

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 11162 OF 2014

Shri Sitaram Shivram Kadam,
since deceased through his legal heirs

1A) Shri Sakharam Sitaram Kadam & Ors.

...Petitioners

vs.

Shri Maruti Yashwant Deshmukh,
since deceased through his legal heirs

1A Shri Deepak Shankar Deshmukh & Ors.

...Respondents

Mr. Shirish V. Pitre for Petitioners.

Mr. Sanjay Kshirsagar for Respondents 1A and 1B.

CORAM : ROHIT B. DEO, J.

DATED : 1 JULY 2022

P.C. :

1. The Petitioners are the Judgment Debtors, who are aggrieved by order dated 30 September 1999 rendered by Civil Judge, Junior Division, Mahad, whereby the applications, Exhibits 69 and 73 in R.D. No.12/2000, are rejected.

2. Regular Civil Suit No.22/1990 was instituted by the Respondents against Mr. Sitaram Shivaram Kadam and Mr. Ganpat Shivaram Kadam for removal of encroachment and perpetual injunction.

3. The learned Civil Judge, Junior Division, Mahad, partly allowed Regular Civil Suit 22/1990 by judgment dated 30 September 1999. The operative part of the judgment reads thus :

“ The suit is hereby partly decreed.

Defendants are hereby ordered to remove the encroached portion as shown in the map (Exh.117) within the period of three months from the date of decree of the suit.

The map Exh.117 be treated as part and parcel of the decree.

The prayer of the injunction stands rejected.

No order as to costs.

Decree be drawn accordingly.”

4. Mr.Sitaram Shivaram Kadam preferred Civil Appeal 150/1999 which the District Judge, Raigad dismissed vide judgment dated 26 April 2006. The operative part of the appellate court judgment reads thus :

“ Appeal stands dismissed with costs.

But it is hereby clarified that only red marked portion of encroachment beyond the yellow marked portion marked by black colour which is situated to the East of suit property is encroached portion and to which Plaintiff is entitled for recovery of possession i.e. removal of encroachment and possession thereof.

The said portion today is marked by letter “A”, “B”, “C”, “D”, by green colour ink from map Exh.117 which forms part of the decree.

The appeal is disposed of accordingly.”

5. Mr.Sitaram Shivram Kadam and others preferred Second Appeal 1011/2006 which this Court dismissed vide order dated 13 June

2007. Paragraphs 3 and 4 of the order dated 13 June 2007 in Second Appeal 1011/2006 read thus :

“Before the trial court Shri Chandarkant Kamble, T.I.L.R. was examined at Exh.116 and on visiting the site he had drawn map at Exh.117. He pointed out that prior to 1988 the house occupied by the defendants was rightly on the plot of land owned by them but while constructing a new house, defendants had encroached to the extent of 28 ft. x 15 ft. and this encroached area was shown in black and red colours. He further stated that his findings about the encroachment were passed on the original map of 1988 when the city survey had taken place and he further stated that from the said old map, the old house of the defendants was smaller in size. The city survey enquiry register (Exh.145) was also an additional evidence in support of the depositions of this witness.

4. Thus, both the courts below have recorded a concurrent finding on the issue of encroachment by the defendants while constructing a new house in place of the old house and to the extent of 28 ft. x 15 ft. This fact finding exercise regarding the encroached portions and based on the T.I.L.R.’s evidence does not involve any substantial question of law for consideration in this second appeal.”

6. Undeterred, the defendant-Judgment Debtor preferred Application, Exhibit 73, purportedly invoking the provisions of Section 47 of the Code of Civil Procedure, 1908 (Code), objecting to the execution of the decree.

7. The Judgment Debtor sought a declaration that the decree is not executable in view of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. Prayer (B) seeks the alternative relief that the encroached portion which is sought to be

demolished is construction admeasuring 3 ft. x 15 ft., and instead of causing great loss to the judgment debtor, the said construction may be permitted to exist and the decree holder may be monetarily compensated. Prayer clause (C) seeks a declaration that the defendant – judgment debtor is the owner of the suit property and further seeks injunctive relief against the decree holder from executing the decree. The other objection is that necessary parties are not joined in the suit.

8. The learned Executing Court has rightly observed that the judgment and decree in RCS 22/1990 is confirmed in Civil Appeal 150/1999 and the High Court has dismissed Second Appeal 1011/2006, and it would be impermissible for the Executing court to go beyond the decree.

9. I entirely agree with the reasons recorded by the learned Executing court. Apart from the fact that nothing is brought on record as to demonstrate even *prima facie* that the decree is contrary to the statutory provisions, in essence, the judgment debtor was inviting the Executing court to go beyond the decree and to adjudicate on the legality of the judgment and decree in suit which is confirmed by the High Court. The learned Executing court obviously could not have considered the objection that necessary parties are not impleaded nor could the Executing court have considered the objection that the suit property is, as a fact, owned by the defendant – judgment debtor. I am satisfied that the only attempt made by raising such frivolous and untenable objections is somehow or the other deprive the plaintiff of the fruits of the decree and, as unfortunately is the case more often than not, the judgment debtor has succeeded to a great extent.

10. It is passionately submitted by the learned Counsel for the judgment debtor that the portion encroached and which is to be demolished admeasures partly 3 ft. x 15 ft. (45 sq.ft.) and the judgment debtor is more than willing to compensate to the plaintiff monetarily or by offering some alternate land. I am afraid, in exercise of writ or supervisory jurisdiction, it would not be permissible for this Court to consider the said submission since the learned Counsel for the decree holder is not agreeable to consider the offer. According to the learned Counsel for the decree holder, the area of encroachment is 28 ft. x 15 ft., i.e. 420 sq. ft. That apart, according to the learned Counsel for the decree holder, the offer is not bonafide and the judgment debtors are wrongly insisting that the construction which is directed to be removed admeasures only 3 ft. x 15 ft., i.e. 45 sq. ft.

11. In any event, if the contesting parties are not in a position to arrive at an amicable solution, there is precious little that can be done by the Court.

12. The writ petition is dismissed.

13. Interim order, which is operating, shall continue to operate for a period of eight weeks to enable the Judgment Debtors to approach the Hon'ble Supreme Court.

(ROHIT B. DEO, J.)