passing the decree, has already considered the merits of the matter. Decree was passed on 9th March 2006. The Commissioner had submitted a report Exh.44 now after 13 years of passing of the decree. The said application was also rejected. While rejecting the said application, the trial Court in paragraph Nos.4, 5 and 6 has specifically made observation about various opportunities granted to the petitioners. However, inspite of that, it is the petitioner, who failed to avail those opportunities. It is clear that the intention is only to prolong the proceeding of the execution. He

further submits that, no case is made out for appointment of fresh Commissioner. If at all, petitioners wanted to challenge the earlier report, it was open for the petitioner to challenge the same within reasonable time. Having failed to take objection at the relevant time. The petitioner is now taking undue advantage of the order passed by this Court which only allowed petitioner to file fresh application. However, it was open for the trial Court to consider the application on merits which is rightly done by the trial Court and the order is rightly passed.

12. After hearing the parties, this Court noted following; the Commissioner's report Exh. 44 was prepared in presence of both the parties long back. There is no objection raised by the petitioner to the said report for almost 10 years. There is endorsement on the draft note about the threats by the plaintiff's Advocate. However, still the judgment debtor did not move the Court immediately objecting report, neither filed any application for appointment fresh commissioner. This Court in earlier writ petition had only granted liberty to the petitioner to raise the

objection to the Commissioner's report that itself cannot be construed that the executing Court was obliged to allow the application. This Court thus has to consider the time at which the application was moved for appointment of Commissioner. No satisfactory reason is given as to why the petitioner could not move the application earlier. It cannot be said that this Court granted permission and thereafter, only the petitioner could get the cause of action. The trial Court has rightly considered all these aspects. This Court does not find any reason to interfere with the order passed by the trial Court. If the petitioner really was aggrieved, he would have immediately filed an application and raised an objection.

13. Considering all above, this Court finds that, no case is made out calling for interference at the hands of this Court. The petition, therefore, stands dismissed. No order as to costs.

[KISHORE C. SANT, J.]