



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11974 OF 2017 WITH
CIVIL APPLICATION NO. 5166 OF 2018
IN WP/11974/2017

Kalyan Aananda Patil

VERSUS

Shashikant Bhaskar Patil And Others

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Mr. M. S. Kulkarni, Advocate for the Petitioner

Mr. B. R. Waramaa, Advocate for Respondents

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CORAM : R.M. JOSHI, J

DATE : JULY 25, 2024

PER COURT :

1. By consent of both sides, heard finally at admission stage.

2. This Petition was heard extensively on the last date of hearing. At the request of learned Counsel for Respondents, hearing of Petition was postponed.

3. The question arises before this Court as to whether there could be order of demolition of property situated at Gut No. 14/2-B-2 area admeasuring 15R from Avdhan Shivar, Tq and Dist. Dhule. Execution proceedings bearing no. 54/2008 is initiated by Plaintiff in RCS No. 54/1994 which is decreed on

19.02.1997. Defendant Nos. 8 to 11 are permanently restrained from carrying out construction over the suit property. This decree admittedly is not stayed till date. Execution proceeding is filed by Plaintiff with the averment that during the pendency of the Suit as well as Appeal, concerned Defendants continued with construction work and on 31.08.2008 the said construction work is completed. It is claimed that since the construction is done in contravention of the injunction against this Defendant, the same deserves to be removed. Execution Court accepted contention of decree holder and passed impugned order directing removal of the structure standing on suit property. Perusal of the said order indicates that the Court in paragraph 15 it is observed that there is possibility that Sumanbai may have made construction on the suit property. Apart from this, the court has placed reliance on the report of Court Commissioner in respect construction with observation that the said report and the evidence of the Court Commissioner shows that the construction is recent one made by cement and bricks having slab.

4. Learned Counsel for Petitioner submits that unless it is established that the structure has been erected after order of injunction is passed by the Trial Court, the same cannot directed to be removed. In this regard, reference is made to the plaint wherein there is specific averment of the Plaintiff that concerned Defendants are carrying out construction over the suit property. It is his contention that admittedly during the pendency of the suit, no injunction was against this Defendant restraining them from carrying out any construction. It is his further submission that the Court Commissioner's report does not candidly show about the period of construction and evidence of the Commissioner also rests upon the statement made by someone at the time of said inspection work. Thus, it is his contention that unless it is established that the construction has come up in spite of order of injunction, the same cannot be removed.

5. Learned Counsel for Decree Holder/Plaintiff supported the impugned order. According to him, it is sufficient for the decree holder to prove by examining the Court Commissioner that the construction is recent

one. Apart from this, it is sought to be canvassed that the documents relied upon by the Petitioner on the face of it are not genuine considering contradictions in these documents and since the Petitioner has not come out with a clean hands before this Court, is not entitled for any relief.

This submission is responded by the learned Counsel for the Petitioner by contending that these documents very well placed before the Execution Court and his genuineness were never taken exception to. In such circumstances, according to him, it is not open for this Court while entertaining this Writ Petition to make any observations in this regard.

6. Finally, it is sought to be canvassed by learned Counsel for Respondents by relying upon the judgment of this Court in case of *Vijay Shrawan Shende and Ors vs. State of Maharashtra and Ors, 2009 Legal Eagle (Bom) 800* that merely because correct procedure has not been adopted by the Court Commissioner, it cannot be said that the decree holder has lost his right to execute the decree. It is his submission that order passed by this Court shall not come in a way of

initiating further proceedings in accordance with law in the execution of order.

7. There cannot be any dispute about the position of law that if any construction is carried out in contravention of the injunction granted by the competent Court, such construction could be removed. However, at the same time, it cannot be ignored that such removal of construction is not possible unless it is proved so. It is specific case of Plaintiff/Decree holder in plaint that during the pendency of the proceeding the construction work was going on. Admittedly, for want of injunction, there was no prohibition of the Court from continuation of such construction work. Hence, initial burden is on the decree holder to show as to the construction of portion of structure which was carried out before injunction and after injunction. *Prima facie*, at least darkhast does not indicate so.

8. Now question arises as to whether the decree holder has been able to prove before the Execution Court that the construction in question has come up

after the injunction was granted against the concerned Defendant. In this regard, specific query was made to the learned Counsel for Respondent to make statement as to whether the Court Commissioner has assessed the age of construction and has given specific opinion about the same. Reply to the said query is in negative. Moreover, the impugned order also indicates that there is a vague expression of the Commissioner in his evidence about the construction being recent one. It is not sufficient for the decree holder to prove whether the construction is recent one or otherwise. The age of construction can be certainly proved with scientific evidence. It was thus absolutely necessary for the decree holder to prove the time of construction in order to ascertain whether the same is done after injunction or before injunction. Since this evidence is absent in the present case, the impugned order cannot sustain on the basis of observation that Sumanbai may have made construction on suit property.

9. As far as the contention of the learned Counsel for the Respondent about this order likely to come in way of the decree holder from pursuing his

remedy for execution of decree is concerned, it needs to be recorded that once the decree holder claims that the construction is done continuously during the pendency of the suit, as stated in the plaint as well as in the darkhast, it may be open for him to prove which portion of construction was carried before injunction and portion thereof has come into existence after injunction. It is only after proof of this, Decree Holder will be in a position to seek execution of the decree. Order passed by this Court, therefore, would not come in way to execute decree.

10. In view of the above discussion, Petition stands allowed. Impugned order is set aside.

11. Since the Petition is allowed, the Petitioner is permitted to withdraw amount deposited before the Execution Court pursuant to order passed by this Court.

12. Pending application is also disposed of.

(R. M. JOSHI, J.)

Malani