

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7609 OF 2017
WITH
CIVIL APPLICATION NO. 3486 OF 2018

ASHOK HARI GAWALI (DIED) THROUGH LRS
VERSUS
GIRISH GULABCHAND BHATE AND OTHERS

Advocate for Petitioners : Mr. M.S. Kulkarni.
Advocate for Respondent Nos. 1 and 2 : Mr. S.P. Shah.

CORAM : RAVINDRA V. GHUGE, J.
DATE : 22nd November, 2018

PER COURT :

1. The petitioner is aggrieved by the following orders passed by the executing court in Regular Darkhast No.53 of 2012; (A) Order dated 28.09.2016 passed below Exhibit 98, (B) order dated 01.04.2017 passed below Exhibit 117 and (C) order dated 02.05.2017 passed below Exhibit 133.

2. The petitioner has therefore put forth prayer clause "A", which reads as under:

"(A) The Hon'ble High Court may be pleased to issue a writ of certiorari or any other appropriate writ, direction or order in the nature of writ and thereby quash and set aside.

i) the judgment and order passed below Exhibit 98 in Regular Darkhast No. 53 of 2012 dated 28.09.2016 by Civil

Judge Junior Division, Dhule.

ii) the judgment and order passed below Exhibit 117 in Regular Darkhast No. 53 of 2012 dated 01.04.2017 by Civil Judge Junior Division, Dhule.

iii) the judgment and order passed below Exhibit 133 in Regular Darkhast No. 53 of 2012 dated 02.05.2017 by Civil Judge Junior Division, Dhule.

and may further be pleased to reject the application at Exhibit 98 and allow the applications at Exhibit 117 and 133 by issuing appropriate orders for the said purpose;"

3. I have heard the strenuous submissions of the learned Advocates for the petitioner/original tenant and respondent nos. 1 and 2, the original landlords. It needs mention that the original tenant has passed away and his heirs are on record.

4. Anand Hiraji Gawali was the tenant inducted by the original landlord Gulabchand Bhate in the suit shop property. Anand Hiraji Gawali inducted Haribhau Pundlik Gawali as a sub-tenant. Consequentially, Anand Hiraji Gawali lost the possession of the suit property to the sub-tenant Haribhau Pundlik Gawali. Gulabchand Bhate, the landlord preferred R.C.S. No. 454 on 16.09.1982 against Anand and Haribhau thereby seeking their eviction from the rented premises. The

landlord proved before the trial court that the original tenant was in arrears, was a defaulter and has unlawfully sublet the rental premises to the second defendant Haribhau. It was further proved that Haribhau was occupying the suit premises as a tenant.

5. By judgment dated 13.07.1983, the trial Court, while drawing the above stated conclusions, decreed the suit and directed both the defendants Anand and Haribhau to deliver the vacant possession of the suit premises. Certain orders towards payment of arrears of rent were passed and an enquiry was also directed to be held under Order XX Rule 12(1)(c) of the Code of Civil Procedure for determining future mesne profits

6. The dispute was carried to the first appellate court by Regular Civil Appeal No. 20 of 1984 which was filed only by Haribhau, who was inducted as a tenant by Anand. Anand passed away in the interregnum and his LRs were arrayed as the respondents in the appeal proceedings. The LRs of Anand did not choose to challenge the eviction judgment. The appellate court, vide judgment dated 07.09.1991, dismissed Haribhau's appeal with costs to be paid to the landlord. The appellate court concluded that the landlord has proved that Anand had unlawfully sublet, assigned and transferred his interest in the suit shop in favour of Haribhau. This reveals the probable reason for the LRs of Anand not

challenging the judgment of the trial court as Anand had already lost his possession of the suit shop. The appellate court concluded that Haribhau could not establish that he was the tenant of the suit shop owing to the combined effect of Sections 14 and 15 of the The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, “Bombay Rent Act”). The rest of the conclusions arrived at by the trial court were sustained and the appeal was dismissed.

7. Since Haribhau passed away during the above stated litigation, his LRs Yashwant Haribhau Gawali and Ashok Haribhau Gawali preferred Writ Petition No. 1078 of 1997 before this Court. By judgment dated 11.01.2012, this Court dismissed the Writ Petition and sustained the judgment of the appellate court. With this judgment, the litigation with regard to eviction was brought to an end as the LRs of Haribhau did not choose to take the litigation any further.

8. The LRs of the landlord Gulabchand, namely, Khirish Gulabchand Bhate (erroneously mentioned as Girish Gulabchand Bhate in some proceedings) and Sanjay Gulabchand Bhate, preferred Regular Darkhast No. 53 of 2012 seeking execution of the decree in their favour.

9. The contention of the petitioner in this petition is that the landlord has taken possession of the suit shop on 16.04.2014 with police

aid. A panchanama was drawn indicating that the suit shop no. 9 was handed over to the landlord. A *kabja pawti* (possession receipt) was prepared in the presence of the Court bailiff. The bailiff submitted a report dated 16.04.2014 to the Court stating that the *kabja pawti alvida* was obtained.

10. Learned counsel for the petitioner points out that the landlord submitted a purshis dated 29.04.2014 before the executing court contending that he has received the possession of the suit shop and does not desire to proceed with the execution proceedings. The petitioner, therefore, submits that after the possession was handed over to the decree holder, the execution proceedings could have been disposed of. However, for some reason, the same were kept pending.

11. The judgment debtor then moved an application Exhibit 81 on 29.04.2014 contradicting the taking over of the possession of the suit shop. It was averred in Exhibit 81 that the physical possession of the suit shop was never handed over by the judgment debtor. Though the bailiff has submitted a report of satisfaction of the decree, the petitioner denied that the possession was ever taken over. He alleged vide Exhibit 81 that the various items/utensils/fixtures mentioned in a list (of such properties) were forcibly taken by the landlord in his unsuccessful attempt of forcible taking over of the possession of the suit shop and

they should be returned by the landlord to these petitioners under orders of the executing court. The petitioners published a public notice in a news paper declaring that the possession of the suit shop has not been taken over by the landlord and the same is still in possession of the judgment debtor.

12. The application Exhibit 84 was filed by an objection petitioner Smt. Kalpana Shantaram Gawali contending that she is the widow of judgment debtor no.6 Shantaram Anand Gawali and she is still in possession of the suit shop.

13. The decree holder then preferred an application Exhibit 98 contending that the judgment debtor had forcibly taken the possession of the suit shop. Judgment debtor no. 9 Ashok Haribhau Gawali (Jadhav) had broken the lock and taken the possession of the suit shop forcibly. The decree holder therefore prayed that as the possession warrant was frustrated by the conduct of Ashok, the executing court should once again issue a possession warrant so as to ensure that the decree is satisfied and justice is done.

14. It is intriguing that the judgment debtor declared that Exhibit 81 is 'not pressed'.

15. The executing court has passed a common order below Exhibit 84 filed by Kalpana and Exhibit 98 filed by the decree holder on 28.09.2016. This is the first order impugned in this petition by Ashok Haribhau Gawali. Though the said order is passed on the application filed by Kalpana and is not in connection with the petitioner Ashok, Kalpana has not challenged the said order and instead, Ashok has assailed it in this petition. The trial court rejected application exhibit 84 filed by Kalpana and as such, the contention of Kalpana that she is having the possession of the suit shop, was rejected. Her claim that she has a joint right in the property, was also rejected. Exhibit 98 was allowed thereby issuing a possession warrant with regard to the suit shop and that is the reason why Ashok Haribhau Gawali has challenged the said common order since he is admittedly in possession of the suit shop. It is an admitted position that the rejection of Exhibit 84 is not a subject matter of this petition.

16. The grievance of the petitioner is that when application Exhibit 98 was heard, his Advocate was not present and hence the said impugned order was passed without hearing him. In order to voice his grievance, he initially preferred an application Exhibit 117 before the same executing court seeking a review of the order dated 28.09.2016. The trial court has considered that Ashok, on the one hand, has withdrawn his application Exhibit 81 by stating that he does not intend to press the

application for seeking a judicial order and on the other hand, he did not submit any say to oppose application Exhibit 98 filed by the decree holder. By the order dated 01.04.2017, which is the second impugned order, the executing court rejected Exhibit 117 concluding, on the basis of the roznama recorded, that the Advocate representing Ashok was present, Exhibit 81 was not pressed and Exhibit 98 was not resisted by Ashok.

17. Ashok then preferred application Exhibit 133 on 02.05.2017, once again seeking a review of the order dated 01.04.2017 below Exhibit 117 and in turn, seeking review of the first impugned order below Exhibits 84 and 98 dated 28.09.2016. Since Exhibit 133 was based on the same belief and contention that the Advocate representing Ashok was not present, the executing court, therefore, rejected Exhibit 133 by order dated 02.05.2017.

18. The petitioner primarily seeks to challenge the order dated 28.09.2016 on two grounds. Firstly, that his Advocate was not heard when the said order was passed and secondly, once the decree is executed, whatever may be the conduct of the judgment debtor in forcibly taking over the possession of the suit property despite having lost the possession through the process of law, a second warrant for possession cannot be issued by the executing court in view of the

judgment of the Hon'ble Apex Court (Three Judges Bench) in the matter of *Shew Bux Mohata and Others vs Bengal Breweries Ltd. and Others* [AIR 1961 SC 137]. Learned Advocate for the petitioner strenuously submits that as the decree holder can resort to any of the modes permissible under Order XXI Rule 35 of CPC for taking possession of the suit property, once such possession is delivered, the executing court will lose its jurisdiction to adjudicate upon the execution proceedings. Consequentially, a second order issuing a possession warrant would therefore be unsustainable, in view of the law laid down by the Hon'ble Apex Court in *Shew Bux* (supra).

19. Learned Advocate for the decree holder submits that the conduct of this petitioner has always been defiant and he has consistently made efforts to deprive the decree holder of the fruits of litigation. The executing court has passed an order in the execution proceedings on 17.02.2017 that the learned Advocate representing the petitioner has indulged in brow beating and has attempted to pressurize the court by raising his voice and acting in a belligerent mood. The executing court therefore recorded the said conduct in its order.

20. He further submits that though the decree holder has tendered a pursis stating that he has received possession of the suit shop, the judgment debtor has taken a specific stand in his application Exhibit 81

that there was a scuffle between the litigating sides when the decree holder approached, along with the court bailiff, to take possession of the suit shop. There appears an extensive narration of the events that took place between the parties in paragraph no. 4 of Exhibit 81. It also indicates that the judgment debtor created obstacles in the path of the decree holder in taking possession and there was a damage to the property and equipments and the belongings of the judgment debtor. He averred that as a huge crowd gathered on account of the commotion, the decree holder succeeded in applying one lock to one door of the shop and the rest of the doors could not be locked by him and the judgment debtor continued to be in possession of the suit shop.

21. It is further submitted that the judgment debtor inserted a public notice in a news paper declaring that the decree holder is falsely demonstrating that he has taken the possession of the suit shop and that the judgment debtor continues to hold the possession. It is further contended that once the judgment debtor has taken a stand of having not lost his possession, it is obvious that the first warrant of possession issued by the executing court was frustrated.

22. He submits that though the decree holder had entered a purshis claiming that he has received the possession of the property, he claimed vide Exhibit 98 that he had subsequently lost the said possession. He

submits that there is no bar prescribed under the Code of Civil Procedure for issuing a second warrant of possession and more so, such a bar cannot be presumed unless expressly provided in law and in the peculiar facts and circumstances of this case.

23. He further submits that the judgment delivered by the Hon'ble Apex Court in *Shew Bux* (supra) would not be applicable to this case considering the specific facts that were before the Hon'ble Apex Court. In addition to the said contention, he relies upon the judgment of this court in the matter of *Ramchandra B. Relwani vs. Raees Ahmed Faruque* [2011 (1) Mah.L.J. 949] wherein this Court concluded that the order of eviction was executed and the decree holder was put in possession of the flat, the competent authority has the jurisdiction to enforce its order of eviction if the decree holder files a subsequent application, after the respondent/judgment debtor has forcibly obtained the possession of the flat after being vacated.

24. He then relies upon another judgment delivered by this Court in the matter of *Iqbal Hussain s/o Ali Hussain (died) through L.Rs. Sayed Ahmed Hussain s/o Ali Hasan and another vs. Municipal Council, Purna* [2015 (6) Mh.L.J. 833] by which, this Court has concluded that the court executing the decree, is entitled to pass incidental, ancillary and necessary orders for ensuring the effective

enforcement of the decree for possession which includes the power to remove any obstructions made *pendente lite*.

25. He then submits that this Court is exercising its supervisory jurisdiction under Article 227 of the Constitution while dealing with this Writ Petition. If substantial justice has been done by an impugned order which does not appear to have caused gross injustice to any aggrieved party, this Court should not cause an interference in such an order merely because a second view is possible. He relies upon the judgment of this Court in the matter of ***Ramesh T. Gopalani vs. Janta Sahakari Bank Ltd.*** [2000 (3) Mh.L.J.115].

26. Upon considering the conspectus of this matter in view of the peculiar facts recorded as above, it clearly appears that on the one hand, the judgment debtor specifically declines and denies that the possession of the suit shop was taken over by the decree holder and on the other hand, he maintains a conspicuous silence as to whether he has forcibly broken the lock applied by the decree holder and has forcibly taken the possession of the suit shop. A litigant cannot be permitted to play hide and seek before the Court. Either the judgment debtor takes a clear stand that he had lost his possession and has forcibly taken the possession by his violent action or that he must maintain that he never lost his possession. The decree holder has contended that the judgment

debtor has lost his possession through a legal process and has forcibly taken the possession of the suit shop by breaking open the lock and forcibly gaining an entry in the said shop. If the judgment debtor claims that he had never lost his possession in view of the contents set out in paragraph no.4 of Exhibit 81, it would then amount to he having frustrated the orders of the executing court to evict him from the suit shop.

27. The judgment debtor has laid a heavy stress on ***Shew Bux*** (supra). In the very first paragraph of the said judgment the Hon'ble Apex Court has specifically noted that, "*The question that arises is whether the decree had earlier been executed in full.*" In paragraph No. 8, the Hon'ble Apex Court noted that when the parties proceeded to the concerned premises with the Nazir of the Court and certain police officers, the manager of Bengal Breweries opened the premises. The Nazir report indicates that the decree holder and the judgment debtor arrived at an amicable settlement and the decree holder agreed to permit the factory to run its normal business as before for six weeks and in the said period, the executive body of the factory (judgment debtor) would arrive at a settlement between the decree holder and the judgment debtor. It was, therefore, recorded that the decree holders declared their satisfaction of taking a symbolic possession of the suit property and were satisfied in not taking the physical possession of the said premises. Based on this

satisfaction, the executing court recorded its satisfaction by concluding that *"Possession delivered. One third party has filed an application under Or. 21 r. 100 of C.P.C. Let the execution case be put up after the disposal of Miscellaneous Case No. 13/1948."*

28. Since Bengal Breweries did not vacate the premises, certain criminal proceedings were also initiated. In the meanwhile, the decree holders made a fresh application for execution against defendant No. 4 (Bengal Breweries) for evicting it from the concerned premises. The Hon'ble Apex Court has concluded in paragraph No. 20 to 22 as under :

"20. It is not in dispute that if the decree was once executed against defendant No. 4 in full, then it cannot be executed over again regarding premises No. 27. In other words, if possession had been fully delivered to the decree-holders in execution of the decree on October 1, 1948, the decree must have been wholly satisfied and nothing remains of it for enforcement by further execution. The decree was for khas possession and under Or. 21, r. 35 of this Code in execution of it possession of the property concerned had to be delivered to the decree-holders, if necessary, by removing any person bound by the decree who refused to vacate the property. The records of the proceedings show that such possession was delivered. Defendant No. 4 was the party in possession and bound by the decree. With regard to defendant No. 4, the order made on September 8, 1949, states, "Possession so far as regards the Bengal Breweries are concerned, delivered."

This is an order binding on the decree-holders. It has not been said that this order was wrong nor any attempt made at any time to have it set aside or to challenge its correctness in any manner. The same is the position with regard to the order of November 22, 1948, recording on the Nazir's return that possession had been delivered in terms of the writ.

21. The order of September 9, 1949, no doubt further states, "Ordered that the execution case be dismissed on part satisfaction". The words "part satisfaction" in this order, however clearly do not refer to part satisfaction as against defendant No. 4, the Bengal Breweries, for the order expressly states, "possession so far as regards the Bengal Breweries are concerned, delivered." The decree had therefore been satisfied in full as against the Bengal Breweries Ltd. and consequently as regards premises No. 27 in its possession. Even the learned Subordinate Judge who held the execution maintainable found that "the decree-holders had no doubt previously got possession". Notwithstanding this, the learned Subordinate Judge decided that the decree could still be executed as he took the view that at the hearing before the High Court on January 21, 1949, defendant No. 4 "must have ignored the delivery of possession by the Naib Nazir and he cannot now be heard to say that the delivery of possession by the Naib Nazir was legal and valid". For reasons to be stated later, we are unable to agree with this view.

22. It is true that the Nazir's return showed that defendant No. 4 had not been bodily removed. But the same return also shows that it had not been so removed because of certain

arrangement arrived at between it and the decree-holders and as the decree-holders had not required the removal of defendant No. 4 from the premises. Now under Or. 21, r. 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. This is what happened in this case. The decree-holders in the present case, of their own accord accepted delivery of possession with defendant No. 4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on September 8, 1949, on the basis that full possession had been delivered to them by defendant No. 4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they had obtained full possession. It was open to the decree-holders to accept such possession. Having once done so, they are bound to the position that the decree has been fully executed, from which it follows that it cannot be executed any more. In the case of Maharaja Jagadish Nath Roy v. Nafar Chandra Parmanik (1) an exactly similar thing had happened and it was held that the decree was not capable of further execution. It was there said at p. 15, "The case, therefore, seems to me to be one of those cases in which a

decree-holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second installment asks for khas possession. The question is whether such a course is permissible under the law. I am of opinion that it is not ".

We entirely agree with the view that was there expressed."

29. It is, therefore, obvious from the facts in ***Shew Bux*** (supra) that the judgment debtor entered into an amicable settlement with the decree holder. Both the sides were satisfied by the decree holders peacefully taking the symbolic possession of the premises and acquiescing their right to take the physical possession of the suit premises, thereby permitting the judgment debtors to continue to hold the physical possession of the said premises. It is in this backdrop that the Honble Apex Court concluded that once the decree was satisfied and the decree holders had no grievance by taking the symbolic possession of the premises, the decree holders were precluded from once again seeking physical possession of the said premises. The observations of the Hon'ble Apex Court in paragraph No. 22 are crystal clear as it recorded that the execution case came to be dismissed on 08/09/1949 on the basis of the declaration by the decree holders that they are satisfied by accepting the possession of the premises in view of what actually happened on October 1, 1948, as is recorded in paragraph No. 8 of the

order.

30. The view taken by the Hon'ble Apex Court is, therefore, in the light of the execution proceedings having been dismissed on account of the complete satisfaction of the decree holders. In the instant case, the facts are quite peculiar. The judgment debtor has declared that he had lost possession on 16/04/2014. The possession warrant was issued on 10/04/2014 and was made returnable on 29/04/2014. The judgment debtor promptly entered an application Exhibit 81 on 29/04/2014 in the execution proceedings and declared before the executing court that he has not lost possession, there was a scuffle which took place in front of the shop as the judgment debtor resisted the taking over of the possession and therefore, he prayed before the executing court that a direction be issued to the decree holder to return all the items/equipments/furniture/fixtures/goods, taken from the shop. It appears that the judgment debtor has subsequently not pressed Exhibit 81. He has however not retracted all his allegations and statements made in paragraph No. 4 in Exhibit 81. In this backdrop, coupled with the publishing of a public notice in the newspaper on 03/05/2015, the judgment debtor cannot be permitted to hoodwink the law by conveniently taking a stand now that the possession was peacefully handed over and hence, the decree was satisfied and a second possession warrant could not be issued in view of the law laid down in

Shew Bux case (supra).

31. The Court must be conscious about the conduct of the litigant before granting any relief. As has been held by the Hon'ble Apex Court in the matter of *Kishore Samrite Vs State of Uttar Pradesh* [(2013) 2 SCC 398] and in the matter of *Bhaskar Laxman Jadhav & Ors. Vs Karamveer Kakasaheb Wagh Education Society & Ors* [(2013) 11 SCC 531] that, the law would not assist mischievous or unscrupulous litigants. The petitioner herein has consistently denied that the possession was taken over by the decree holder or that the decree was fully satisfied. He has consistently contended that he had resisted the taking over of possession and on account of the scuffle that took place on 16/04/2014, the possession of the shop was never lost by him. No doubt the decree holder was advised to enter a pursis on 29/04/2014, on which date the possession warrant was made returnable. However, if this contention is tested in the face of the contentions of the judgment debtor, it is obvious that these petitioners continue to hold the possession of the suit shop and is not willing to make a statement that he has forcibly acquired the possession by breaking open the lock and by taking the law in his own hands.

32. In view of the above, the conclusions drawn by the Hon'ble Apex Court in *Shew Bux* (supra) would not be of any assistance to this

petitioner. So also, this Court has dealt with an almost identical case in **Ramchandra B. Relwani** (supra) where the judgment debtor forcibly obtained the possession of the flat despite the decree holder having been put in possession by the order of the executing Court and has concluded in paragraph Nos. 17 to 19 as under :

"17. There is another aspect of the matter. The Petitioner brought to the notice of the Competent Authority that during the pendency of the revision application preferred by the Respondent for challenging the order of eviction, the Petitioner was forcibly dispossessed though he was placed in possession on the basis of the order of eviction passed by the Competent Authority. The respondent admittedly did not follow the due process law. He took forcible possession. Power to do justice is inherent in every Tribunal. The Division Bench of this Court in the case of Maharashtra Shikshan Sanstha vs. Education Officer ([1995]1 Mh.L.J 875) dealt with inherent powers of the School Tribunal established under the Maharashtra Employees of Private School (Condition of Service) Regulations Act, 1977. In paragraph No.14 of the said decision, the Division Bench held thus:

"14. We have pointed out hereinbefore that the School Tribunal is conferred with all the necessary

powers, procedural as well as substantive in the adjudication of the matter before it under sections 10 and 11 of the Act. When the School Tribunal is conferred with the powers of the Appellate Authority under the Code of Civil Procedure, 1908, for the purposes of admission, hearing and disposal of the appeals before it, and even otherwise also being a quasijudicial if not a judicial authority it would mean that it has inherent powers to pass appropriate orders in the lis before it ex debito justitiae including the power to issue temporary injunctions in matters not specifically covered by Order 39 of the Civil Procedure Code or by any provision of the Act. See Manoharlal Vs. Seth Harilal, Air 1962 Sc 527. Also see Ram Bahadur Vs. Devidayal, AIR 1954 Bombay 176.”

(emphasis added)

18. Thus, even in case of the Competent Authority, which is certainly a quasijudicial authority, there is an inherent power vesting in it to pass appropriate order for the purposes of doing justice between the parties.

19. In the circumstances, the Competent Authority had jurisdiction to entertain the subsequent application filed by the Petitioner for enforcing the order of eviction. To that extent, the impugned order dated 5th March, 2010 will have to be clarified and modified. The Competent Authority shall direct the Superintendent to take over possession of the suit

flat and to place the Petitioner in possession thereof. A reasonable time deserves to be granted to the Respondent to surrender the possession of the suit flat.”

33. This Court has once again held in ***Iqbal Hussain*** (supra) that when execution of a decree is frustrated, the executing Court can pass necessary orders to ensure that the decree is satisfied. The observations of this Court in ***Iqbal Hussain*** (supra) in paragraph Nos. 21 to 25, read as under :

"21. The Apex Court in a case of B.Gangadhar, Petitioner Vs. B.G.Rajalingam, Respondent (supra), in paragraph Nos. 6 and 7 of the judgment, made following observations :

“6. Rule 35(3) of Order 21 itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or superstructure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the

judgment debtor or a person interested or claiming right through the judgment debtor has taken law in his hands and made any construction of the property pending suit, the decree holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings.

7. It is also not necessary that the tenant should be made party to the suit when the construction was made pending suit and the tenants were inducted into possession without leave of the Court. It is settled law that a tenant who claims title, right or interest in the property through the judgment debtor or under the colour of interest through him, he is bound by the decree and that, therefore, the tenant need not be impleaded as a party defendant to the suit nor it be an impediment to remove obstruction put up by them to deliver possession to the decree. What is relevant is only a warning by the bailiff to deliver peaceful possession and if they cause obstruction,

the bailiff is entitled to remove the obstruction; cause the construction demolished and deliver vacant possession to the decree holder in terms of the decree. Thus considered, we hold that the High Court and the executing Court have not committed any error of law in directing demolition of shops and delivery of the possession to the decreeholder.”

22. The High Court of Andhra Pradesh in the case of Dongala Venkaiah and another Vs. Dongala Raji Reddy (supra) relying upon the Judgment of the Supreme Court in the case of B.Gangadhar, Petitioner Vs. B.G.Rajalingam, Respondent, reported in AIR 1996 Supreme Court 780 has made similar observations.

23. It is thus clear that the Court executing the decree is entitled to pass such incidental, ancillary, necessary orders for effective enforcement of the decree for possession. This power also includes the power to remove any obstruction, or superstructure made pendente lite. In the case in hand, the decree of possession had become final. It was for the RespondentMunicipal Council, Purna not to allow any such illegal constructions raised pendente lite by the side of the road. Thus, the petitioner/decreed holder is not bound by any such illegal constructions. It is not necessary for the petitioner to file a separate suit, otherwise, the decree becomes inexecutable driving him again for another round of litigation which the Code expressly prohibits such multiplicity of litigation.

24. *In the given set of facts, it would be rather wise to say that the approach of the Executing Court to some extent disallowing the amendment, which is in the nature of traveling beyond the decree, may be correct, but, certainly the executing court ought to have taken care to execute the decree by directing the removal of the said illegal constructions by exercising the powers of Order XXI Rule 35 (3) of Code of Civil Procedure.*

25. *In light of the above discussion and observations made by the Apex Court in case of B.Gangadhar, Petitioner Vs. B.G. Rajalingam, Respondent, reported in AIR 1996 Supreme Court 780 (supra), Writ Petition is disposed of with directions to the Executing Court to execute the decree by removing the illegal construction carried out over the additional area of 12R as shown in the map Exh.123, and shall order delivery of vacant possession of the property under execution to the petitioner within a period of three (03) months from the date of this order.”*

34. This Court has, therefore, relied upon the judgment of the Hon'ble Apex Court in ***B. Gangadhar Vs. B.G. Rajalingam, (1995) 5 SCC 238; AIR 1996 Supreme Court 780***, wherein the Hon'ble Apex Court concluded that Order XXI Rule 35(3) mandates that when a decree for possession of immovable property was granted and delivery of possession was directed, the court executing the decree is entitled to

pass such incidental, ancillary or necessary orders as would be imperative for the effective enforcement of the decree for possession. That power also includes the power to remove any obstruction made *pendente lite*.

35. It is obvious that the judgment debtor, by his own declaration in Exhibit 81, has stated that a scuffle took place on 16/04/2014 and the decree holder had to return with empty hands without taking the possession of the suit shop. The judgment debtor has therefore frustrated the possession warrant issued by the executing Court on 10/04/2014 made returnable on 29/04/2014. In this backdrop, the executing Court cannot find itself helpless and refuse to pass an incidental or consequential order. If the contention of this petitioner is accepted, it would mean that a litigant, who has no respect for law and order would be benefited by the executing court abdicating its powers to deal with the situation by which the judgment debtor has frustrated the possession warrant issued by the said court.

36. In view of the above, I do not find that the impugned order dated 28/09/2016 passed by the executing court, reissuing the possession warrant, could be branded as being perverse or erroneous or would cause gross injustice.

37. In so far as the contention of the petitioner that, the order dated 28/09/2016 was passed without hearing him, is concerned, I find no reason to believe the said contention for three reasons. Firstly, that the presence of the Advocate at the time of hearing is mentioned in the roznama. Secondly, this petitioner never opposed the application Exhibit 98 and did not put forth any contention praying for rejection of Exhibit 98. Thirdly, the executing Court, considered this grievance of the judgment debtor while deciding applications Exhibit 117 and 133, and has concluded that the learned Advocate for the judgment debtor was present at the hearing. In this backdrop, the challenge to the subsequent orders dated 01/04/2017 and 02/05/2017 must fail.

38. In the light of the above, this petition, being devoid of merit, is dismissed.

39. Learned counsel for the petitioner submits that the statement made by the decree holder that he would not take further steps to evict him, be continued.

40. Learned Advocate for the decree holder submits that considering the conduct of the petitioner and the fact that he has tried to overbear the authority and majesty of law, he is not inclined to continue the said statement.

41. In view of the above, no orders are required to be passed as the decree holder does not desire to continue his statement in this matter. Pending Civil Application does not survive and stands disposed of.

(RAVINDRA V. GHUGE, J.)

S.P.C.