

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4815 OF 2014

PITAMBAR BHATU CHAUDHARI LRS SARUBAI AND OTHERS
VERSUS
KASHINATH YASHWANT JAMBHALE DIED AND OTHERS

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Advocate for petitioners : Mr. V. C. Solshe h/f Mr. Mahesh H. Patil
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CORAM : V. K. JADHAV, J.

DATED : 18th FEBRUARY, 2015

PER COURT :-

1. Heard the learned counsel for petitioners.
2. The Petitioners are the original plaintiffs in R.C.S. No. 27/99. The suit was instituted for recovery of possession against the respondent Nos. 1 to 7. The said suit was decreed and the judgment and decree passed by the Trial Court was confirmed up to Hon'ble Supreme Court. Consequently, the petitioner has filed Special Darkhast No. 171/2009 for execution against respondent No. 7. In the said Darkhast, respondent No. 8 appeared *suo moto* and opposed the Darkhast stating that he is in possession of the area ad-measuring 100x100 sq. feet. The learned counsel submits that so far as the other portion of the suit property is concerned, the execution petition was satisfied except the said portion of 100x100 sq. feet area. The petitioners have filed an application/pursis at Exh. 52 that

they do not want to proceed with the Darkhast. The learned Civil Judge (Senior Division), Dhule, by its impugned order, has ignored the pursis at Exh. 52 and directed to proceed further with the Darkhast in view of the pending application of the obstructionist vide Exh. 35, 55 and 56. Hence this Writ Petition.

3. The learned counsel for the petitioners submits that in view of the provisions of Order 21 Rule 101 of Civil Procedure Code, all the questions including right, title or interest in the property, shall be determined by the Court dealing with the application under Rule 97 and Rule 99 of Order 21 of C.P.C.. The learned counsel for the petitioner further submits that the orders are required to be treated as decrees. Furthermore, the learned counsel submits that the respondent No. 8 has already instituted a separate suit and the same is also pending. In view of this, the learned counsel submits that the order impugned is not proper, correct and legal and thus, liable to be set aside.

4. It appears that so far as the objections raised by the obstructionist as per the provisions of Order 21 Rule 97 are concerned, they are to be dealt with by the executing Court alone. So far as the suit instituted by the respondent No. 8 is concerned, the same was instituted after the commencement of the execution proceedings. The provisions of Rule 104 of Order 21 are applicable

only as regards the suit that is pending on the date of commencement of the proceedings in which orders were passed under Rule 101 or 103. The Rule does not cover those suits which are filed later on, only because orders under Rule 101 or 103 were passed during the pendency of such suit.

5. In view of this, the provisions of Rule 104 of Order 21 of the C.P.C. will not apply in this case. If the petitioner is permitted to withdraw the execution proceedings, the respondent No. 8 will have no remedy as his pending applications at Exh. 35, 55 and 56 will be rendered without any adjudication and since the suit instituted by him, separately, after the commencement of execution proceedings, the same is also barred by the provisions of Rule 101 of Order 21 of the C.P.C.. The learned Judge of Trial Court, though has not discussed all these provisions, has rightly ignored the pursis at Exh. 52. The approach of the Trial Court is proper, correct and legal. The Darkhast is required to be proceed further to decide the application of the obstructionist pending before the Trial Court.

6. The Writ Petition is devoid of any merits and the same is hereby dismissed. No order as to costs.

(V. K. JADHAV, J.)

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aaa/-