

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

902 WRIT PETITION NO.6899 OF 2021

SHAMSING KALU GIRASE
VERSUS
SARLABAI BHARATSING GIRASE AND OTHERS

...

Mr. Kulkarni, Advocate holding for
Mr. S.P. Brahme, Advocate for the petitioners.

...

CORAM : **AVINASH G. GHAROTE, J.**

DATE : 14-07-2021.

ORDER :

1. Heard Mr. Kulkarni, learned Counsel holding for Mr. Brahme, learned Counsel for the petitioner. It is an admitted position, that a decree for possession of Plot No. 7 admeasuring 1500 sq. ft., has been passed by the trial Court on 30.04.2016, which has been put into execution. In the execution proceedings, when a warrant of possession of the plot was issued, the bailiff found that the plot was not vacant but a house was standing thereupon, occupied by the petitioner / judgment debtor. An application therefore came to be filed before the Executing Court in R.D. No.37/2017 at Exh.26, seeking the possession, alongwith the house constructed thereupon, which was claimed to be a temporary structure with the tin roof, by breaking of the lock. Vide impugned order dated 03.12.2020, the Executing Court found that it had ancillary powers, to direct removal of construction or structure made over it, in order to execute the decree to it's fullest. It also found that the construction was made by the judgment debtor during the pendency of

the suit or after passing of the decree, and therefore, it had the power, to direct removal of the construction by demolishing the same and directing delivery of possession of the open plot to the decree holder / respondent, and accordingly allowed the application at Exh. 26.

2. Mr. Kulkarni, learned counsel for the petitioner takes exception to this order contending that house No. 137, was standing on plot No. 7, since 2008-2009 even before the institution of R.C.S. No. 60/2013 and the decree passed, which is sought to be executed. He invites my attention to para-1 of the plaint in RCS No. 60 of 2013 where the description of the suit property is given wherein and it is stated that Grampanchayat house No. 137 was there. He further invites my attention to the judgment passed by the 2nd Joint Civil Judge, Junior Division, Shahada in R.C.S. No. 60/2013 on 30.04.2016, where in para-2 the Court has considered the defence raised, that there was a house bearing Grampanchayat No.137 standing upon plot No.7. He further invites my attention to para-5 of the judgment which makes a mention of Exhs.23 and 25, which are the entries in respect of the house and receipt of taxes. He further invites my attention to para-10 of the judgment, in which, the version of the plaintiff, that the entry in the Grampanchayat record, has been manipulated by the judgment debtor / petitioner, has been accepted, in absence of any denial by the petitioner / judgment debtor, since he was absent and proceeded *ex parte*. The learned Counsel for the petitioner therefore contends, that the house in question bearing No.137, was always in existence, inspite of which, the decree in respect of open plot No. 7 has been passed. He further

invites my attention to the position as reflected in the judgment dated 30.04.2016, that the respondent had no title, but was only entitled to possession thereof.

3. The learned Counsel for the petitioner also submits, that an application under Order IX Rule 13 of the Code of Civil Procedure (CPC) to set aside the *ex parte* decree is presently pending before the Civil Judge, Senior Division, Shahada, in which the application for condonation of delay has since been allowed and the application, under Order IX Rule 13 of the CPC has been registered as MJC No. 94/2018. He further submits, that on the merits of the matter, the petitioner has fair chance, on the MJC being allowed, to defend the suit.

4. All these pleas, are not permissible to be considered in my jurisdiction under Article 227 of the Constitution of India. It is material to state that inspite of a plea raised that there was a house No. 137 standing on plot No.7, which plea was in the plaint itself, and is also considered by the Court while passing the judgment dated 30.04.2016, a decree for delivery of vacant possession of plot No.7 has been passed, which points out that the court, while passing the judgment was aware of this plea raised and the documents in support thereof, considering which the decree for delivery of vacant possession, has been passed. This would categorically indicate, that the Executing Court, would be having all the powers, to issue directions, that the decree as passed and sought to be executed, was fully satisfied. Though the observations by the Executing Court, that the construction of house No. 137, was made during the pendency of the suit or after

passing of the decree, may not stand to reason, however, while exercising powers under Order XXI of the CPC for executing the decree, the direction to either remove the construction and deliver vacant possession of plot No.7 in satisfaction of the decree dated 30.04.2016, as is where is, cannot be faulted with.

5. The petition, therefore, fails and is accordingly dismissed. It is however clarified, that as of now, no action can be taken in respect of demolition of the structure / possession in view of the order of the Full Court dated 26.03.2020, which has been continued from time to time and till such time the same is further continued.

6. Learned Counsel for the petitioner submits, that the proceedings under Order IX Rule 13 of the CPC in MJC No.94/2018, be expedited and be directed to be decided within a specified time without being affected by the observations made in this order. In so far as the observations made in this order, they do not in any way affect the adjudication of MJC No. 94/2018. It is however directed that MJC No. 94/2018, shall be endeavoured to be decided by the 2nd Jt. Civil Judge, Jr. Divn., Shahada as early as possible.

(AVINASH G. GHAROTE, J.)

VD_Dhirde