

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO. 959 OF 2012
WITH
CIVIL APPLICATION NO. 846 OF 2012 IN CRA/959/2012**

Mr. Subhash Dagdu Khutwal

..Applicant

Vs

Smt. Indirabai Anant Vaidhya

.. Respondent

Ms. Ranjana Todankar a/w Mr. Jai Prakash Sawant and Ms Prerana Janvekar, Advocates for Applicant.

Mr. Shrishailya S. Deshmukh with Mr. Sai Chaughule and Shri Sachin D.Bagde, Advocate for Respondent no.1.

**CORAM : R.G.KETKAR,J.
DATE : 22/12/2015**

PC:

1. Heard Ms. Ranjana Todankar, learned counsel for the applicant and Mr Shrishailya Deshmukh, learned counsel for respondent at length.
2. By this Application under Section 115 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and order dated 9.10.2012 passed by the learned Jt. Civil Judge Jr. Dn., Mangaon, below Exhibit 68 in Regular Darkhast No.20 of 2002. By that order, the learned trial Judge allowed the application made by the respondent, hereinafter referred to as 'decree holder' for handing over possession of 164 sq. meters

from northern side of CTS No.560. The learned trial Judge issued possession warrant for that purpose and appointed Deputy Superintendent of Land Records to hand over possession along with Bailiff on the basis of Map at Exhibit-84.

3. In this Civil Revision Application, Civil Application No. 846 of 2012 is taken out for stay of the impugned order. On 29.11.2012, this Court recorded statement made on behalf of the applicant that judgment debtor is ready and willing to give an area of 164 sq.meters to the respondent/decreed holder from City Survey no.560 from northern side excluding the residential house situate in the same premises. After recording that statement, notice was issued to the decreed holder, returnable on 3.1.2013. Meanwhile, this Court directed the parties to maintain status quo in respect of the suit property.

4. It appears that the applicant changed his Advocate. The matter was thereafter heard on 14.12.2015 when Ms Todankar was asked to take instructions as to whether the applicant is ready and willing to comply the order dated 29.11.2012 and make appropriate statement in that regard. After obtaining instructions from the applicant-judgment debtor, Ms.Todankar states that judgment debtor is not ready and willing to comply order dated 29.11.2012. Ms. Todankar submitted that judgment debtor is not in a position to comply order dated 29.11.2012 as

also the decree passed by the trial Court as the residential house is situate in CTS No. 560.

5. On the other hand, Mr Deshmukh invited my attention to the judgment and order dated 10.9.1996 passed by the learned Illrd Addl. District Judge, Raigad in Civil Appeal No.11 of 1992 and in particular paragraphs 19, 22, and 24. He submitted that perusal of the judgment of the District Court will clearly reveal that at the relevant time no residential house was constructed in City Survey No.560. The decision of the Appellate Court was confirmed by this Court on 24.9.1997 and Second Appeal preferred by the judgment debtor was dismissed. He, therefore, submitted that if judgment debtor claims that there is residential house in City Survey No.560, same is obviously constructed subsequent to the decision of the courts below including this Court. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, decree holder had filed suit for declaration that she is owner of properties bearing C.T.S. nos.558, 559 and area admeasuring 164 sq.meters from C.T.S no.560. She also instituted suit for removal of encroachment and injunction. By judgment and decree dated 31.12.1991, learned

Civil Judge, Jr. Dn., Mangaon decreed the suit. Decree holder is declared as owner of C.T.S.Nos. 558, 559 and 560 to the extent of 164 sq.meters to its northern side of village Goregaon, Tal.Mangaon. Judgment debtor was directed to hand over vacant and peaceful possession of the encroached area in CTS No.560 to its northern side to the extent of 164 sq.meters to the plaintiff. Operative part of the order reads thus:

“Suit is hereby decreed with costs.

Plaintiff is hereby declared as owner of CTS No.558, 559 and 560 (to the extent of 164 sq.meters in CTS No.560 only to its northern side) of village Goregaon, Tal.Mangaon.

Defendants are hereby directed to give peaceful vacant possession of encroached area in CTS No.560 to its northern side about 164 sq.meters to the plaintiff.

Defendants are hereby permanently restrained from obstructing the peaceful possession of the plaintiff over the suit property (CTS Nos 558, 559 and 164 sq.meters to the north side) in CTS no.560 of village Goregaon, Tal Mangaon by themselves, through their agents servants or anybody acting on their behalf.

Decree be drawn up accordingly.”

7. Aggrieved by this decision, judgment debtor preferred Civil Appeal no.11 of 1992. In paragraph 19, learned District Judge considered evidence of DW1-Shivaji. He deposed that he is cultivating vegetables in the CTS no.560 and there is one temple owned by him which is situate in CTS No.560. During the pendency of the suit, it appears that Court Commissioner was

appointed. Court commissioner submitted map at Exh.130. Learned District Judge considered map at Exhibit 130 and observed that there is one temple in existence. It was also observed that there are trees along the boundaries of the entire properties and the entire suit properties are on the slope of hill. It was also observed that the defendants did not establish that the temple is old one and it is owned by them from the period of their forefathers.

8. In paragraph 22, PW 1 Ravindra deposed that deceased Dagdu encroached in CTS No.560 and cultivated vegetables in the suit land. In paragraph 24, the learned District Judge considered the map at Exhibit 130 and observed that the said map gives all the details of possession of the defendant in CTS No.560. Thus, the map at Exh.130 alongwith evidence of the plaintiff and defendants is sufficient to identify the area of encroachment of the defendant on the property of the plaintiff. Learned District Judge, therefore, held that decree holder succeeded in establishing that the defendant had made encroachment upon the plaintiff's property. Perusal of the judgment of the Courts below does not indicate that the defendants deposed about existence of residential house in CTS No.560.

9. Aggrieved by the decisions of the Courts below, the

defendant preferred Second Appeal No. 408 of 1997 in this Court and the same was dismissed on 24.9.1997. It is not in dispute that decisions passed by the Courts below including this Court were not challenged and thus attained finality.

10. Aggrieved by the impugned order, judgment debtor instituted Civil Revision Application in this Court. Along with C.R.A., Civil Application No. 846 of 2012 was filed for stay of the impugned order. In paragraph 6 of the application, it is asserted that admittedly there is residential house no.142 by the defendant. This house is now re-numbered as House no.166. It is further asserted that unless under such circumstances boundaries of house no.142, newly numbered house no.166, are fixed, the decree cannot be executed. For the reasons recorded earlier, the case made by the judgment debtor that there exists residential house is not acceptable, rather it supports the contention of the decree holder that judgment debtors have carried out encroachment in CTS No. 560.

11. In fact, while issuing notice to the respondent in Civil Application No.846 of 2012, this Court recorded statement made on behalf the then Advocate of the applicant that judgment debtor is ready and willing to give an area of 164 square meters from the northern side from Survey No.560 to the decree holder after excluding the residential house. This was on the basis of

the impression given by the judgment debtor that residential house is constructed and is in existence in CTS No.560.

12. In view of the evidence adduced by the parties, it is abundantly clear that at the relevant time, no house was standing in CTS No.560.

13. Even after change of Advocate, matter was heard by this Court on 14.12.2015 and it was adjourned till today so as to enable Advocate for the applicant to take instructions whether judgment debtor is ready and willing to comply order dated 29.11.2012. Ms Todankar submitted that judgment debtor is not ready and willing to comply the order dated 29.11.2012. In view thereof and for reasons recorded earlier, no case is made out for invocation of powers under section 115 of C.P.C. Application fails and the same is dismissed. In view of disposal of Civil Revision Application, Civil Application No. 846 of 2012 does not survive and the same is disposed of.

(R.G.KETKAR, J.)