

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.726 OF 2014

Ramesh Narayan Marathe
Aged about : 62 years, Occu: Retired,
R/o: House No.4-19-102, Khokadpura,
District: Aurangabad.

... Petitioner

Versus

Vijaysingh S/o Vitthalsingh Rajput
Aged about: 65 years, Occu: Retired,
R/o: House No.5-20-74, Sabji Mandi,
District: Aurangabad.

... Respondent

...

Mr. Vinod I. Thole, Advocate for the Petitioner
Mr. D. K. Kulkarni, Advocate for the Respondent-Sole

...

CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 29th November, 2021

PRONOUNCED ON : 16th December, 2021

JUDGMENT :

. **RULE.** Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This petition takes exception to the order dated 10-02-2012, passed by the 15th Joint Civil Judge, Junior Division, Aurangabad below Exhibit-43 in Regular Darkhast No.137/2003.

3. Facts in brief leading to this petition are as follows:

(I) The respondent/decreed holder filed Regular Civil Suit No.20/1986 against one Gangubai and four others for removal of encroachment on his plot bearing C.T.S. No.13904. The suit was decreed and the decree is confirmed up to this Court.

The respondent/decreed holder thereafter filed Regular Darkhast No.137/2003 for execution of the decree. The Executing Court appointed City Engineer of Municipal Corporation, Aurangabad as a Court Commissioner and directed him to identify the suit plot and to demolish the encroachment over it. The Court Commissioner found that the petitioner/objection petitioner has encroached on the suit plot to the extent of 1.25 X 0.45 meters. The petitioner/objection petitioner is the owner of C.T.S. No.13525/1 which is adjacent to the suit plot.

(II) The Municipal Corporation issued notice to the petitioner for removal of encroachment made by him. The petitioner filed application Exhibit-17 in Regular Darkhast No.137/2003, thereby taking objection to the said notice and further sought a declaration and prayed for stay to the said notice. The said application was allowed by the Executing Court and it was directed to issue correct and specific writ in respect of the execution of decree.

(III) The respondent/decreed holder filed application (Exhibit-28) under Order XXI Rule 97 of the Civil Procedure Code (for short "CPC") for removal of encroachment of 1.25 X 0.45 meters made on suit plot by the petitioner/objection petitioner.

(IV) The said application was resisted by the petitioner. The Executing Court, after hearing the parties, allowed application (Exhibit-28) and dismissed the objection raised by the petitioner/objection petitioner. This order is impugned in the present petition.

4. Heard the learned advocate for the Petitioner and the learned advocate for the Respondent.

5. The learned advocate for the Petitioner vehemently submitted that since no decree is passed against the Petitioner, the Executing Court erred in allowing application (Exhibit-28) and rejecting the objection raised by the Petitioner. While disposing of application (Exhibit-17), a specific direction was given to issue correct and specific writ in respect of the suit property. He further submitted that, no evidence of the Commissioner was led by the decree holder. The encroachment, on the part of the Petitioner, cannot be decided under Order XXI Rule 97 of CPC in absence of a decree against him. Therefore, the decree cannot be executed against the Petitioner. He, therefore, submitted that the impugned orders are liable to be quashed and set aside.

6. Per contra, the learned advocate for the Respondent submitted that, the application raising objection by the Petitioner ought to have been filed under Order XXI Rule 99 of CPC and not under Rule 97 of CPC. The order challenged by the Petitioner is subject to appeal under Rule 103 of Order XXI. Since the Petitioner has failed to file appeal, the present petition is not maintainable. He further submitted that liberty was granted to the decree holder to add the Petitioner as party. A well reasoned order is passed by the Court. The Petitioner has not made out

any case to interfere in the impugned order, only with view to come out of limitation, instead of filing an appeal, the present petition is filed.

7. It is not disputed that Regular Civil Suit No.20/1986 was filed by the respondent/decreed holder against Gangubai and four others for removal of encroachment on his plot bearing C.T.S No.13904. The said suit was decreed and decree was confirmed up to this Court. Regular Darkhast No.137/2003 is filed by the respondent/decreed holder for execution of the decree. In the execution proceedings, City Engineer of Municipal Corporation was appointed as Court Commissioner for identifying the suit plot and for demolishing the construction over it. The Court Commissioner found out that there has been encroachment by the objection petitioner on the suit plot to the extent of 1.25 X 0.45 meters. Hence, notice Exhibit-43 was issued to him for removal of said encroachment. The objection petitioner therefore filed application under Order XXI Rule 97 of CPC contending that, since he was not a party to the suit, decree cannot be executed against him, the Municipal Corporation authority has no right issue notice to him for demolishing his construction. Accepting the said objection, the Executing Court directed the Court Commissioner to demolish the construction only to the extent of area which is in possession of judgment debtors. Fresh writ of Court Commissioner to that effect was issued.

8. The record indicates that the respondent/decreed holder filed application (Exhibit-28) under Order XXI Rule 97 of CPC praying for removal of encroachment made by the petitioner/objection petitioner on the suit plot. The objection petitioner has filed his say to the said application contending that he has not encroached on the suit plot, but admitted that his house is adjacent to the suit plot. He reiterated that, since he is not a party to the suit, decree cannot be executed against him.

9. Admittedly, the objection petitioner was added as party in the Darkhast. The Executing Court considering the rival contentions of both the parties, framed issues. Both the parties did not lead any evidence in the support of their respective contentions. The Executing Court, after considering the record, came to the conclusion that in the execution proceedings, it can decide the right and interest claimed by the decree holder and objection petitioner over the disputed plot/suit plot.

10. The Executing Court has recorded a finding that no evidence was led by the objection petitioner about his possession of disputed plot that he legally in possession of disputed plot, either as a owner or as a tenant. So also no document of title was filed by him on record in respect of actual constructed area on his plot. It is also observed that only vague submissions were made by the objection petitioner without leading any oral and documentary evidence in spite of ample opportunity having been

given to him. The Executing Court therefore recorded a finding that the objection petitioner has failed to prove that he is lawfully possessing the disputed plot. By relying in **Nooruddin Vs. K.L. Anand** reported in (1995) **1 SCC 242**, the Executing Court has rightly come to the conclusion that it can decide the right and interest claimed by the decree holder and objection petitioner over the disputed plot and the Executing Court has rightly allowed the application Exhibit-28 and dismissed the objection raised by the objection petitioner.

11. Order XXI Rules 97, 101, and 103 of CPC deals with resistance or obstruction to possession of immovable property etc., which reads thus;

“Rule 97 Order XXI of Code of Civil Procedure 1908 "Resistance or obstruction to possession of immovable property"

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate the upon the application in accordance with the provisions herein contained.

Rule 101 Order XXI of Code of Civil Procedure 1908 "Question to be determined"

All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding

anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

Rule 103 Order XXI of Code of Civil Procedure 1908 "Orders to be treated as decrees"

Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree."

12. Thus the order passed upon adjudication of application under Rule 98 or Rule 100 of CPC, the orders have the same force, as it were a decree. The same therefore is an appealable order and the petitioner should have availed the remedy of challenging the said order in appeal.

13. The order impugned in the present petition is dated 10-02-2012, the present petition is filed on 20-01-2014 i.e. after a delay of two years. There is no explanation of delay on the part of the petitioner.

14. In **Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and Another** reported in **(1998) 3 SCC 723**, the Hon'ble Supreme Court held:

"A this party to the decree who offers resistance or obstruction to execution of the decree would fall within the ambit of Rule 101 is an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further

contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. The words “all questions arising between the parties to a proceeding on an application under Rule 97” would envelop only such questions as would legally arise for determination between those parties.....”

15. In **Shreenath and Another Vs. Rajesh and Others** reported in **(1998) 4 SCC 543**, the Hon’ble Apex Court while considering the scope of Rule 97 (1) of Order XXI held that “any person” includes even a person not bound by the decree.

16. The principles in the above ratios support the case of the respondent. For the aforesaid reasons, this Court is of the considered view that the Executing Court was justified in allowing the application (Exhibit-28) filed by the respondent. No illegality or perversity is found in the order impugned in the present petition. The petitioner has failed to make out a case to interfere in the extraordinary writ jurisdiction of this Court.

17. Writ Petition being devoid of merit is dismissed. Rule is discharged. No order as to costs.

(NITIN B. SURYAWANSHI, J.)