

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 4821 OF 2016

Shri. Nemrao Mangoji Kamble

vs.

Smt.Sitabai w/o. Kamsen Dhawde and two others

Office Notes, Office Memorandum of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri. M. K. Mishra, counsel for petitioner.

Shri. G. M. Hambarde, counsel for respondents No.1 to 3.

CORAM : MANISH PITALE J

DATED : 11.11.2019

By this writ petition, the original judgment debtor has challenged order dated 10.02.2016 passed by the Court of Civil Judge, Jr. Division, Nagpur (executing Court) whereby objections raised on behalf of petitioner at Exh.84 to an application filed on behalf of respondents (original decree holders) stood rejected. In the present case, a suit was filed by the respondents claiming that the petitioner had encroached upon 30.40 square meters of land belonging to them. The suit was decreed and the said decree attained finality by dismissal of appeals filed by petitioners. This decree was put to execution and as per bailiff report, the said decree was satisfied when the encroachment carried out by the petitioners was removed. The report of bailiff shows that it was removed on 21.07.1996.

2. Therefore, respondent filed an application dated 11.09.2000 before the executing Court under Order 21 Rule 32 of the Civil Procedure Code, claiming that after the encroachment was removed on 21.07.1996, taking advantage of the old age of the decree holder, the petitioner had allegedly again encroached upon the suit land and constructed latrine and bathroom as also compound wall. It was claimed that the same was in the teeth of clause (iv) of the judgment and decree dated 12.01.1994 passed by the Trial Court, which permanently restrained the petitioner from committing any encroachment on the land of the decree holder. This application was opposed by the petitioner and it was claimed that the said latrine bathroom were constructed about 15 years ago and therefore, there was no substance in the contentions raised on behalf of respondents. An application was also filed on behalf of the petitioner for dismissal of the said application filed by the respondents, claiming that since the decree was satisfied, there was no basis for the grievance raised on behalf of respondents.

3. A Commissioner was appointed and report dated 21.12.2006, was submitted before the executing Court along with site plan. The report of the Commissioner did show existence of the aforesaid latrine and bathroom as claimed by the respondents. Objections to the report of Commissioner were filed on 09.01.2007 on behalf of the petitioner for rejection of the said report and for appointment of an Architect as Commissioner. The same was made subject matter of challenge before this Court by the petitioner by

filing writ petition No.4173/2012. By order dated 22.04.2013, the said writ petition was allowed and the matter was remanded to the executing Court for considering the objections raised by the petitioner to the Commissioner's report.

4. It was upon remand that the executing Court has passed the impugned order dated 10.02.2016, rejecting the objections raised on behalf of the petitioner to the report of Commissioner. The main grounds raised on behalf of the petitioner while challenging the report of the Commissioner were that proper measurements were not carried and such measurement ought to have been carried out only by an Architect and secondly, that the Commissioner was young and he had not handled such work. The executing Court has given detailed reasons while rejecting the objections of the petitioner to the Commissioner's report.

5. The learned counsel for the petitioner submitted that the despite remand of the matter by this Court, the executing Court committed an error in passing the impugned order. It was submitted that the latrine and bathroom, compound wall were existing for about 15 years prior to the application filed by the respondents before the executing Court claiming that clause (iv) of the decree had been violated by the petitioner by undertaking a fresh construction on the suit land. The executing Court observed on this aspect that submissions made on behalf of the petitioner could not be relied upon for the reason that the petitioner has failed to

file documents to show that the latrine and bathroom were constructed prior to execution of warrant for removal of encroachment. It was then observed that the report of the Commissioner appeared to be proper and that therefore, there was no necessity to appoint another Commissioner in the matter. The objections raised against the report of the Commissioner were rejected on this basis.

6. The learned counsel appearing for the petitioner, while taking exception to the approach adopted by the executing Court, submitted that the contentions raised on behalf of the petitioner that latrine and bathroom as also the compound wall were constructed about more than 15 years prior to the grievance raised by the respondents, was not considered in the proper perspective by the executing Court and that therefore, the impugned order was liable to be rejected.

7. The learned counsel appearing for the respondents supported the impugned order passed by the executing Court. In order to examine the contentions raised on behalf of petitioner, it would be necessary to peruse the nature of decree passed by the Trial Court in the present case. The operative portion of the order passed by the Trial Court reads as follows :-

ORDER

“(i) The plaintiff’s suit is hereby decreed.

(ii) The defendant is directed to remove

encroachment on the land of the plaintiff's admeasuring 30.40 sq. mtrs. as shown in the plaint map is part and parcel of decree.

(iii) The defendant is also directed to remove the compound wall erected in the land of plaintiff's as described in the plaint map.

(iv) The defendant is hereby permanently restrained from committing any encroachment on the land of the plaintiff's house.

(v) An enquiry u/s 20 Rule 12 of C.P.C. be made regarding mesne profit from the date of suit till the date of delivery of possession.

(vi) The defendant shall pay cost of the suit to the plaintiff's and bears his own.

(vii) A decree be drawn up accordingly. "

8. A perusal of the same would show that clause (iv) of the order permanently restrained the petitioner from committing any encroachment on the land belonging to the respondents.

9. The respondents have alleged violation of the said clause of the decree by filing application under Order 21, Rule 32 of C.P.C. The said grievance raised by the respondents has been refuted by the petitioner by claiming that no fresh encroachment was ever committed and that the said structures were in existence for more than 15 years. In this backdrop, that the report of the Commissioner was called by the executing Court.

10. A perusal of the report of the Commissioner dated 21.12.2006 shows that the structures of latrine and bathroom were found to be existing. The measurement of the said structures were stated in the report and it was also stated that these structures was surrounded by broken bricks. There is no objection raised on behalf of the petitioner that such commission was carried out behind his back or in his absence. The thrust of the contentions raised on behalf of the petitioner appears to be that when the decree stood satisfied way back on 21.07.1996 and grievance was raised by the respondents in the year 2000 that encroachment as aforesaid was committed, it was for the respondents to prove that the aforesaid structures of latrine and bathroom were not existing when the decree was satisfied on 21.07.1996. It was the stated stand of the petitioner that such construction existed prior to 15 years and that therefore, there was no question of violation of the decree passed by the Trial Court in the present case.

11. From the nature of the contentions raised on behalf of the petitioner it becomes clear that the report of the Commissioner could not have been objected to only because of the stated stand of the petitioner that the said structures were already existing. The specific contentions raised on behalf of the petitioner while objecting to the report of the Commissioner do not appear to have any substance, because what is claimed is that the Commissioner was a young person with lack of experience and proper measurement could not be carried out by him. It was further claimed that a second

Commissioner was required to be appointed, who could be a qualified Architect. Such objections would have no bearing on the thrust of the contentions raised on behalf of the petitioner that there was no fresh encroachment committed by the petitioner.

12. In view of the above, it is found that the executing Court did not commit any error in rejecting the contentions raised on behalf of the petitioner when objections to Commissioner's report were decided. The report of the Commissioner, in any case, does not give findings on the age of the construction of the latrine and bathroom, which is alleged to be fresh encroachment carried out by the petitioner. Since it is the case of the respondents that such fresh encroachment was carried out even after the decree was satisfied on 21.07.1996, it would be for the respondents as decree holders to prove that such fresh encroachment was indeed carried out in the face of clause (iv) of the said decree. For the said purpose, the objections raised on behalf of the petitioner that there was no case of any fresh encroachment would also have to be decided by the executing Court. In such a situation, it would be for the rival parties to lead evidence in that regard. The conclusions rendered by the executing Court which were limited to the objections raised to the Commissioner's report, cannot be said to be erroneous and therefore, to that extent there is no substance in the present writ petition.

13. Accordingly, the writ petition is dismissed with

the observation that the parties would be at liberty to lead evidence on the main bone of contention as regards violation of clause (iv) of the decree passed by the Trial Court. The claim of the respondents that fresh encroachment was committed in the teeth of the aforesaid clause (iv) of the decree would obviously have to be proved with cogent evidence before the executing Court.

14. The writ petition is disposed of with above observations.

JUDGE

KOLHE