

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 1432 OF 2011

Pandharinath Dinkar Jadhav ...Petitioner

Versus

Ramchandra Antu Khandait
(deceased Through Lrs) Popat Ramchandra
Khandait And Ors ...Respondents

....

Mr. Uday P. Warunjikar, Advocate for the Petitioner.

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CORAM : R. G. KETKAR, J.

DATE : 26th APRIL, 2016

P.C.

1. Heard Mr.Uday Warunjikar, learned Counsel for the petitioner, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'judgment debtor No.1' has challenged the judgment and order dated 12.11.2010 passed by the learned Civil Judge, Junior Division, Patan below Exhibit-63 in Regular Darkhast No.50/2005. By that order, learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'decree holders', and directed that the judgment debtors be detained for 15 days from the date of their arrest. Learned trial Judge directed decree

holder to deposit in the Court the necessary subsistence allowance according to rules for civil detention of the judgment debtors. The judgment debtors are to be detained in civil prison in proportion of the subsistence allowance paid by the decree holder. The decree holder was also directed to supply necessary bed-beddings and utensils before issuance of detention warrant against judgment debtor No.1 and other judgment debtors. Learned trial Judge further directed issuance of warrant on fulfillment of the conditions led by the decree holder.

3. The decree holder instituted suit against the judgment debtors for perpetual injunction restraining them from causing any sort of obstruction in the peaceful possession and enjoyment of the decree holders over the open space bearing G.P. No.23 admeasuring 30 ft. X 30 ft. situate at village Nune under Grampanchayat Tarale, Taluka-Patan, District-Satara bounded as under :

To the East	:	Open space of Nana Ganu Koli,
To the West	:	foot way and then after land of Walubai,
To the South	:	Open space of Kondiba Sitaram Kondwale, and
To the North	:	Open space of Dada Sakharam,

4. On 18.4.1994, learned trial Judge decreed the suit. Aggrieved by that decision, original defendant No.1 (petitioner herein) preferred Civil Appeal before the learned District Judge. By judgment and order dated 27.2.2004, learned District Judge dismissed the appeal.

5. It is not brought on record that aggrieved by these judgments and orders, the judgment debtors carried the matter further. In other words, the orders passed by the Courts below attained finality. Decree holders thereafter took out execution proceedings. It appears that the judgment debtor prayed for fixation of the boundaries of the suit property through Court Commissioner. By order dated 10.8.2006 below Exhibit-24, the Executing Court rejected the application holding that the prayer of judgment debtor cannot be granted as issue of description and identification of the property cannot be reopened as the same was finally decided in appeal. Judgment debtors preferred Writ Petition No.6924/2006 against that order before this Court. By order dated 7.1.2009, this Court dismissed the Writ Petition by holding that the issue regarding description of the suit property was specifically raised and has been addressed by the

Appellate Court and, therefore, it was not open to the Executing Court to once again address the same issue at the instance of the judgment debtor.

6. Decree holders thereafter filed application on 18.4.2009 duly supported by affidavit alleging disobedience of the injunction order by the judgment debtors and praying for their detention in civil prison. Judgment debtors filed reply at Exhibit-72 *inter alia* contending that decree was passed in respect of Survey No.23 of village Nune under Grampanchayat Tarale. Judgment debtors have not obstructed enjoyment of the decree holders in respect of that property. It was further contended that the suit property is within the limits of Tarhale Grampanchayat and the decree passed in respect of Mouje Nune is not binding on the judgment debtors. As there is discrepancy in the description in the decree as also in the suit, the decree itself is inexecutable. The prayer made for judgment debtors' detaining in civil prison is, therefore, liable to be rejected.

7. By the impugned order, learned trial Judge allowed the application in the terms indicated earlier. It is against this order, judgment debtor No.1 has instituted the present petition.

8. In support of this petition, Mr. Warunjikar reiterated the submissions that were advanced before the trial Court. He submitted that judgment debtors have not obstructed the decree holders from enjoying the suit property. He further submitted that perusal of description of the suit property does not indicate existence of three babhul trees in respect of which decree holders have complained to the Court. He submitted that village Nune and village Tarhale are different. Judgment debtors are not bound by the decree in respect of the property situate in Mouje Nune. He submitted that perusal of the application Exhibit-63 shows that no particulars are given as to when the obstruction was caused by the judgment debtors. No details are furnished. In short, he submitted that the application is bereft of any particulars and as such learned trial Judge was not justified in passing the drastic order. Even otherwise, there is no compliance of Order 21 Rule 32 of Code of Civil Procedure, 1908 (for short, 'CPC') and in particular sub-rules (4) and (5) thereof. Learned trial Judge has not fixed the subsistence allowance. Decree holders have also not deposited the subsistence allowance. Unless and until the decree holders deposit the subsistence allowance, learned trial Judge was not justified in

ordering detention of judgment debtors in civil prison.

9. I have considered the submissions advanced by Mr.Warunjikar. I have also perused the material on record. As noted earlier, the suit instituted by the decree holders for perpetual injunction restraining judgment debtors from causing obstruction to their peaceful possession and enjoyment over the suit property was decreed by the Courts below. It appears that the decree holders thereafter filed execution proceedings. During the course of execution proceedings, the judgment debtors took out application for fixation of boundaries of the suit property through the Court Commissioner. By order dated 10.8.2006, the Executing Court rejected the application on the ground that the judgment debtors cannot be permitted to raise the issue of description and identification of the property as the same was finally decided in appeal. Judgment debtors preferred Writ Petition No.6924/2006 in this Court which was also dismissed on 7.1.2009.

10. Learned trial Judge considered the lengthy objections raised by the judgment debtors and observed that despite express order passed by the High Court, judgment debtors are

once again raising dispute as regards identity as also trying to make out a variation between the property situate at village Nune under Grampanchayat village Tarale and the property situate under Grampanchayat Tarale and that decree has no effect over their property at village Nune. In paragraph-10, learned trial Judge noted that said objections were reiterated in the earlier round of litigation. Once the said objections were turned down not only by the Courts below but even by the High Court, judgment debtors cannot reopen the issue of identification of the suit property. Learned trial Judge therefore held that the objection raised by the judgment debtors is unsustainable.

11. In paragraph-11, learned trial Judge considered the description of the suit property given in the plaint as also in the decree and observed that the decree was prepared in consonance of the order passed by the Court. In paragraph-12, learned trial Judge has considered the affidavits filed by the decree holder in respect of obstruction in her possession at the hands of judgment debtors. She also sought police protection for erecting a protection wall. At Exhibit-64 the decree holder

affirmed on oath regarding restraining her at the hands of judgment debtors in severing of 'Babul' trees standing in the suit property.

12. Learned trial Judge thereafter noted that the judgment debtors deny the possession of the decree holder in the suit property itself and judgment debtors have tried every bit to oppose the execution at each stage. Judgment debtors have not left any stone unturned in opposing the execution. In the context of these circumstances and record it became clear that judgment debtors have willfully obstructed the decree holder in her right of peaceful possession over the suit property and thereby committed the breach of perpetual injunction order. The judgment debtors had an opportunity and knowledge of the injunction order and inspite of it willfully by their express conduct, have disobeyed the order of the Court. Learned trial Judge thereafter considered the provisions of Order 21 Rule 32 of CPC and ordered detention of judgment debtors in civil prison.

13. Mr. Warunjikar submitted that Order 21 Rule 32 of CPC provides for detention of judgment debtor in civil prison or

attachment of his property or by both. In the present case, learned trial Judge has not assigned any reasons for not attaching the properties of judgment debtors and straightway ordered detention of judgment debtors in civil prison. That apart, learned trial Judge has not fixed the subsistence allowance and also did not direct decree holder to first deposit the subsistence allowance and thereafter detention of judgment debtors in civil prison. It is not possible to accept this submission. Learned trial Judge has recorded consistent defiance of judgment debtors in execution of the decree. In paragraph-13, the learned trial Judge observed that “Considering the facts and adamant behaviour of judgment debtors for defying an express injunction order of the Court, it will be in the interest of justice to sentence him for civil imprisonment.” In view thereof, it cannot be said that learned trial Judge ought to have ordered attachment of the property of judgment debtors. The defiant attitude of judgment debtors does not call for any other order. In fact, learned trial Judge would have been justified in ordering attachment of the property as also ordering detention of judgment debtors in civil prison. Learned trial Judge, however, has not passed that order.

14. As far as the contention based on non-compliance of the provisions of order 21 Rule 32 of CPC is concerned, operative part of the order reads thus :

- “a) The judgment debtors be detained in civil prison for 15 days from the date of their arrest.
b) The decree holder to deposit in court the necessary subsistence allowance according to rules for civil detention of the judgment debtors.
c) The judgment debtors be detained in civil prison in proportion of the subsistence allowance paid by the decree holder.
d) The decree holder to supply necessary bed-beddings and utensils before issuance of detention warrant against the judgment debtors.
e) Issue the detention warrant on fulfillment of the conditions led by the decree holder.”

15. In view thereof, I do not find that learned trial Judge has not fixed the subsistence allowance and has ordered detention of judgment debtors in civil prison without directing deposit of the subsistence allowance. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)