

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4071 OF 2022

Shaikh Aslam S/o. Abdul Khaliq Petitioner

Versus

Maharashtra Depressed Class
League Hostel,
Through its Secretary
and another Respondents

.....
Mr. Pratap P. Mandlik, Advocate for the Petitioner
Mr. A.H. Kasliwal, Advocate for Respondents
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 19th JUNE, 2023

ORDER :

1. Petitioner is aggrieved by the order passed by the learned Civil Judge, Junior Division, Nanded, below Exhibit-47 in Regular Darkhast No.123 of 2013, thereby rejecting the application filed by the petitioner/judgment debtor.

2. Regular Civil Suit No.25 of 2010 was filed by respondent No.1/plaintiff for recovery of possession of land to the extent of 10 x 37 feet having width east-west 10 feet and length south-north 37 feet of Survey No.77 of Vazirabad,

Nanded under Section 6 of the Specific Relief Act, 1963. In the suit, though the suit summons was served both the defendants, i.e. petitioner and respondent No.2 in the present petition, they both failed to appear. The suit was decreed *ex parte* vide judgment and decree dated 03/05/2010. By filing Regular Darkhast No.123 of 2013, the decree holder/respondent No.1 sought execution of the decree passed in his favour.

3. The petitioner, by filing application Exhibit-47, objected the execution of decree contending that the decree is un-executable for proper identification of the suit property. It is further contended that the claim clause on which the relief of possession is claimed is not clear and it is ambiguous, and is without basic requirement. In the claim clause it is not disclosed as to in which part of Survey No.77, the suit property is situated. The operative part of the judgment shows that the possession of which relief is granted is based on encroachment, whereas the claim clause is silent in respect of encroachment.

4. The Executing Court after hearing the parties, rejected the said application holding that, the questions to be decided under Section 47 of the Code of Civil Procedure is very

limited. The objection petitioners/petitioner is challenging the judgment and decree, which is passed *ex parte* and the same is not set aside. The objection petitioners/petitioner has failed to challenge the decree in appeal.

5. Heard the learned advocate for the petitioner and the learned advocate for respondent No.1. Perused the writ petition memo, annexures thereto, impugned order and the citation relied upon by the learned advocate for the petitioner.

6. Learned advocate for the petitioner strenuously urged that the Executing Court has failed to consider the provisions of Order VII Rule 3 of the Code of Civil Procedure while rejecting the application. By relying on decision of Apex Court in ***Hindustan Petroleum Corporation Ltd. Vs. Ajay Bhatia, AIR 2022 SC 4739***, he submits that since no precise description of the suit property is given in the plaint, the decree cannot be executed as the said property is not easily identifiable. He, therefore, submits that the impugned order is liable to be quashed and set aside, and application Exhibit-47 filed by the petitioner deserves to be allowed.

7. Per contra, learned advocate for respondent No.1 supports the impugned order. He submits that the application filed by the petitioner under Order IX Rule 13 of the Code of Civil Procedure for setting aside *ex parte* decree was withdrawn by the applicant. This fact is not brought to the notice of this Court, therefore, on this ground alone, the writ petition is liable to be dismissed.

8. Admittedly, *ex parte* order is passed against the petitioners. The application filed by the petitioner under order IX Rule 13 is withdrawn for the reasons best known to the petitioner. The petitioner has failed to challenge the decree by filing appeal. From the documents placed on record, it appears that the petitioner has encroached on the property of respondent No.1. Since the petitioner has encroached on the property of respondent No.1, he is not entitled for equitable relief. In view of the description of the property in the plaint, the property is easily identifiable.

9. Learned advocate for the petitioner placed reliance on general receipt issued by the Commissioner Nanded-Waghala City Municipal Corporation, Nanded to contend that the said receipt pertains to the property in question. On going through the receipt, it appears that the said receipt is in

respect of the house to be allotted under B.S.U.P. scheme to the petitioner, who is resident of *Nai Aabadi*, Nanded, whereas the property in question is situated at Survey No.77 of Vazirabad area of Nanded.

10. In *Hindustan Petroleum Corporation Ltd.* (supra), the Apex Court held that, "*when a suit for immovable property had been decreed but the property not definitely identified, the defect in the Court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 could be cured. The Court which passed the decree could supply the omission. Alternatively, exact description of the decretal property might be ascertained by the Executing Court, as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47. There could be no doubt that a decree should not the extent practicable be allowed to be defeated. At the same time, a decree can only be executed in respect of the suit property if the suit property is easily identifiable. The extent of the suit property would have to be determined by the Executing Court, as a question relating to execution, discharge or satisfaction of the decree.*"

11. Since in the present case the property can be identified as per description given in the plaint/decreed, the decision in *Hindustan Petroleum Corporation Ltd.* (supra) would not help the case of the petitioner. There is no illegality or perversity in the order impugned in the present petition.

12. The writ petition being devoid merit is dismissed.

13. Interim relief stands vacated.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane