



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

WRIT PETITION NO. 12366 OF 2018

Rajjubai Shantaram Koli Through
GPA Shantaram Shenfadu Koli .. Petitioner

Versus

Bebabai Ramkrishna Koli .. Respondent

Shri Shantaram R. Dheple, Advocate for the Petitioner.
Shri M. G. Patil, Advocate for the Respondent.

CORAM : SHAILESH P. BRAHME, J.
DATE : 05TH DECEMBER, 2023.

FINAL ORDER :

. Heard the learned counsel for both the sides finally at the admission stage.

2. The petitioner who is a decree holder is challenging common order dated 06.08.2018 passed below Exhibit 16 and 18 in Regular Darkhast No. 10 of 2017 by the learned Joint Civil Judge Junior Division Jamner. The petitioner is armed with a decree of injunction secured in R.C.S. No. 88 of 2007 against the respondent. In pursuance of the decree, the execution in question has been instituted by the petitioner.

3. The petitioner filed R.C.S. No. 88 of 2007 for perpetual injunction. The respondent contested the suit by filing written statement as well as counter claim for injunction. The suit of the

petitioner was decreed by judgment and decree dated 21.12.2016. Simultaneously, counter claim was dismissed. Being aggrieved R.C.A. No. 41 of 2017 and R.C.A. No. 49 of 2018 have been preferred by the respondent before the lower Appellate Court. There is no stay to the operation and execution of the judgment and decree of the Trial Court.

4. The petitioner filed execution proceedings and submitted application Exhibit 12 for police protection. No say was filed to the application Exhibit 12. By order dated 13.11.2017 the Executing Court granted police protection to the petitioner. Thereafter, respondent filed application Exhibit 16 seeking review of order dated 13.11.2017. The petitioner submitted application Exhibit 18 again for the same purpose. Applications below Exhibit 16 and 18 are decided by the common order.

5. The learned counsel for the petitioner submits that application Exhibit 16 is in the form of review and without there being any grounds for review, the jurisdiction is being exercised and application is allowed, which is perverse. The learned counsel submits that there is no stay granted by the lower Appellate Court to the operation of the judgment and decree passed by the Trial Court. The learned Judge has committed error of jurisdiction in rejecting application Exhibit 18 and allowing application Exhibit 16.

6. The learned counsel would point out the findings recorded by the Trial Court in paragraph Nos. 17 and 18 to show that the

petitioner is in possession of the suit land. He would further submit that the Executing Court travelled beyond the decree in commenting upon the measurement of the suit properties. According to him finding recorded regarding inconvenience of the respondent is misconceived.

7. The learned counsel for the respondent supports the impugned order. He submits that demarcation of the boundaries is disputed. He has placed on record a copy of judgment passed in R.C.S. No. 95 of 2008 filed by the respondent's husband for injunction against the petitioner. It was decreed on 27.02.2012. He would point out the findings recorded in paragraph No. 8 of the judgment indicating that the plaintiff in that suit failed to discharge the burden to prove that the boundaries were wrongly described.

8. He submits that the observations recorded in the impugned order regarding measurement are not mandatory. As there is dispute over land gut No. 18/1 belonging to the respondent's husband and suit land belonging to the petitioner bearing land gut No. 18/2/2, the learned Judge is justified in rejecting the application Exhibit 18. He would further submit that in view of Section 47 of the Civil Procedure Code, the Executing Court has powers to decide all the issues.

9. I have considered submissions of the parties. The judgment and decree passed by the Trial Court in R.C.S. No. 88 of 2007 is subjected to challenge in R.C.A. No. 51 of 2017 and

R.C.A. No. 49 of 2018. However, the judgment and decree of the Trial Court has not been stayed by the lower Appellate Court. The Trial Court granted decree of injunction in favour of the petitioner considering the fact that the petitioner is in possession of the land gut No. 18/2/2. The validity of the said finding can be gone into by the Appellate Court. As of today it has to be recorded that the petitioner is in possession of the suit land.

10. Considering the possession, the petitioner is seeking police protection. The review is permissible as per Order XLVII read with Section 114 of the C. P. C. The executing Court has failed to discuss that a case is made out to invoke powers of review. I am of the considered view that the Executing Court committed error of jurisdiction in allowing application Exhibit 16.

11. The learned counsel for the respondent has referred to the judgment passed in R.C.S. No. 93 of 2008 in respect of land gut No. 18/1 which is contended of to be adjoining land. For deciding application Exhibit 18 or executability of the decree passed by the Trial Court, it is not necessary to refer to the findings recorded in the judgment passed in R.C.S. No. 93 of 2008 at this juncture. Similarly, the observations regarding measurement of the suit property involved in both the suits is also not relevant.

12. It is not permissible for the Executing Court to travel beyond the decree. The decree is of injunction founded on the possession of the petitioner. Therefore, whether the boundaries of the suit land or the adjoining land are disputed or not disputed

and the measurement is necessary or not necessary should not have been embarked upon. Unless and until the decree of the Trial Court is stayed by the lower Appellate Court, the petitioner is entitled to protect his possession as well as entitled to police protection.

13. For the reasons stated above, I am inclined to allow the present petition. The impugned common order below Exhibit 16 and 18 passed by the Joint Civil Judge Junior Division, Jamner in R.D. No. 10 of 2017 is quashed and set aside. The application below Exhibit 18 stands allowed to the extent of prayer clause 'A'. So far as prayer clause 'B' of the application is concerned, the parties are at liberty to file the same at appropriate stage. The writ petition is allowed in above terms.

[SHAILESH P. BRAHME, J.]

bsb/Dec. 23