

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

WRIT PETITION NO.2073 OF 2013

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1. Iqbal Hussain s/o Ali Hussain,
Died, Through L.Rs.

1/1) Syed Ahmed Hussain s/o Ali Hasan,
age 77 years, Occ. Agri and Business,
R/o Lal Mill Compound, Purna,
Taluka Purna, District Parbhani.

1/2) Syed Kamal Ahmed S/o Syed Ali Hussain
Dead, Through LR/1.

(Petitioner/
Orig. Plaintiff.)

VERSUS

Municipal Council, Purna,
Through Its Chief Office,
Municipal Council, Purna
District Parbhani.

Respondent.

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Mr. S.G.Chapalgaonkar, Advocate for the petitioner.
Mr. S.N.Rodge, Advocate for the Respondent.

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CORAM : V. K. JADHAV, J.

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DATE OF RESERVING THE JUDGMENT : 01.10.2015.
DATE OF PRONOUNCING THE JUDGMENT : 07.10.2015.

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JUDGMENT :-

1. Rule. Rule made returnable forthwith. With the consent of the parties, petition is taken up for final hearing at the admission stage.

2. The petitioner/original decree holder has filed an application at Exh.125 before the Executing court seeking amendment in Regular Darkhast No.02/2004. The learned Civil Judge, Jr. Division, Purna, by its impugned order dated 31.07.2012 rejected the said application. Hence, this writ petition.

3. Brief facts giving rise to the present writ petition, are as under :-

The petitioners are the legal representatives of the original plaintiff in Regular Civil Suit No.12/1997 (old R.C.S. No.234/1989). The said suit was instituted for recovery of possession and decree of perpetual injunction against the respondent/original defendant Municipal Council, Purna in respect of the suit property.

4. The trial court, by its judgment and order dated 15.1.2003, partly decreed the suit and thereby directed the Respondent/original defendant to hand over the possession of the land ad-measuring 63R out of the land S.No.16 situated at Purna, Tq. Purna, District Parbhani to the plaintiff and further restrained the defendant-Municipal Council, Purna, from using the road passing through said portion of the land ad-measuring 63R in any manner. Said

decree has attained finality. Consequently, the petitioner filed Regular Darkhast No.2/2004 before the learned Civil Judge Jr. Division, Purna.

5. During the course of the execution of the decree, the executing court was pleased to issue possession warrant. Some strangers had approached this Court by filing the Writ petition No.6258/2006 praying therein to stay the execution of the decree on the ground that they are the persons likely to be adversely affected by the execution of the decree. They were claiming to be in possession over some portion of the property through Municipal Council. However, this Court rejected the said writ petition with observations that strangers to the decree are entitled to file the appropriate application before the executing Court under the provisions of the Code of Civil Procedure. Thus, said strangers to the decree filed an application before the Executing Court about their possession over some portion of the property under execution i.e. precisely on the side portion of the road constructed by the Municipal Council. The learned Judge of the executing court, after considering their objections and reply filed by the decree holder, rejected said applications.

6. Thereafter, executing court was pleased to issue the warrant for delivery of possession in favour of the plaintiff as per the decree. Furthermore, necessary directions were also issued to the Taluka Inspector of Land Records, Purna to mark the property for execution and carry out the necessary measurement for that purpose. Accordingly, the Taluka Inspector of Land Records has carried out the measurement on 25.6.2008 and noted that the suit road has been expanded from both sides after previous measurement of the year 1986 relied upon in the suit and there is some encroachment in the periphery of the suit property. The Taluka Inspector of Land Records submitted its report dated 15.7.2008 to the Executing Court. The petitioner has, therefore, moved an application before the executing court to carry re-measurement of the suit property alongwith additional encroachment, if any, found on the spot. Said application was allowed and re-measurement was carried out on 5.6.2009 through the Taluka Inspector of Land Records, Purna. Accordingly, re-measurement was carried out.

7. In the re-measurement, it was found that actual land to the extent of 75R out of S.No.16 owned by the petitioner/decreed holder is covered by the encroached area including the suit land ad-measuring 63 R. The Taluka

Inspector of Land Records has drawn a map showing additional encroachment, which is placed at Exh.123 alongwith panchnama at Exh.124 on the record of the executing Court.

8. In pursuance of the aforesaid contents of the panchnama and map drawn by the Taluka Inspector of Land Records, Purna, the petitioner filed an application to issue possession warrant to the extent of 75R, however, the executing Court by order dated 23.9.2011 on the application at Exh.114 directed the petitioner to examine the Taluka Inspector of Land Records, Purna to prove the contents of the map. It has also observed in the order that, prayer made in the application Exh.114 for issuing possession warrant as per the said map would be considered after leading the necessary evidence.

9. The petitioner, in pursuance of the aforesaid order, examined the Taluka Inspector of Land Records, Purna at Exh.122. Said witness has testified the details of the measurement carried out by him and accordingly, the contents of the map proved. Same is marked at Exh.124.

10. Accordingly, the petitioner, in view of the aforesaid evidence and in pursuance of the earlier order passed by the executing court on the application Exh.114, moved an application at Exh.125 dated 24.1.2012 praying thereby permission to carry out the amendment in the execution petition, incorporating the amendment in the claim clause as well as the prayer clause in terms of the measurement map Exh.123. However, said application came to be rejected by the impugned order dated 31.7.2012 with the observation that the petitioner cannot travel beyond the decree. Hence, this writ petition.

11. The learned counsel for the petitioner submits that as per the order of the executing court, re-measurement was carried out through the Taluka Inspector of Land Records, Purna, and map alongwith panchnama was placed before the executing court. It is, therefore, necessary to incorporate the changes recorded during the actual execution of the decree in the execution petition. The learned counsel further submits that, merits of the proposed amendment cannot be gone into while considering the application for amendment. The learned counsel further submits that, the learned judge of the executing court has not considered this material aspect and rejected the prayer of amendment in the

execution petition. The learned counsel further submits that, the petitioner is about 77 years of age and is fighting for execution of the decree passed in the year 2003. Rejection of the application for amendment has virtually stalled the executing proceedings itself.

12. The learned counsel for the petitioner, in the alternate, submits that, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession in view of the provisions of Order XXI, Rule 35(3) of the Code of Civil Procedure. These powers also includes the power to remove any obstruction or super-structure made pendente lite. The learned counsel further submits that though decree does not contain mandatory injunction for demolition, but when the decree had attained the finality, the decree holder is not bound by any such construction, and it is not necessary to file a separate suit when the construction by way of illegal encroachment was made pending the suit/decreed without permission of the court.

13. The learned counsel for the petitioner, in support of his submissions placed reliance on following judgments:-

- I] **B.Gangadhar, Petitioner Vs. B.G.Rajalingam, Respondent, reported in AIR 1996 Supreme Court 780.**
- II] **Dongala Venkaiah and another Vs. Dongala Raji Reddy, reported in AIR 2007 Andhra Pradesh 344.**

14. The learned counsel for respondent submits that in the execution proceedings the executing Court has no right to travel beyond the decree. The learned counsel further submits that the learned Judge of the executing court has therefore rightly rejected the application for amendment in the execution petition Exh.125, the Writ Petition is, therefore, devoid of any merits and thus liable to be rejected.

15. On careful perusal of the map Exh.123, it appears that, Purna-Nanded road is situated east-west in direction and the suit land S.No.16 is situated towards the southern side of the road Purna-Nanded. It appears from the judgment and decree passed in the suit that the measurement was carried out in respect of the suit land on 6.2.1986 and 7.2.1986 and it was revealed in the said measurement that land ad-measuring 63R out of S.No.16 has been encroached by Purna-Nanded road. Accordingly, the learned judge of the trial court in the suit has concluded that the defendant Municipal Council, Purna has made

encroachment upon 63R land out of S.No.16 and accordingly recorded findings to issues No.1 and 2 in the affirmative. Consequently, in the operative order of the suit, the defendant Municipal Council, Purna is directed to hand over the possession of the land ad-measuring 63R out of the land S.No.16 as shown in the said map and further the Municipal Council, Purna is also restrained from using the said road passing through the said portion of land ad-measuring 63R in any manner.

16. It further appears that, as per the re-measurement map Exh.123 carried out by the Taluka Inspector of Land Records, Purna as per the directions given by the executing court and as per the testimony of the Taluka Inspector of Land Record (Exh.122), towards the southern side of road, the encroachment to the extent of 12R by making constructions like hotel etc., found in existence. It also appears that the Taluka Inspector of Land Record, Purna has also carried out panchnama to that effect and said panchnama is also marked at Exh.124 before the executing court. It is needless to repeat here that, the said encroachment over the additional area of 12R is raised pendente lite. The same obviously prevents the passage or right to access to the property under execution.

17. It further appears that, those encroachers rather to say persons raised the construction over the said portion of additional area of 12R by illegal means approached this Court by filing the writ petition No.6258/2006 and this Court had rejected their writ petition with observation that they are entitled to file an appropriate application before the Executing Court under the provisions of Code of Civil Procedure. So far as said obstruction caused by those strangers are concerned, they had approached the executing court by filing their objection petition under Order XXI Rule 97(1) of the Code of Civil Procedure. The learned Judge of the executing Court, after considering their objections and reply filed by the decree holder, rejected the said applications.

18. It is well settled that, no action will lie on an executable judgment, for the execution is only remedy on such a judgment. Main principle underlying Section 47 is that, matter relating to execution, discharge or satisfaction of the decree and arising between the parties or their representatives should be determined in the execution proceedings and not by separate suit. Section 47 of the Civil Procedure Code reads as under :-

“S.47. Questions to be determined by the Court executing decree.-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

(2) [omitted by Act 104 of 1976]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation I.- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.- (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”

19. It appears that the question to be determined by the Court executing the decree is very wide and comprehensive/ exclusive jurisdiction has been conferred upon the executing court in respect of all matters relating to the execution, discharge or satisfaction of the decree, irrespective of whether such question arises before or after the decree has executed. It provides an inexpensive and expeditious remedy to the parties before the Court to obtain adjudication of all questions relating to the execution of the decree.

20. It is thus, utmost necessary to refer the provisions of Order XXI Rule 35 which reads as under :-

35. Decree for immovable property.-

(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree holder in possession.

21. The Apex Court in a case of **B.Gangadhar, Petitioner Vs. B.G.Rajalingam, Respondent** (supra), in paragraph Nos.6 and 7 of the judgment, made following observations :-

“6. Rule 35(3) of Order 21 itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any construction of the property

pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes in-executable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings.

7. It is also not necessary that the tenant should be made party to the suit when the construction was made pending suit and the tenants were inducted into possession without leave of the Court. It is settled law that a tenant who claims title, right or interest in the property through the judgment debtor or under the colour of interest through him, he is bound by the decree and that, therefore, the tenant need not be impleaded as a party defendant to the suit nor it be an impediment to remove obstruction put up by them to deliver possession to the decree. What is relevant is only a warning by the bailiff to deliver peaceful possession and if they cause obstruction, the bailiff is entitled to remove the obstruction; cause the construction demolished and deliver vacant possession to the decree holder in terms of the decree. Thus considered, we hold that the High Court and the executing Court have not committed any error of law in directing demolition of shops and delivery of the possession to the decree-holder.”

22. The High Court of Andhra Pradesh in the case of **Dongala Venkaiah and another Vs. Dongala Raji Reddy** (supra) relying upon the Judgment of the Supreme Court in the case of **B.Gangadhar, Petitioner Vs. B.G.Rajalingam, Respondent, reported in AIR 1996 Supreme Court 780** has made similar observations.

23. It is thus clear that the Court executing the decree is entitled to pass such incidental, ancillary, necessary orders for effective enforcement of the decree for possession. This power also includes the power to remove any obstruction, or super-structure made *pendente lite*. In the case in hand, the decree of possession had become final. It was for the Respondent-Municipal Council, Purna not to allow any such illegal constructions raised *pendente lite* by the side of the road. Thus, the petitioner/decreed holder is not bound by any such illegal constructions. It is not necessary for the petitioner to file a separate suit, otherwise, the decree becomes in-executable driving him again for another round of litigation which the Code expressly prohibits such multiplicity of litigation.

24. In the given set of facts, it would be rather wise to say that the approach of the Executing Court to some extent

disallowing the amendment, which is in the nature of traveling beyond the decree, may be correct, but, certainly the executing court ought to have taken care to execute the decree by directing the removal of the said illegal constructions by exercising the powers of Order XXI Rule 35 (3) of Code of Civil Procedure.

25. In light of the above discussion and observations made by the Apex Court in case of **B.Gangadhar, Petitioner Vs. B.G. Rajalingam, Respondent, reported in AIR 1996 Supreme Court 780** (supra), Writ Petition is disposed of with directions to the Executing Court to execute the decree by removing the illegal construction carried out over the additional area of 12R as shown in the map Exh.123, and shall order delivery of vacant possession of the property under execution to the petitioner within a period of three (03) months from the date of this order.

26. Rule is made absolute in above terms. In the circumstances, there shall be no order as to costs.

(V.K. JADHAV, J.)

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