

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

901 WRIT PETITION NO. 3905 OF 2021

**KAKASAHEB RAMBHAU NIKAM AND OTHERS
VS
RAJENDRA RAMBHAU ZADBUKE AND OTHERS**

Mr. Kishor R. Doke, Advocate for the petitioners

CORAM : N. J. JAMADAR, J.

DATE : 03-03-2021

ORAL ORDER :

. Heard learned counsel for the petitioners.

2. The challenge in this writ petition is to an order passed by the learned Civil Judge Junior Division, Washi on an application (Exh.20) in Misc. Civil Application No.58/2019 whereby the petitioners have been directed to remove the tin-shed and hotel which has been unauthorizedly erected over the suit premises in RCS No.371/2013.

3. There is prelude to this order. The respondents herein instituted the suit for perpetual injunction against the petitioners herein from causing obstruction to the possession and enjoyment of the plaintiffs over the premises described in para Nos.3 to 9 of the plaint. The respondents-plaintiffs preferred an application for temporary injunction. By an order dated 19-01-2015 the learned

Civil Judge was persuaded to allow the said application (Exh.5) and the defendants-petitioners were restrained from doing any act which has the effect of causing obstruction to the peaceful possession of the plaintiffs over to suit plot and over open space supposedly in the marginal distance area situated between the suit plots and Washi phata to Washi village road till final disposal of the suit. Indisputably, said order dated 09-01-2015 still holds the field.

4. The respondents-plaintiffs preferred instant application alleging that in breach of the injunction order the petitioners have erected tin-shed and hotel over the very premises in respect of which the petitioners were restrained from causing obstruction. After hearing the submissions on behalf of petitioners and respondents, the learned Civil Judge was persuaded to enter a finding that at the time the temporary injunction order was passed, no structure was erected on the suit premises and despite the order of the court restraining the petitioners-defendants from causing obstruction to the possession and enjoyment of the respondents-plaintiffs, the petitioners have unlawfully erected the structures thereon. The learned Civil Judge was thus persuaded to direct the petitioners to remove the said structure on their own within a period of two months of the impugned order. In default, the respondents were allowed to execute the order with assistance of police, if required.

5. Learned counsel for the petitioners urged that the

learned Civil Judge committed a manifest error in placing reliance upon the judgment of learned Single Judge of this court in the case of *Nirmalabai Jaisingh Patel Vs Poonam Siyaram Maharaj Vyas (Writ Petition No.4984/2004)* dated 22-12-2004, wherein it was inter alia observed that the provisions of the code relating to execution of decrees are deemed to apply to even cases for execution of orders.

6. Learned counsel for the petitioners urged that the aforesaid view is not in consonance with law. Reliance was placed on the judgment of the Supreme Court in the case of ***Kanwar Singh Saini Vs High Court of Delhi (2012) 4 SCC 307***, wherein the Supreme Court enunciated the legal position as regards the applicability of the provisions contained in order 39 Rule-2-A, after passing of the decree. The Supreme Court observed, inter alia, in para 20 to 21 as under:

“20. The proceedings under Order 39 Rule -A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order 21 Rule 32 CPC and not by means of contempt proceedings. Even otherwise, it is not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the

subordinate court, for the reasons that where a decree is for an injunction, and the party against whom it has been passed has willfully disobeyed it, the same may be executed by attachment of his property or by detention in civil prison or both.

21. The provision of Order 21 Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of Order 21 Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible. (*See Hungerford Investment Trust Ltd V. Haridas Mundhra*)."

7. Evidently, in the aforesaid case the resort to the provisions contained in Rule 2-A of order 39 was sought to be made post disposal of suit. In that context, it was held that proceedings under order 2-A are available only during the pendency of the suit and not after conclusion of the trial of the suit.

8. In the case at hand, learned Civil Judge is still seized of the suit. A categorical finding is recorded that structure came to be

erected after passing of temporary injunction order. The content and effect of an order of the court cannot be permitted to be robbed of with impurity. A party who commits breach of the orders of the court cannot be heard to say that it can only be proceeded against either for attachment of property or detention in civil prison. The court is not denuded of the powers to ensure that its orders are enforced. In the circumstances of the case, the direction for removal of encroachment which is found to have been committed in flagrant violation of the order of temporary injunction, partakes the character of a mandatory direction. It cannot be urged that the court is not vested with the authority to pass such an order.

9. For the forgoing reasons, this court does not find any justifiable ground to invoke the extra ordinary jurisdiction. Hence, the petition stands dismissed.

[N. J. JAMADAR, J.]