

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

Civil Revision Application No. 163 of 2012

Tulshiram S/o Dattatraya Shinde. .. **Petitioner.**

Versus

Janardhan S/o Dattatraya Shinde
And Others. .. **Respondents.**

Shri. M.K. Deshpande, Advocate, for petitioner.

Smt. M.A. Kulkarni, Advocate, for respondent No.1.

CORAM: T.V. NALAWADE, J.

DATE : 16th NOVEMBER 2015

ORDER:

1) The proceeding is filed to challenge the judgment and order of Regular Darkhast No.22/2007 which was pending in the Court of the Civil Judge, Junior Division, Georai. The executing Court has dismissed the proceeding. Both the sides are heard.

2) Regular Civil Suit No.248/1993 was filed by present petitioner for relief of perpetual injunction in respect of one agricultural land against the present respondents. The suit was decreed in favour of the

petitioner and the appeal filed against this decision by the preset respondents was dismissed. In the Execution Petition the petitioner contended that the judgment debtors have committed breach of injunction order and so the judgment debtors need to be kept in civil prison.

3) Inquiry was conducted by the executing Court. During inquiry the decree holder gave admission that the judgment debtors had made encroachment over some portion of his land and the encroachment was there since 1982-83. Thus the decree holder gave admission in execution proceeding when aforesaid relief was claimed that from prior to the date of suit the defendants were in possession of some portion of his land as encroacher.

4) Learned counsel for the petitioner, plaintiff submitted that when there was decree of injunction in favour of the petitioner, the executing Court could not have considered such admission given by the decree holder during inquiry and the execution petition could not have been dismissed. This Court has carefully gone through the record of inquiry. For getting relief of

injunction some record was produced which included the measurement taken through surveyor. The measurement shows that defendant No.1 was in possession of 39 R portion out of land Gat No.82 belonging to the plaintiff. Defendant is owner of adjacent land, land Gat No.83. This record is considered by the trial Court and the appellate Court and after that relief of perpetual injunction is given. Learned counsel for the petitioner, plaintiff submitted that the order made by the executing Court shows that the executing Court has gone beyond the decree. This submission is not at all acceptable. For getting the relief claimed in the execution petition, it was necessary for the decree holder to prove that there was willful breach of the order. For that it was necessary for the decree holder to prove that after getting the decree of injunction, the defendants had done some act which amounted to breach of the decision or order. When there is admission of aforesaid nature, it cannot be inferred that there was breach of order much less willful from the defendants. Thus there was no other alternative before the executing Court than to dismiss the application. It appears that by using the decision of injunction, the plaintiff is trying to take

possession and that can be seen from the evidence given by the plaintiff during inquiry conducted by the executing Court.

5) Learned counsel for the petitioner, plaintiff submitted that if no relief is given to the plaintiff of the nature claimed, there will be injustice to him. This submission is not acceptable. If there is fresh cause of action, it is open to the plaintiff to take appropriate steps in respect of that cause of action. On the point involved, learned counsel for the respondent, defendant, placed reliance on one case reported as **BCR-1989-3-122 (Sitaram v. Ragho)**. This is on the requirement which needs to be satisfied for making the order in execution proceeding under Order 21 Rules 32(1) and 32(2) of the Civil Procedure Code. There cannot any dispute over the proposition made in this case and this point is already discussed.

6) As no interference is possible, the revision stands dismissed.

Sd/-
(**T.V. NALAWADE, J.)**

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