

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8806 OF 2012

Shivaji Shankar Salunkhe	...	Petitioner
Vs.		
Sudam Shankar Salunkhe since deceased through LRs Kantabai Sudam Salunkhe and others	...	Respondents

Mr. S. V. Sadavarte for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : MARCH 31, 2016

P.C. :

Heard Mr. Sadavarte, learned Counsel for petitioner at length.
None appears for respondents, though duly served.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order below exhibit-93 as also order dated 22.06.2012 passed by the learned Civil Judge, Junior Division, Baramati in Regular Darkhast No.8 of 1998. By order below exhibit-93, the learned trial Judge rejected the application filed by the petitioner, hereinafter referred to as decree-holder, on the ground that there is no provision in Order XXI of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for creating a new road in execution of a decree of perpetual injunction. By subsequent order dated 22.06.2012, the learned trial Judge rejected the application in view of the order passed below exhibit-93.

3. Decree-holder had instituted Regular Civil Suit No.320 of 1986 against the respondents, hereinafter referred to as defendants, for perpetual injunction restraining defendants No.1 to 4 from - causing obstruction to the plaintiff's user of road and prohibiting plaintiff from plying vehicles on the suit road. The Suit was decreed on 09.08.1995.

Decree-holder thereafter instituted Regular Darkhast No.8 of 1998 for execution of the said decree. In Darkhast, decree-holder made application raising grievance that defendants No.1 to 4 have broken the road in respect of which perpetual injunction was issued against them. Decree-holder, therefore, prayed for appointing Court Commissioner for bringing the road to the original condition. Defendants No.1A to 1D and 2 to 4 resisted the application by filing reply at exhibit-69. Decree-holder made application dated 19.11.2003 at exhibit-80 for appointing the Court Commissioner. Decree-holder filed affidavit at exhibit-86 and was cross-examined by the defendants. By order below exhibit-93, the learned trial Judge rejected the application on the ground that there is no provision under Order XXI of C.P.C. for creating new road in execution of a decree of perpetual injunction. By order dated 22.06.2012, the learned trial Judge rejected the application in view of order below exhibit-93. It is against these orders, decree-holder has instituted the present Petition.

4. Mr. Sadavarte relied upon Order XXI, Rule 32(5) read with explanation thereto and submitted that in view of this provision, the executing Court is not powerless for issuing appropriate mandatory directions.

5. Order XXI, Rule 32(5) read with explanation reads thus,

“32. Decree for specific performance for restitution of conjugal rights, or for an injunction.-

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

[Explanation. - For the removal of doubts, it is hereby declared that the expression “the act required to be done” covers prohibitory as well as mandatory injunctions.]”

6. Perusal of the above extracted provision shows that where a decree for an injunction is not obeyed, the Court is empowered to direct the act required to be done at the expenses of the judgment-debtors. Explanation thereto lays down that the expression “the act required to be done” covers prohibitory as well as mandatory injunctions.

7. In view of this, order below exhibit-93 cannot be sustained. The learned trial Judge did not consider the provisions of Order XXI, Rule 32 (5) of C.P.C., extracted hereinabove. The impugned order below exhibit-93, is therefore, liable to be set aside and is accordingly set aside thereby restoring application exhibit-93 to the file of the trial Court. The learned trial Judge will consider provisions of Order XXI, Rule 32 (5) of C.P.C., and after hearing both sides, will pass appropriate order. In view of the setting aside of the order below exhibit-93, the order dated 22.06.2012 also does not survive and the same is set aside. Parties shall appear before the trial Court on 11.04.2016 and the learned trial Judge will dispose of the application exhibit-93 within four weeks from the appearance of the parties. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab