

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.3747/2016

Nathu s/o Vithoba Rakhade (Lokhande) (since Deceased through his legal heirs)- Smt.
Sugratabai wd/o Nathu Rakhade and others.

Vs.

Sitabai wd/o Vasanta Bante and others.

Office notes Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri P.C.Marpakwar, Advocate for petitioners.

Shri Yash Maheshwari, Advocate with Advocate S.V.Bhutada, for
respondent nos. 1 to 3.

CORAM : A.S.CHANDURKAR, J.

DATED : July 31, 2019.

In view of notice for final disposal issued earlier, the learned
counsel for the parties have been heard at length.

The challenge raised in this writ petition filed under Article
227 of the Constitution of India is to the order passed by the Executing
Court on 20.02.2016 dismissing the execution proceedings as filed by the
petitioners.

The petitioners had filed suit seeking relief for permanent
injunction so as to restrain the respondents-defendants from disturbing
their possession in respect of 0.03 hectare land of Gat No.252 from the
northern side of Gat No.251. It was their case that they were the owners
of Gat No.252 while the respondents were owners of Gat no.251 which
was on the southern side of the plaintiffs field. The respondents did not
file their written statement and the suit proceeded without such written
statement. On 17.02.2006 the suit was decreed and the respondents were
restrained from disturbing the peaceful possession of the petitioners with

regard to 0.03 hectare of land in Gat No.252. That decree attained finality. The petitioners thereafter initiated execution proceedings and in those proceedings they filed an application under the provisions of Order XXI Rule 32(5) of the Code of Civil Procedure, 1908 (for short, 'the Code') stating therein that the judgment debtors be detained in civil prison as they had breached the decree for permanent injunction. Those proceedings were contested by the respondents. The parties led evidence in those proceedings and the Executing Court by the impugned order recorded a finding that the decree holders had failed to prove any encroachment or breach of the judgment passed by the trial Court. On that basis, the execution proceedings came to be dismissed. That order is challenged in the present writ petition.

Shri P.C.Marpakwar, learned counsel for the petitioners submitted that the Executing Court was not justified in dismissing the execution proceedings. Since the plaintiffs were entitled to the relief of permanent injunction by virtue of which the respondents were restrained from disturbing their possession to the extent of 0.03 hectare of land and as the petitioners had indicated breach of such injunction, the decree was liable to be executed. By filing an application below Exhibit 6 under the provisions of Order XXI Rule 32(5) of the Code, the property of the respondents were liable to be attached for disobedience of the said decree. He further submitted that the Executing Court erred in recording a fresh evidence and thereafter concluding that there was no encroachment caused by the respondents. The Executing Court could not have gone beyond the decree. He thus submitted that by restoring the execution proceedings the petitioners ought to be permitted to execute that decree.

Shri Yash Maheshwari, learned counsel for the respondents on the other hand supported the impugned order. He submitted that the Executing Court rightly found that there was no disobedience on the part of the respondents so as to warrant any action being taken under the

provisions of Order XXI Rule 32 of the Code. According to him, under the garb of executing the decree, the petitioners had sought possession of land in question. As there being no decree for possession, such attempt on the part of the petitioners was rightly turned down by the Executing Court. He referred to the deposition of the Surveyor who was examined by the decree holders and submitted that from his deposition it was clear that the respondents had not committed any breach of the decree for permanent injunction. He also submitted that the decree holders had earlier filed execution proceedings vide Regular Darkhast No.34/2006 which came to be subsequently withdrawn. Even on that count the present proceedings were not sustainable. Hence, there was no reason to interfere with the impugned order.

I have heard the learned counsel for the parties and I have perused the records of the case. The decree for permanent injunction passed in R.C.S.No.78/2003 restraining the respondents from disturbing possession of the plaintiffs with regard to 0.03 hectare land of Gat No.252 had attained finality. Under that decree therefore the petitioners were in possession of Gat No.252 owned by them and the respondents as the owners of Gat No. 251 were restrained from disturbing possession of the petitioners from southern side of their field. The record indicates that the petitioners had initially filed Regular Darkhast No.34/2006 and in those execution proceedings they had moved an application under the provisions of Order XXI Rule 32 of the Code praying that the respondents be detained in civil prison for disobeying that decree. The Executing Court passed an order dated 16.03.2009 and observed that the respondents were preparing *dhura* in their own land and not beyond the boundary of their land. On that count, the said application came to be rejected. Evidence was led in those proceedings and thereafter on 25.01.2010 the petitioners filed a *pursis* and sought permission to withdraw those proceedings. The Executing Court granted permission to withdraw those proceedings in terms of that *pursis* dated 25.01.2010. Thereafter the present execution

proceedings came to be filed on 20.07.2010. In the said proceedings being Regular Darkhast No.37/2010, an application below Exhibit 6 under the provisions of Order XXI Rule 32(5) of the Code was again filed praying that the respondents be detained in civil prison for breach of the decree of permanent injunction. The decree holders then led evidence in support of the execution application. The decree holders also examined an employee of the Land Record's office. He measured the land in question and submitted his report. Another witness was also examined at Exhibit 38. The respondent no.2 examined himself. After considering all this evidence on record the Executing Court found that the document of title with regard to Gat No.252 was not available when the land was measured by the Surveyor. Only that land and not the land of the respondents was measured. It was further held that the decree holders failed to prove any encroachment or breach of the decree for permanent injunction. Hence the execution proceedings came to be dismissed.

Perusal of the entire material on record indicates that the original plaintiff had admitted in his cross-examination that the respondents had not taken possession of his land. As per the evidence of the Surveyor which has been assessed by the Executing Court, the decree holders have not been able to bring on record any disobedience of the decree for permanent injunction on the part of the judgment debtors. The judgment debtors were not shown in possession of any portion of Gat No.252. Since the decree holders were seeking detention of the judgment debtors in civil prison, the burden to prove wilful disobedience was on them. Though the learned counsel for the petitioners submitted that the Executing Court was not justified in referring to the evidence on record, it is seen that it was the petitioners themselves who got the land measured through Surveyor and then examined him in the Executing Court. It is after considering the evidence led by the petitioners themselves that a finding has been recorded that the petitioners have not been able to indicate any breach of the decree for perpetual injunction by the

respondents. In doing so the Executing Court has not gone beyond the decree.

In that view of the matter, it cannot be said that the Executing Court erred in dismissing the execution proceedings. After considering all the material brought on record by the petitioners themselves, a conclusion has been arrived at that such disobedience as alleged by the petitioners has not been proved. I do not find any reason to interfere with the impugned order. The writ petition therefore stands dismissed with no orders as to costs.

JUDGE

Andurkar.