

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

WRIT PETITION NO. 4611 OF 2017

Kumar Anant Joshi

...Petitioner

Versus

Vivian Pascal Falcao & Ors.

...Respondents

.....

Mr.Ashutosh R. Gole for the Petitioner.

Mr.S.S.Redekar h/f. Mr. Anil D'souza for Caveator.

.....

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: APRIL 20, 2017

P.C. :

1. This petition filed under Article 227 of the Constitution of India is directed against the order dated 3rd April 2017 passed by the learned II Jt. Civil Judge, J.D., Vasai below application Exhibit 51 in R.C.S.No. 247 of 2016.

2. The respondents are the original plaintiffs who had filed the suit for a declaration, mandatory and perpetual injunction against the petitioner i.e. original defendant. On 22nd December 2016, interim relief and mandatory injunction was granted in favour of the plaintiffs by the trial Court by which the petitioner/defendant was directed to make the access road free. The said order was challenged

by the petitioner before the District Court. The said appeal was dismissed on 18th January 2017. Thereafter, the petitioner has filed the Writ Petition No. 1193 of 2017. The said Writ Petition was dismissed on 30th January 2017. Thus, there was concurrent finding of all the Courts in respect of granting interim mandatory injunction in favour of the respondents/ original plaintiffs. Thereafter, the respondents/ original plaintiffs have filed the application below Exhibit 33 for appointment of Commissioner before the trial Court for the purpose of execution of the said order, which was allowed. However, the wall which was standing in between free access of the respondents/original plaintiffs could not be demolished due to resistance on the part of the petitioner and other persons. Hence, the respondents/original plaintiffs again approached the trial Court and moved the application below Exhibit 51 for the police protection for demolition of the wall. The said application was allowed by the trial Court on 03.04.2017 and the police protection was granted. Hence, this Writ Petition.

3. The learned counsel for the petitioner submits that the trial Court has erred in entertaining the applications at Exhibit 33 and 51 and ought not to have appointed the Court Commissioner for the

purpose of execution as it is interim order. He further submits that interim order is to be executed as per procedure laid down under Order 21 Rule 32 of Code of Civil Procedure. He argued that the appointment of Court Commissioner and seeking the police protection to execute interim order is illegal. In support of his submission, he relied on the judgment of *Venkat Niloba Kabade Versus Kishan Dadarao Dhumal* reported in *1983 Mah LJ 1105*.

4. The learned counsel for the respondents while opposing this petition supported the orders passed by the learned trial Judge for appointment of the Commissioner and also giving the police protection to the respondents/ original plaintiffs for execution of interim orders. The recourse is open under Order 21 Rule 32 of Code of Civil Procedure.

5. It is admitted fact that the respondents/original plaintiffs did not file a separate proceeding under Order 21 Rule 32 of Code of Civil Procedure in respect of execution proceeding. Order 21 Rule 32 of Code of Civil Procedure lays down the procedure of execution of injunction orders. In the case of *Venkat Niloba Kabade (supra)*, the learned single Judge of this Court while dealing with the issue of

execution of interim mandatory injunction has considered Order 21 Rule 32 (1) of Code of Civil Procedure and sections 35 and 36 of Code of Civil Procedure and held that if there is a breach of mandatory injunction then only remedy that is open to the plaintiff was under Order 39 Rule 2 (A) read with Order 21 Rule 32 (1) of Code of Civil Procedure and while getting the attachment of movable property of the defendant or by putting the defendant in jail. This finding given by the learned single Judge of this Court cannot be disputed. However, in the said case, the learned Single Judge has not considered sub Rule (5) of Order 21 Rule 32 of Code of Civil Procedure. Thus for better understanding sub Rule (5) of Order 21 Rule 32 of Code of Civil Procedure is reproduced as under:

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

(1).....

(2).....

(3).....

(4).....

(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”.

6. Sub Rule (5) of Order 21 Rule 32 of Code of Civil Procedure further empowers the Court not only the power of attachment or sending person in the civil prison but also 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. In the present case, there is no separate application or proceeding filed before the Court for execution of interim order. A separate application was preferred by the plaintiffs for appointment of the Court Commissioner. The record shows that copy of the said application was served on the defendant i.e. petitioner and the petitioner was heard and thereafter the Court Commissioner was appointed by the trial Court. When the order of mandatory injunction was not executed, the plaintiffs have filed the application, which is marked as Exhibit 33. Copy of the said application was also given to the petitioner and the petitioner was also heard at length on providing the police protection to the Court Commissioner to carry out the work. Thus, the procedure is rightly adopted by the original plaintiffs and the trial Court. At the most, it can be said that the

application should have been numbered separately, otherwise the petitioner was given notice; they had knowledge of the steps taken by the plaintiffs. The principles of natural justice are followed and thus orders passed by the learned trial Judge cannot be called illegal. Hence, no interference is required. Writ Petitions is dismissed accordingly.

(MRIDULA BHATKAR, J.)