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**(2010) 02 BOM CK 0145**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 735 of 2010**

Satyapal Katariya

APPELLANT

Vs

Sanjay Kanjune and Others

RESPONDENT

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**Date of Decision :** 08-02-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32, Order 39 Rule 1, Order 39 Rule 2, 10, 158

Penal Code, 1860 (IPC) — Section 441, 447, 504, 506

**Citation :** (2010) 02 BOM CK 0145

**Hon'ble Judges :** S.B. Deshmukh, J

**Bench :** Single Bench

**Advocate :** P.N. Sonpethkar, for the Appellant; P.A. Kulkarni, for Respondent Nos. 1 to 10, for the Respondent

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## Judgement

S.B. Deshmukh, J.—On behalf of all the Respondents, except Respondent No. 4, Advocate Mr. Kulkarni presented reply, it is marked by letter "X" for identification and taken on record.

2. Heard learned Counsel for the Respective parties. Parties are referred to their status in the suit.

3. Rule, made returnable forthwith. Learned Counsel Mr. Kulkarni accepts notice of rule on behalf of all Respondents. Heard finally with the consent of the parties.

4. A short, but interest question, whether execution of any order passed by the Civil Court is permissible under Order 21 of the Code of Civil Procedure? [the Code, for short], arises in this petition.

5. To decide this question, raised in this writ petition, I am listing down facts which are not disputed by the parties.

(a) The petitioner is the original plaintiff in Regular Civil Suit No. 303 of 2008.

(b) Suit filed by the Petitioner has been followed by an application seeking

temporary injunction under Order 39 Rule 1 and 2 of the Code against the defendants.

(c) The learned 15th Joint Civil Judge, Junior Division, Aurangabad passed an order on 9th September, 2008 allowing the application for temporary injunction restraining the defendants, their relatives, servants or any person on their behalf from making obstruction in the suit land, from digging pits, removing soil from the suit property etc. till the disposal of the suit.

(d) Order passed below Exhibit-5 in Regular Civil Suit dated 9th September, 2008, by the learned 15th Joint Civil Judge, Junior Division, Aurangabad, was subjected to Misc. Civil Appeal No. 105 of 2008 before the learned District Judge-1, Aurangabad by the defendants.

(e) Misc. Civil Appeal No. 165 of 2008 filed by the nine defendants, was heard and finally dismissed by judgment and order dated 7th November, 2008. This order is passed by the learned District Judge-1, Aurangabad.

(f) Order passed by the learned District Judge-1, Aurangabad in Misc. Civil Appeal No. 165 of 2008 was further challenged by filing Writ Petition No. 1171 of 2009 in this High Court. This writ petition was filed by nine defendants in the suit and indisputably has been withdrawn.

(g) It is made clear that order of temporary injunction passed by the trial Court under Order 39 Rule 1 and 2 of the Code has attributed finality.

(h) The successful litigant/ plaintiff unfortunately was not able to enjoy the fruits of temporary injunction granted by the competent civil Court and had attributed finality up till High Court. The original plaintiff was therefore required to file execution petition, seeking execution of the order of temporary injunction granted by the competent Civil Court. This execution petition was presented to the office of learned Civil Judge, Senior Division at Aurangabad. This execution petition was registered as R.D. No. 102 of 2007 by the learned Civil Judge, Senior Division, Aurangabad.

(i) In R.D. No. 102 of 2009, original defendants filed application Exhibit-16 on 28th July, 2009 praying for dismissal of R.D. No. 102 of 2009.

(j) The original defendant also filed application Exhibit-17 on the same day i.e. 28th July, 2009 praying for dismissal of the R.D. No. 102 of 2009.

(k) It is admitted by the parties that application under Order 39 Rule 2A of the Code was filed by the plaintiff. Copy is on record Annexure R-A (Page 47). In this application, filed by the plaintiff, prayer is made that contempt proceedings may be initiated against the defendants and they may be punished according to law. This application was filed by plaintiff on 16th February, 2009.

(1) The original plaintiff has also filed summary criminal case No. 6925 of 2008 in the court of learned Judicial Magistrate, First Class, Aurangabad for the alleged offences u/s 504, 506, 441, 447 of I.P.C. against around 12 persons. Out of

these 12 persons, 10 persons are defendants in the suit. In this complaint, alleged offence is dated 22nd September, 2008.

6. Learned Counsel for the plaintiff points out the nature of the suit, the facts and proceedings noticed herein above. They have not been disputed by the counsel appearing for the defendants. Learned Counsel for the petitioner submits that Regular Darkhast filed by the petitioner is maintainable and order impugned in this writ petition is per-se illegal. Per contra, learned Counsel for the Respondents vehemently urged that plaintiff has filed an application under Order 39 Rule 2A of the Code, which is pending. Execution petition is not maintainable. He submits that the two proceedings for the same purpose i.e. Regular Darkhast No. 102 of 2009 and application under Order 39 Rule 2A of the Code are not maintainable. Grievance raised, is within the parameters of Section 10 of the Code.

7. The suit filed by the petitioner is pending before the civil Court, copy is not on record. Counsel for the petitioner submits that suit is for perpetual injunction. This is not disputed by the Respondents. From the facts, it is manifest that despite the grant of temporary injunction by the competent civil Court, the petitioner, who possess the order of temporary injunction, is unable to cultivate the land/ enjoy the suit property and, therefore, has moved Regular Darkhast No. 102 of 2009. Expression "decree" is defined u/s 2(2) of the Code of Civil Procedure, 1908 (the Code, for short), which reads as follows:

Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include -

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation. - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

Thus, decree is the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. In the case on hand, there is no decree passed in favour of either of the parties, is an admitted position. We are concerned with one more definition i.e. "decree holder". Section 2(3) provides that "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

8. Facts which have been noticed herein above, do show that the petitioner is a decree holder. To become a decree holder, does not necessarily mean that person

must hold a decree passed by the competent civil Court. Definition of "decree holder" takes in its sweep any person in whose favour an order, capable of execution, has been made.

9. Expression "order" is defined u/s 2(14) of the Code meaning thereby the formal expression of any decision of a Civil Court which is not a decree. In the case on hand, in my view, order passed by the competent Civil Court under Order 39 Rule 1 and 2 of the Code, restraining the defendant, from interfering possession of the plaintiff over the suit property is an order u/s 2(14) of the Code.

10. Having held that the order of temporary injunction is an order within the parameters of Section 2(14) of the Code, now it would be essential to consider, as to whether the order of temporary injunction, passed by the competent Civil Court can be sought to be executed with the mechanism provided under Order 21 of the Code. At this juncture, it would be beneficial to refer to Section 36 of the Code, which reads:

36. Application to orders.- The provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).

11. Part II of the Code is titled as "Execution", Subtitle is General. Section 36 lays down that the provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order). The Code of Civil Procedure, 1908 is a procedural code for conduct of civil cases. Ordinarily, there are two branches of law; civil laws and penal laws. Procedure to be followed in relation to conduct of civil cases, is provided under the Code of Civil Procedure. So far as penal laws are concerned, procedure therefore is made available under the Code of Criminal Procedure, 1898. The procedural laws under the CPC and the Criminal Procedure Code have undergone amendments from the competent Legislature from time to time. The Higher Courts in the country and Legislature are worried and concerned about pendency of cases in various Courts and at all levels. To curtail life span of civil cases, the Legislature, in its wisdom, has recently introduced and implemented some amendments. In substance, time span of civil cases in various Courts is being tried to be curtailed down by the Legislature and the Honourable Supreme Court is also of the same view. Every endeavor is being suggested and tried to be implemented.

The CPC primarily consists of two parts. The first part comprises of various sections right from Sections 2 - 158. The first part i.e. Section 2 - 158 can be said to be a substantive part of the Code of Civil Procedure. The procedure for carrying out the objects of Section 2 - 158, is laid down in the schedule, which is titled as the First schedule. Order 1 makes reference to parties to suits. Last is

the Order 52 in the first Schedule of the Civil Procedure Code. When it comes to interpretation of the provisions of the Civil Procedure Code, ordinarily, sections in the first part of the Code and the orders which are made available in the first schedule are considered conjointly. Primacy however is to be given to the substantive part of sections in the Code.

12. In the case on hand, Section 36 is the provision, which I have referred here in above. In my view, it is substantive provision which has made applicable procedure for seeking implementation of the order, with the aid of Order 21 of the Code. In this view of the matter, any order passed under the provisions of the Code after hearing the parties and not altered by superior Court, in my view, is implementable with the assistance of Order 21 of the Code. Grant of temporary injunction which has been uphold up to the High Court is an important and significant facet of order passed by the competent civil Court, in the case on hand. Such order is required to be honoured, obeyed and implemented. Orders passed by the Civil Court are not for decorating the dwelling of the decree holder. Order passed in accordance with the provisions of law are required to be executed and holder thereof is entitled to fruits of the order in accordance with the provisions of law.

13. The Legislature, however, in its wisdom, has made available the mechanism for execution of decree for perpetual injunction, Order 21 Rule 32 and also Order of temporary injunction with the assistance of Section 36 and Order 21 of the Code.

14. Many a times, winner litigant, so far temporary injunction is concerned, are/ is anxious to seek implementation of the temporary injunction. It would be unjust to say to such litigant to wait till passing of the decree by the civil Court i.e. perpetual injunction. It is more unjustifiable in this era of inter-net. It is for this reason, in my view, Section 36 will have to be read with order 21 of the Code.

15. The submission of learned Counsel for the Respondent cannot be countenanced for more than one reasons. Order 39 Rule 2A of the Code has been brought on statute entirely for different purpose. There, in that case, if case is established within the parameters of Order 39 Rule 2A of the Code, consequences would follow. There, the prime importance is given to disobedience or breach of injunction. Consequences are made available under Order 39 Rule 2A(2) of the Code. Many times, litigant holding the order of temporary injunction may be interested only in enjoying his own property by restraining the defendants. He/she may not be interested to seek attachment of the property of the defendant and/ or see the defendant in civil prison as provided under Order 39 Rule 2A of the Code. In substance, an order under Order 39 Rule 1 and 2 and Order 39 Rule 2A operates in two different eventualities. Only because such litigant has filed an application under Order 39 Rule 2A for alleged breach of injunction, his prayer for execution of the temporary injunction order within the parameters of Section 36 read with Order 21 of the Code, can not be refused.

The order impugned, in this writ petition, in my view, is perverse, relegating the winner litigant/petitioner to the date of filing of the suit that too without remedy despite the fact that petitioner is holding lawful order passed by the competent Civil Court which is final. The trial Court failed to consider all these aspects of the matter.

16. The second submission of the learned Counsel for the Respondents, that such an exercise is hit by Section 10 of C.P. Code, cannot be accepted also for more than one reasons. Section 10 speaks about suit. Expression "suit" is not defined under the Code. Expression "suit" means any proceeding by a party or parties against another in a court of law. [Black's law dictionary]. Expression "suit" is employed twice in Section 10. At the out set, it has been provided that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties.... What is contemplated u/s 10, in fact, is pendency of two suits. If Section 10 in its entirety is considered, it is difficult to accede to the arguments of learned Counsel for the Respondent. It is the lame attempt on the part of the Respondents to multiply the harassment which is being already suffered by the petitioner/ plaintiff. This argument, therefore, I am rejecting.

17. I am of the considered view that the order impugned is per-se illegal, requires to be quashed and set aside. Regular Darkhast filed by the petitioner needs to be restored on the file of the learned Civil Court which shall hear the parties and pass appropriate orders in accordance with the provisions of law.

18. Writ petition is allowed. Order passed below Exhibits 16 and 17, impugned in this Writ Petition is quashed and set aside. Regular Darkhast No. 102 of 2009 stands restored on the file of learned executing Court which shall hear the parties and proceed with the said execution in accordance with the provisions of law.

19. Rule is made absolute, in above terms, with no orders as to costs.

20. Both the learned Counsel have pointed out that writ petition No. 2966 of 1994 in between the present petitioner and State of Maharashtra is pending in this High Court. I am clarifying that I have not heard either the State or the Petitioner in relation to the subject matter of Writ Petition No. 2966 of 1994. This order shall be construed only among the plaintiff and defendants in Regular Civil Suit No. 303 of 2008 and Regular Darkhast No. 102 of 2009.