

ORDER BELOW EXH. 73
(Passed on 9th August 2021)

The present application is filed by the decree holder for review of an order passed below Exh. 48 of dated 19-08-2019.

2. The DH averted that in the present execution she had obtained permission for possession warrant. Accordingly, bailiff visited suit property and found that there is a construction of Jagan over the suit property. The DH further averted that she filed a pursis and rebut contentions/report of the bailiff, accordingly, the DH filed an application below Exh. 48 for demolition of construction over the suit property erected by the JD's. The DH further averted that on 19-08-2019 this court has rejected an application filed below Exh. 48 on the ground that the decree is not for possession and the court cannot go beyond the decree.

3. The DH further averted that on 09-09-2015 an application for restoration of possession below Exh. 4 allowed in her favour and yet not challenged. The DH further averted that on 04-09-2018 an application for issuance of possession warrant below Exh. 40 was allowed. The DH further averted that JD's preferred an appeal before the Hon'ble District Court, Gondia in respect of findings and observations regarding possession vide MCA No. 22/2016. Accordingly, said MCA No. 22/2016 was rejected. The DH further submitted that all these orders are yet not challenged.

4. The DH further averted that dispute in respect of possession is already settled. The DH further averted that while passing an order below Exh. 48 there is no reference of orders passed below Exh. 4 and Exh. 40 as well as in MCA No. 22/2016. The DH

further averted that an order passed below Exh. 48 on account of some mistake or error apparent on the fact of the record or for any other sufficient reason. Therefore, the DH filed the present application for review of an order passed below Exh. 48 of dated 19-08-2019.

5. Overleaf of the present application JD's filed their say of dated 07-10-2019. JD's have submitted that the decree passed in respect of permanent injunction does not create any right of delivery of possession and demolition. JD's further submitted that without leading evidence of both parties it is not a proper to demolish a construction or structure over the suit property. JD's further submitted that an order passed below Exh. 48 dated 19-08-2019 is a proper and according to the provisions of law. JD's further submitted that the present application is not maintainable in the eyes of law. Therefore, JD's prayed to reject the present application.

6. Heard learned advocate Mr. S. K. Bawariya for the DH. Also heard learned advocate B. T. Maskare for JD's.

7. The advocate Mr. S. K. Bawariya for the DH relied on a case law of *Board of Control for Cricket, India and another v/s Netaji Cricket Club and others, 2005 AIR SCW 230*, wherein, the Hon'ble Supreme Court held that an application as per section 114 of the Code of Civil Procedure, 1908 for a review on the ground of mistake of court is maintainable. Mistake on the part of court include mistake in nature of undertaking. As per section 114 and Order 47 of the Code of Civil Procedure, 1908, any person considering himself aggrieved, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his

knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order. It is pertinent to note here that as per section 114 and Order 47 of the Code of Civil Procedure, 1908 a right has been given to the aggrieved person to file an application for review, therefore, no need to discuss about the case law filed by the advocate of the DH.

8. Perused the record. After perusal of record it appears that DH had filed the Regular Civil Suit No. 48/2000 against JD's for perpetual injunction only. In said suit JD's filed a counter claim. Accordingly, on 30-01-2008 Regular Civil Suit No. 48/2000 was decreed and counter claim was dismissed. After that the DH filed present execution proceeding on the basis of judgment and decree passed in Regular Civil Suit No. 48/2000.

9. Now coming towards the present application it is the contentions of DH that while passing an order below Exh. 48 there is no reference of an order passed by the Hon'ble District Court, Gondia, in MCA No. 22/2016. It is pertinent to note here that after perusal of record it appears that neither the DH nor JDs have filed said order (MCA No. 22/2016) on record.

10. After perusal of record it also appears that on 09-09-2015 an application for restoration of possession below Exh. 4 allowed in favour of the DH. After perusal of record it also appears that on 04-09-2018 an application for issuance of possession warrant below Exh.

40 was allowed. After perusal of record it also appears that on 14-09-2018 possession warrant issued against JD's vide Exh. 47. After perusal of report of bailiff vide Exh. 47 dated 18-09-2018 it appears that JD Kachribai erected a house (25 X 25 Foot) and shed (10 X 10 foot) on the suit property. After perusal of report of bailiff it also appears that over the suit property there is a one well from the South-East side. After perusal of report of bailiff it also appears that one Jagan Bhoyar also encroached over the suit property and erect a foundation/construction from western side of the suit property.

11. It is pertinent to note here that after perusal of record, judgment and decree and other relevant documents on record, it clearly shows that the decree holder filed a Regular Civil Suit No.48/2000 against JD's for perpetual injunction. DH filed a simplicitor injunction suit against JD's. As per the report of bailiff it is clear that one Jagan Bhoyar also encroached over the suit property and erect a foundation/ construction from western side of the suit property. It is pertinent to note here that it is well settled law that executing court cannot go beyond the judgment and decree. It is also pertinent to note here that Regular Civil Suit No. 48/2000 is not filed against Jagan Bhoyar, therefore, the present execution cannot be executed against Jagan in absence of decree. Furthermore, facts, circumstances and actual position over the suit property while passing an orders below Exh. 4 and Exh. 40 of dated 09-09-2015 and 04-09-2018, respectively, and an order passed below Exh. 48 of dated 19-08-2019 are different. Therefore, in such facts, circumstance, legal position and as discussed above the present application of the DH is deserves to be rejected. Therefore, in the interest of justice, I proceed to pass the following order.

ORDER

The present application is hereby rejected.

(Pronounced and dictated in open court.)

Date:- 09-08-2021

Sd/-
Mohmad Wasim Akram
S/o Mohmad Jalal Sheaikh
Civil Judge Junior Division
Deori.