

IN THE HIGH COURT OF BOMBAY AT GOA.**WRIT PETITION NO. 704 OF 2010.**

Shri Pundalik P. Mayenkar (Dec.)
through LR's Petitioner.

Vs.

Shri Pemnath Ramai Shirodkar Respondent.

Mr. P. Karpe, Advocate for the petitioners.
Mr. A. R. Kantak, Advocate for the respondent.

Coram:- M. S. SONAK, J.
Date:-18th April, 2017.

P.C.

Heard Mr. P. Karpe, learned Counsel for the petitioners and
Mr. A. R. Kantak, learned Counsel for the respondent.

2. The challenge in this petition is to the order dated 21.8.2009 made by the learned Trial Judge in execution of decree dated 10.4.1991 in Regular Civil Suit No.114/1987/C, to the extent, impugned order, does not direct demolition of room/structure admeasuring 134 sq. mts.

3. Mr. Karpe, learned Counsel for the petitioners, submits that decree, had directed the respondent to fill up a well and demolish the parapet of the well in the suit property and also to demolish the suit structure admeasuring 24 sq. mts. in the suit property. Mr. Karpe, submits that the respondent, extended the suit structure from 24 sq.mts to 134 sq. mts. Mr. Karpe submits that decree dated

10.4.1991 had in fact enjoined the respondent from undertaking any construction in the suit property. He submits that extension is in the teeth of a decree dated 10.4.1991 and therefore, the entire structure admeasuring 134 is liable to be demolished in the execution of decree dated 10.4.1991. He submits that the impugned order to the extent, it does not grant such relief is liable to be interfered with.

4. Mr. Kantak, learned Counsel for the respondent/ judgment debtor at the out set makes a reference to order dated 22.12.1992 made by the Executing Court in the execution of very same decree dated 10.4.1991 and points out that Executing Court, had directed the execution of the decree but had made it clear that house bearing no. 847 admeasuring 134 sq. mts. which belongs to the wife of the respondent and which was subject matter of Regular Civil Suit No.117/1192/C shall not be demolished in the execution of the decree dated 10.4.1991. He submits that said order has attained finality, since, same was never challenged by the petitioner. Mr. Kantak, further points out that in Regular Civil Suit No.117/1192/C which was instituted by the wife of the present respondent, the petitioner, raised a counter claim in respect of the structure admeasuring 134 sq. mts. He points out that after evidence was led and considered in the suit the said suit as well as counter claim was dismissed by judgment and decree dated 20.8.2004. Dismissal of the suit was challenged by wife of the respondent by instituting an appeal, which appeal was however, dismissed in the year 2007. Mr. Kantak, however, points out that

dismissal of the counter claim was never challenged by the petitioner. In these circumstances, Mr.Kantak, submits that there is no reason to interfere with the impugned order, since the issue as to whether the respondent or his wife had extended the structure which was earlier 24 sq. mts and converted into a structure which now admeasures 134 sq. mts has been gone into by the learned Trial Judge in its judgment and decree dated 20.8.2004 in Regular Civil suit No.117/1992/C and same has been decided against the petitioners. Mr. Kantak, also submits that the structure admeasuring 24 sq. mts was nothing but a pump house near the suit well. He submits that said pump house was demolished by the respondent during the pendency of the suit and upon demolition of the pump house, the respondent did not even bother to contest the suit any further. He submits that the decree dated 10.4.1991 is therefore an ex-parte decree.

5. Mr. Karpe, learned counsel for the petitioners points out that order dated 22.12.1992 made by Executing Court was not an final order. He submits that learned Executing Court, restrained the demolition of structure admeasuring 134 sq. mts only because Regular Civil Suit No. 117/1992/C was pending at that time. In the said suit the respondent wife had also applied for relief restraining the demolition of said structure admeasuring 134 sq. mts. Mr. Karpe, points out that the suit has been dismissed and such relief has been denied to the respondent wife. Mr. Karpe, therefore submits that Execution Proceedings have to be taken to their logical conclusion in

terms thereof and structure admeasuring 134 sq. mts. is required to be demolished.

6. Rival contentions now fall for my consideration.

7. There is merit in the contention of Mr. Karpe that order dated 22.12.1992 made by the Executing Court cannot be said to be some final order in the Execution proceedings. No doubt, by the said order, Executing Court had restrained the demolition of the structure admeasuring 134 sq. mts, however, such restraint was on account of pendency of the Regular Civil Suit No. 117/1992/C instituted by the wife of the respondent claiming independent right in respect of the structure admeasuring 134 sq. mts.

8. Though Mr. Karpe's aforesaid submission is accepted, it does not, take the case of the petitioners any further. This is because, in Regular Civil Suit No. 117/1992/C, the petitioner raised an counter claim seeking the demolition of the very same structure admeasuring 134 sq. mts. In the counter claim it was the precise case of the petitioners that despite the decree in the Regular Civil Suit No.114/1987/C, the respondent and or his wife, extended the structure admeasuring 24 sq. mts and has put up in the suit property structure admeasuring 134 sq. mts. In Regular Civil Suit No. 117/1992/C a specific issue i.e issue no. 4 was framed to this effect.

9. The learned Civil Judge Junior Division at Panaji, in his

judgment and decree dated 20.8.2004 in Regular Civil Suit No. 117/1192/C has discussed issue no.4 at para 18 and 19, which reads thus :-

18. *The plaintiff has disputed the size of the structure and not the location. It is an admitted fact that said house is the very same place in the said property and therefore it was for the plaintiff to prove that the suit structure is not the suit house in the present suit. As discussed, the decree is in favour of the defendant to demolish the suit structure admeasuring 24 sq.metres. The suit house in the present suit admeasures 134 sq.mts and whatever construction has been done by the plaintiff to the suit house is without the permission of the defendant and the other co-owners. It is in deposition of DW1, in his cross-examination he was found stating that the house admeasuring 134 sq. metres existing in the suit property and referred by him at para 5 of the affidavit is a house as shown in the photograph which is at Exh. DW.1/Dcolly. DW.1 was further found stating that he cannot give the dimensions of the structure admeasuring 24 sq. metres that was sought to be demolished and DW.1 further deposed that he cannot say what partial demolition were carried out. Likewise, in his cross examination he found Dw.1 is unable to say that on which side the room was extended. DW.1 has further failed to narrate the extension of the said house and was found stating" I was unable to say what was the length and the breadth of the extension. I do not have any photos to show that what was the structure existing prior to the year 1991. I have no photos or documents to show that the location of the structure is admesuring 24 sq. mtetres"*

19. *From the deposition of Dw.1 it is further established that defendant has failed to prove that an extension was done to the structure admeasuring 24 sq. metres of that the same was done in the year 1991. The defendant has also filed a counter claim, praying therein to grant decree of mandatory injunction directing the plaintiff to demolish the suit structure admeasuring 134 sq. metres. From the deposition of Dw.1 it is not established by the defendant that the extension was done to the structure admeasuring 24 sq. metres or that the same was done in the year 1991. It is to be remembered that the decree in the Civil Suit was for demolition of structure admeasuring 24 sq. metres and the suit house is around 134 sq. metres. Dw.1 was further found stating that by an order of demolition of 24 sq. metres defendant could not demolish structure admeasuring 134 sq. metres. Absolutely no evidence has been adduced to prove the said issue and therefore, I answer issue no. 4 being not proved by the defendant in the negative."*

10. From the aforesaid, it does appears that the case of the petitioners that extension was carried out to the suit structure admeasuring 24 sq. mts has not been substantially accepted. On this basis, counter claim of the petitioners was also dismissed. The petitioners never appealed against the dismissal of the counter claim and consequently, such dismissal has attained finality.

11. In the the aforesaid circumstances, it cannot be said that the impugned order, to the extent, it issues no directions, with regard

to the demolition of structure admeasuring 134 sq. mts is one without jurisdiction or that this is the case where Executing Court has failed to exercise jurisdiction.

12. The respondent contends that structure admeasuring 24 sq. mts, was pump house near the suit well has already been demolished. There is no material produced on record by the respondent in support of such contention. Mr. Karpe points out that the Executing Court by an order dated 29.12.2006 had in fact issued a warrant of demolition. In paragraph 6 of the order dated 29.12.2006, however, it is noted that nothing was produced on record by the petitioners/decreed holders to show that any new construction has been carried out by the Judgment debtor. The order dated 29.12.2006 at the highest states that in case there exists any structure of 24 sq. mts in the suit property and if said structure has not been demolished, then, warrant of demolition should be issued of said structure of 24 sq. mts.

13. Even today, order dated 29.12.2006 is operative and if, there is indeed any structure admeasuring 24 sq. mts in the suit property which has yet to be demolished, then, the same can be certainly demolished in the execution of decree dated 10.4.1991 in Regular Civil Suit No.114/1987/C.

14. There is also some dispute as to whether well and parapet have been demolished or not. Mr. Karpe, states that till date no such

demolition has taken place. Mr. Kantak, however, submits that such demolition has taken place. Again, petitioners, are at liberty to apply to the Court for appointment of a commissioner to verify whether the well has been covered filled up and parapet to the well has been demolished in the execution of the decree dated 10.4.1991 in Regular Civil Suit No. 114/1987/C. In fact, the impugned order has granted relief to the petitioners in the context of filling up of the well and demolition of the parapet.

15. For all the aforesaid reasons and subject to observation and liberty as aforesaid, the impugned order need not be interfered with in the exercise of extra ordinary jurisdiction under Section 227 of the Constitution of India. This petition is accordingly disposed of with aforesaid observations and liberties. There shall be no order as to costs.

16. Parties to act on the basis of duly authenticated copy of this order.

M. S. SONAK, J.

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