



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

46 WRIT PETITION NO. 12625 OF 2024

Nitin Gitaram Kapse

..Petitioner

Versus

Chandrakant Damodhar Rahatekar and Others

..Respondents

.....

Shri. Shailesh S. Chapalgaonkar, Advocate for the Petitioner

Shri. S. S. Kulkarni, Advocate for Respondent Nos.1, 3 & 5

Respondent Nos.7A & 7C served.

Respondent Nos.4, 6/A to 6/C deleted.

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CORAM : NEERAJ P DHOTE, J.

Dated : APRIL 20, 2026

PER COURT :-

. By the present Writ Petition under Article 227 of the Constitution of India, the Petitioner who is third party to the execution proceedings bearing Regular Darkhast No.5/2015, has challenged the order dated 01.10.2024 passed by the learned Jt. Civil Judge, Junior Division, Rahata (Executing Court) below Exhs.74 and 76 in the aforesaid Execution Proceedings, rejecting the Applications.

2. The facts, in brief, leading to filing of this Petition are as under:

(a) Respondent No.1 had filed Counter Claim for possession in Regular Civil Suit No. 305/1997, which was filed by Deceased Respondent No.7 – Hausabai for Specific Performance of Contract. By Judgment and Decree

dated 28.03.2007 the learned Trial Court dismissed the Suit and allowed the Counter Claim of Respondent No.1. Operative order of the said Judgment reads as under:

“Order

(1) Suit is dismissed with costs.

(2) The Counter Claim put forth by defendants is hereby decreed with costs against plaintiffs.

(3) Plaintiffs are hereby directed to hand over the peaceful and vacant possession of the suit land in favour of defendant Nos. 1 to 6 within one month from the date of this order, failing which the defendants will be at liberty to get the same through this Court by following due procedure of law.

(4) The defendants are entitled to have mesne profit of the suit land from three preceding years on 25/1/2006 till they get actual possession of the suit land. However, separate enquiry of mesne profit is to be held under O. XX, R. 12 of C.P.C.

(5) Preliminary decree be drawn accordingly.”

3. No Appeal was preferred by any of the parties against the said decree. The said decree was put to possession in the aforesaid execution proceedings. The Petitioner claimed to have possession on some part of the suit property. The Petitioner filed the Application for leading the evidence. The learned Executing Court by the common order dated 08.12.2023 allowed the Petitioner to lead his evidence. Subsequently, the Judgment Debtor filed Application below Exh.69 for stay to the orders passed below Applications at Exhs. 37, 44 and 57 on the ground that, they had challenged the order of issuing possession warrant and the Decree Holder filed Application at Exh.70 for closing the evidence of

third party. The learned Executing Court by order dated 09.05.2024 allowed the Application below Exh.70 and rejected the Application below Exh.69 and foreclosed the Petitioners right to lead the evidence.

The operative part of the said order reads as under:

“Order

- 1. Application at Exh. 70 is allowed.*
- 2. Third person's right to lead evidence is foreclosed.*
- 3. Application at Exh. 69 is rejected.*
- 4. Issue fresh possession warrant for possession of subject property found with judgment debtors & third person.*
- 5. Police Inspector, Rahata police station shall provide assistance, if prayed by decree holders while executing possession warrant.*
- 6. Deputy Superintendent of Land Record, Rahata shall assist the officer of the court to hand over the possession of subject property found with judgment debtors & third person, if prayed by decree holders.*
- 7. Decree holder shall pay requisite fee.”*

4. Thereafter, the Petitioner filed Applications below Exhs.74 and 76 seeking stay of the said order dated 09.05.2024 and for setting aside the order foreclosing his evidence, respectively. After hearing learned Advocates for both the sides, learned Executing Court by order dated 01.10.2024 rejected the said Applications filed by the Petitioner.

5. Heard learned Advocate for the Petitioner and learned Advocate for Respondent No.1, who is contesting party. With their assistance,

perused the papers on record.

6. It is submitted by learned Advocate for the Petitioner that, since the Petitioner was found in the possession of some part of the suit property, the Executing Court should have allowed him to lead his evidence. By passing the impugned order, the learned Executing Court has prevented the Petitioner from showing his rightful possession on the suit property. He submitted that, the impugned order be set aside and one chance be given to the Petitioner to lead the evidence before the Executing Court and submits that, the Petition be allowed.

7. It is submitted by learned Advocate for Respondent No.1 that, despite several chances, the Petitioner failed to lead his part of evidence. It is settled position under the law that, the execution proceedings are to be concluded within a time bound period. The decree, which is put for execution, is 27 years old and the execution proceedings are being prolonged by the Judgment Debtor with the help of the Petitioner who claims to be in possession of some part of the suit property. There is no merit in the Petition and the same be dismissed.

8. There is no dispute that, the Petitioner is the third party to the execution proceedings. Learned Executing Court in order dated 08.12.2023 passed below Exhs.37, 44 and 57 permitted the Petitioner to

lead his evidence on the point of encroachment found in the suit property. The observation from the said order is reproduced below:

“12. Decree holders and third person are at liberty to lead evidence on the point of encroachment found in subject property. Though for a while measurement report prepared by court commissioner is put aside, this portion whereon now encroachment is found is already proved to be part of subject property in trial of original suit, if third person is ascertaining that this portion is not a part of the subject property, rather his property bearing gat no.338 consists this part, so burden should be casted upon him to prove this fact. As decree holders once have discharged their burden to prove their case in original suit, it will not be appropriate & justifiable to burden them again to prove case which brought by third person or record. Hence, it is clearing that third persons to prove his case by leading evidence. Further it cannot be overlooked that since 2007 the decree holders are deprived of their right to enjoy the fruits of decree so that no one shall to try the prolong the case. Mere one default of the party will be sufficient reason to take away their legal right. With this, I answer the point no.3 in affirmative.”

9. It appears that, despite the opportunity to the Petitioner to lead his evidence, the Petitioner did not lead his evidence. Therefore, learned Executing Court by the aforesaid order dated 09.05.2024 foreclosed the right of the Petitioner to lead the evidence. The observation in the said order shows that, the Petitioner has not led any evidence, even as per their knowledge third person (Petitioner) and the Judgment Debtors have not challenged the said order dated 08.12.2023. The observation in the order dated 09.05.2024 further shows that, the third person (Petitioner) did not file reply to the Application filed by the Decree Holders below Exh.70. So also, when the said Applications were fixed for hearing, none appeared for the third

person (Petitioner). The learned Executing Court observed that, despite opportunity was given, no evidence was led by the Petitioner and he remained absent even after passing the order dated 08.12.2023, which shows his reluctance in proceeding further.

10. In the impugned order, learned Executing Court noted the conduct of the Petitioner in not leading the evidence despite being given the opportunity and observed that, it was deliberate act on the part of the Petitioner to prolong the execution proceedings. Learned Executing Court noted the observations by the Hon'ble Apex Court in **Rahul S. Shah vs. Jitendrakumar Gandhi, reported in 2021 (6) SCC 418** whereby the Executing Courts are directed to dispose of the execution proceeding within six (6) months. Learned Executing Court further observed that, the decree was pending for execution for last 28 years. The observations goes to show that, the learned Executing Court gave sufficient opportunity to the Petitioner to lead his part of evidence. The contention on behalf of the Petitioner that, he was waiting for the Judgment Debtors to lead his part of evidence and thereafter he would lead his evidence, has not merits. The Petitioner was the third party to the proceedings and not dependent on the Decree Holders. The learned Executing Court has properly considered the matter and passed a well reasoned order which calls for no interference. Hence, the following order is passed.

ORDER

- (i) The Writ Petition stands dismissed.
- (ii) No costs.

(NEERAJ P. DHOTE, J.)

GGP