

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

SECOND APPEAL NO.98 OF 2015

1. Sangita Bhagchand Bhawale,
Age 37 years, Ocuc. Household
2. Premalata Bhagchand Bhawale,
Age 45 years, Occu. Household
3. Premlata Bhagchand Bhawale,
Age 45 years Occu. Household
4. Vijnay Bhagchand Bhawale,
Age 43 years, Occu. Driver
5. Ajay Bhagchand Bhawale,
Age 41 years, Occu. Business
6. Sanjay Bhagchand Bhawale,
Age 37 years, Occu.Business
7. Amar Ramchandra Bhawale,
Age 42 years, Occu.Business
8. Rekha Ramchandra Bhawale
Age 40 years, Occu. Household
9. Premchand Ramchandra Bhawale
Age 38 years, Occu. Business
10. Krishna Ramchandra Bhawale
Age 36 years, Occu. Business
11. Subhash Ramchandra Bhawale
Age 34 years, Occu. Business
12. Babita Ramchandra Bhawale
Age 65 years, Occu. Household

All above r/o at Manjula Colony,
Near jalan Nagar, Aurangabad

.. Appellants
(Orig.objectors)

Versus

1. Sardar Abchanagarsingh s/o Sardar
Karmasingh Bindra, Age 78 years,
Occu. Business, R/o JJ Colony,
House No.J-III/92, Vazirpur, Delhi

presently residing at Dr.S.M.
Bindra Galli, Padampura,
Aurangabad

2. Sardar Gurunamsingh Kapurshingh
Pander, Age 28 years,
Occu.Business,
3. Sardar Gurupreetsingh Gurunam
Singh, Age 28 years,
Occupation Business
4. Sardar Manjeetsingh Gurunam Singh,
Age 28 years, Occu. Business

Above respondent No.2, 3 and 4 are
R/o Golegaonkar Colony, Railway
Station road, Aurangabad

5. Bhagchand Nagoji Bhawale,
Age 75 years, Occu. Nil.,
R/o Manjula Colony, Near
Jalan nagar, Aurangabad

.. Respondents

Mr R.R. Mantri, Advocate h/f Mr P.N. Surwase Patil, Advocate for
appellants

Mr A.D. Kasliwal, Advocate for respondents No.1 to 4

CORAM : N.W. SAMBRE, J.

DATE : 8th May 2015

PER COURT

1. Heard Mr Mantri, learned Counsel for the appellants-objectors in the darkhast proceedings and Mr Kasliwal, learned Counsel for respondents - decree holders. With the consent of parties, the present second appeal is taken up for final disposal at the admission stage.

2. Mr Mantri, learned Counsel for the appellants has raised following questions of law.

(i) The appellants being in settled possession of the suit property since 1992 whether are liable to be dispossessed in execution of the decree in question to which, admittedly the appellants are not parties ?

(ii) Without taking recourse to the provisions of Order XXI, Rule 16 of the Code of Civil Procedure to the satisfaction of the purchaser of the suit property, the decree can be executed against the present appellants ?

(iii) In view of provisions of Order XXI, Rule 97 of the Code of Civil Procedure whether the executing Court and the lower appellate Court can give go-bye to the opportunity to lead evidence and non-consideration of the documentary evidence ?

3. In support of said contentions, learned Counsel for the appellants - objectors has invited attention of this Court to the judgment of this Court in the matter of **The Presidency Industrial Bank Ltd. Vs. The Hindustan Leather industries Ltd., and ors.**, reported in **AIR 1969 BOMBAY 84** so as to canvass that the provisions of Order XXI Rule 16 are required to be followed by subsequent purchaser. He has relied upon paragraph 6 of the said judgment to canvass that recommendation of subsequent purchaser has to be brought to the notice of Court, otherwise the execution would be by stranger to a decree.

4. Apart from above, Mr Mantri has also invited attention of this Court to the judgment of Kerala High Court in the matter of **Babu Raj and ors., Vs. Wasanti Devi and ors.** so as to canvass that general principle that the executing court cannot travel beyond the decree cannot be taken to recourse to always as Order XXI, Rule 97 of the Code is required to be an exception to this and placed reliance on paragraphs 15 and 16 of the said judgment which read thus :

15. There is nothing in the decision in Brahmdeo Chaudhary's Case (Supra) to indicate that what has to be adjudicated upon is only the right, title and interest of the obstructionist or that title of the decree holder is the decree itself and the court cannot go behind the decree. The proposition that the decree itself is the title of the decree-holder may be valid as between the parties to the decree or their privies but not against strangers to the decree. The argument that the executing court cannot go behind the decree is not available to the decree holder or auction purchaser in the case of an adjudication under Order 21 Rules 97 to 101 C.P.C. It is relevant to note that the authority given to the court under Rules 98 and 100 of Order 21 C.P.C. includes a power to put the decree holder or auction purchaser (who are the applicants under Order 21 Rule 97 C.P.C.) or the stranger obstructor (who is the applicant under Order 21 Rule 99 C.P.C.) to be put in possession of the property. It is such an order passed under Rules 98 or Rule 100, as the case may be of Order 21 C.P.C. which will be deemed to be decree and which will be executable and appealable. Such an order supercedes the earlier decree to which the stranger obstructor was not a party.

16. A perusal of the orders under appeal will go to show that the courts below proceeded as if they cannot go behind the decree and that the only enquiry which was contemplated was as to whether the obstructor has made out his claim in support of the obstruction. It is pertinent to note that the claimants in this case are not claiming under the judgment debtors or at their instigation but instead they were setting up independent claims. If in the adjudication of such a claim the court were to merely call upon the obstructor to establish his case, then there could be situations wherein a person in actual possession under a valid title could be thrown out of the property by another person obtaining a decree for possession not against the person who is in actual possession under a valid title but against somebody who may have a semblance of title and it will be travesty justice if the person in actual possession under a lawful title were to be ejected without examining the title of the person who seeks to dispossess or eject such person. That explains the language used by the legislature under Rule 101 of Order 21 to indicate that all the questions including the questions relating to right, title or interest in the property arising between the parties to the proceeding, are to be determined by the Court. Incidentally, it is pertinent to remember that the position of an obstructor as in this case would be analogous to the position of a defendant in a suit for recovery of possession on the strength of title and the enquiry in such a proceeding should be not to consider whether such a person has better title over the person who seeks recovery of possession. The enquiry should be as to whether the person who seeks to displace or dispossess or eject the person who is admittedly found in possession has sufficient title qua the person in possession so as eject him from the property. The enquiry

in this case should have been primarily in that direction, particularly, in a case as the present where both the preliminary as well as final decree were obtained ex-parte without a contest. This is not to say that after such adjudication the Court is precluded from finding that the obstructor is in occupation under the J.D. or is claiming under a title created by the J.D. or was inducted into possession pendente lite or that the obstruction was at the instance of or on behalf of the J.D. or that the obstructor is a pendente lite transferee. But the enquiry should be to find out whether the decree holder has sufficient title de hors the decree to dispossess or eject the obstructor. I am inclined to give the decree holders an opportunity to prove that they have sufficient title to dispossess the appellants herein and get delivery of the property in pursuance of the final decree passed on 8-10-1976. The substantial questions of law are answered in the negative and in favour of the appellants. The impugned judgments are, accordingly, set aside and the matter is remanded to the trial court for fresh adjudication in the light of the legal position adverted to. The parties shall appear before the trial Court without any further notice on 19-12-2008. The Executing Court shall make an endeavour to dispose of the matter expeditiously.

In addition to above, Mr Mantri has placed reliance upon the judgment of **Kuber Housing Investment and Finance Private Limited Vs. TCI Finance Limited & Ors.**, reported in **2013 (6) ALL MR 342** in support of the above referred contentions.

5. Mr Kasliwal, learned Counsel for the decree holders, while opposing the above referred contentions has invited attention of this Court to the fact about filing of Regular Civil Suit No.52 of 1993. He

would urge that in the said suit, the father of the objectors who was defendant, according to him, the suit for possession and injunction which came to be decreed on 31st March 2005, however, the M.A.R.J.I. proceedings came to be dismissed and order of the civil court stood confirmed.

6. According to learned Counsel for the decree holders, another Regular Civil Suit No.34 of 2001 for declaration and perpetual injunction came to be dismissed on 15th December 2008.

7. He has invited attention of this Court to the issues raised in both these suits i.e. in the suit for recovery of possession and declaration initiated by the decree holders and the suit for declaration and perpetual injunction initiated by the defendants. The said issues read thus, respectively.

<u>ISSUES</u>	<u>FINDINGS</u>
1. Do plaintiff prove that they are entitled for the possession of suit property on the basis of title ?	.. Affirmative
2. Do plaintiff prove that they are entitled for mense profit from the suit property ?	.. Affirmative
3. Do plaintiff prove that defendants are in illegal possession of the suit property ?	.. In the affirmative
4. Is plaintiff entitled for a decree of perpetual injunction as prayed?	.. Affirmative
5. What order & decree	.. As per final order

<u>ISSUES</u>	<u>FINDINGS</u>
1. Do plaintiff prove their title to the properties bearing CTS No. 18828 and 18835 situated on land No.22/2 at Aurangabad ?	No
2. Do they prove that they are in possession of the above said properties ?	No
3. Do they prove that summons in RCS No.52/93 were not duly served on them ?	No
4. Do they prove that defendants have obtained ex-parte order in their favour fraudulently ?	No
5. Do they prove that defendants are causing obstruction in their peaceful possession of the suit property ?	Does not survive
6. Is the suit is within limitation ?	Yes
7. Is this court has jurisdiction to try present suit ?	Yes
8. Whether the defendants are entitled to get compensatory costs of Rs.5,000/- from the plaintiffs ?	No

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|-----|--|-----------------------------------|
| 9. | Whether plaintiffs are entitled for declaration and injunction as prayed for ? | No |
| 10. | What order and decree | The suit is dismissed with costs. |
8. He would further urge that the the decree of dismissal of the suit of the defendant No.1 was upholding Regular Civil Suit and also in Second Appeal No.573/2009. According to him, the objections which are filed in the present proceedings by the appellants herein are similar to that of the objections filed by defendant No.1 to the suit on earlier occasion viz. Bhagchand. It is claimed that the intention of filing the objections is nothing but to prolong the execution proceedings. He would submit that there is appropriate remedy available to the parties if it is noticed by the civil Court that the decree is wrongly executed.
9. Upon consideration of the rival submissions made by the parties, it is noticed that decree holder in Regular Civil Suit No.52/1993 is fighting for his rights for possession over the suit property since 31st March 2005.
10. So far as the objection of the present appellants before the executing Court is concerned, the executing Court, by its detail order dated 16th December 2014 has rejected the same. The executing Court, while dealing with the various objections, decided the prayer of the present appellants for permission to lead the evidence and noticed that the objection petitioners are not having any independent

claim of title as they are raising the objection for the second time. The said observations are pertaining to objectors Shakuntalabai, Shamlal, Ramkishan and Mohd. Aslam.

11. The executing Court in paragraph 14 of its order noticed that all the objection petitioners are children of judgment debtors No.1 and 2. The judgment debtors No.1 and 2 have claimed to have partitioned the property in 1992 amongst themselves through which the objectors are claiming their right, however, noticed that no cogent evidence is brought on record to indicate partition. The nature of title as claimed by the objection petitioners is also appreciated by the executing Court.

12. For the cogent reasons, the executing Court has rejected the prayer of the present appellants.

13. The lower appellate Court, while dealing with the claim of the present appellants has done its thoughtful analysis of the facts and the consideration, including that of grounds raised before it. The lower appellate Court, while considering the claim of the appellants qua under Order XXI, Rule 97 and 102 of the Code of Civil Procedure and based upon the entire record and proceedings, noticed that the judgment in both the suits i.e. one preferred by the decree holders and another by the judgment debtors are upheld up to the High Court. The objection applications of the judgment debtors which are similar to one raised in the petition which are subject matter of challenge in the present appeal are already gone into and rejected by passing an order below Exhs.18, 32, 32, 36, 39, 61 and 68. The similar objections

are filed vide Exh.81 by the appellants being sons and daughters of judgment debtors. The lower appellate Court further noticed that the Apex Court in the matter of **Silverline Forum Pvt.Ltd Vs. Rajiv Trust and another, reported in (1998) 3 Supreme Court Cases 723** while examining the claim under Order XXI Rule 97 has observed thus :

“ The words “all questions arising between the parties to a proceeding on an application under Rule 97” would envelop such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97 (2) of the Code, execution court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be result of the adjudication contemplated in sub-section.”

14. The appellate Court, while rejecting the objections has noted entire conduct of the present appellants. It is admitted on the part of appellants that they are asserting their rights through original judgment debtors, whose objections of similar nature are already rejected.

15. Though the appellants have sought to draw support from the above referred judgments so as to establish their case, however, it is required to be noted that the intention of the appellants is nothing but to prolong the proceedings.

16. The nature of grounds which are raised in the appeal, in my opinion, cannot be treated as substantial questions of law, particularly, having regard to the concurrent findings recorded by both the Courts below.

17. In the facts and circumstances, the judgments which are cited will be hardly of any assistance to the appellants. As such, present second appeal fails, stands dismissed.

(N.W. SAMBRE, J.)

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