

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

Writ Petition No. 6015 of 2015 Mr. Rajan R. Save	...	Petitioner
versus		
Kanaiyalal Purshottamdas Shah and Ors ...		Respondents
with		
Writ Petition No. 6016 of 2015		
Mr. Rambali A.Vishwakarma	...	Petitioner
versus		
Kanaiyalal Purshottamdas Shah and Ors ...		Respondents
with		
Writ Petition No. 6447 of 2015		
Mr. Amrutbhai M. Mistry	...	Petitioner
versus		
Kanaiyalal Purshottamdas Shah and Ors...		Respondents
with		
Writ Petition No.6448 of 2015		
Mr. Kalidas B. Patel	...	Petitioner
versus		
Kanaiyalal Purshottamdas Shah and ors...		Respondents
with		
Writ Petition No.6449 of 2015		
Mr. Natwarlal M. Mistry	...	Petitioner
versus		
Kanaiyalal Purshottamdas Shah and Ors...		Respondents
with		

Writ Petition No.6450 of 2015

Mr. Chimanbhai M. Patel ... Petitioner

versus

kanaiyalal Purshottamdas Shah and ors... Respondents

With

Writ Petition No.6451 of 2015

Mr. Gunvant M. Patel ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and Ors ... Respondents

with

Writ Petition No.6452 of 2015

Mr. Bhupendra N. Patel ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and Ors... Respondents

with

Writ Petition No.6454 of 2015

Mr. Pravinhai R.Lad ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and Ors... Respondents

with

Writ Petition No.6455 of 2015

Mr. Kantibhai J. Patel ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and Ors... Respondents

with

Writ Petition No.6456 of 2015

Mr. Nitin V. Satra ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and Ors ... Respondents

with

Writ Petition No.6457 of 2015

Mr. Pramjeet Singh Sadhusingh ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and Ors... Respondents

with

Writ Petition no.6458 of 2015

Mr. Vejiben Velji Satra ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and ors... Respondents

with

Writ Petition No.6459 of 2015

Mr. Akshay C. Desai ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and ors... Respondents

with

Writ Petition No.6460 of 2015

Mr. Bharat V. Satra ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and ors... Respondents

with

Writ Petition No.6461 of 2015

Mr. Rajiv R. Vishwakarma ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and ors... Respondents

with

Writ Petition No.6462 of 2015

Mr. Bharat V. Satra ... Petitioner

versus

Kanaiyalal Purshottamdas Shah and ors... Respondents

Mr. Atul Damle, Senior Advocate, i/b Mr. Shailendra S. Kanetkar,
Advocate for Petitioners in all Petitions.

Mr. S.N.Vaishnawa i/b Mr. Vipul Shukla, Advocate for Respondents no.1 to
4, 7, 8 and 11 in all Petitions.

CORAM : R.G.KETKAR,J.

DATE : 09/07/2015

ORDER:

1. Heard Mr. Atul Damle, learned senior counsel for the petitioners and Mr. S.N.Vaishnawa, learned counsel for respondents no. 1 to 4, 7, 8 and 11 in all Petitions at length.
2. By these Petitions under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'obstructionists', have challenged the Judgment and order dated 26.6.2015 passed by the learned Judge, City Civil Court, Mumbai in Chamber Summons No.984 of

2015 taken out by them for amending their pleadings of their respective Chamber Summons.

3. In support of the Petitions, Mr. Damle reiterated the submissions that were advanced before the trial Court. He submitted that respondents nos 1 to 4, 7, 8, and 11 have instituted Suit No.1173 of 1971 against the Dependents. The suit was decreed on 15.4.1997. The Court Receiver was appointed to recover possession of Survey No.118, situate at village Pahadi, Goregaon, Taluka- Borivali (for short, 'suit property'). He submitted that by orders dated 23.12.2013 and 26.3.2014, the learned trial Judge had framed Issues in the proceedings filed by the respondents-decree holders under Order 21, Rule 97 in each of the above petitions. By order dated 23.12.2013, six issue were framed out of the draft Issues proposed by the respondents herein. By subsequent order dated 26.3.2014, four more Issues were framed. That order was challenged by the respondents herein by instituting Writ Petitions in this Court. Those petitions were disposed of by order dated 10.10.2014 and following issues were framed by consent of the parties.

(i) Does the obstructionist/resister prove his independent right, title in respect of the suit property" In so far as the said issue is concerned, the obstructionist'/resister would be entitled to such pleas as are in consonance with Order XXI Rule 97, including the plea that they are not on the land in respect of which there is a decree.

(ii) Whether the obstructionist/resister is entitled to raise the objection that the suit property has been declared as a slum under the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971.

4. Mr. Damle submitted that the obstructionists thereafter took out

Chamber Summons No. 984 of 2015 on or about 12.6.2015 for amending their pleadings of their respective Chamber Summons as per Schedule annexed. In the Schedule of the proposed amendment and in particular paragraph 10 thereof, it is stated that following facts were noted by Affiant in the Plan of the D.I.L.R.

- (i) In the Plan of the D.I.L.R only a tip of Survey No.118 is noted to be touching the highway and Survey No.120, Hissa No.1 and 3 are touching full length to the highway and acquired as more particularly and as stated in the Plan.
- (ii) In the plan of the DILR, the survey no.120 can be clearly seen and Hissa No.1 and 3 of survey No.120 are in between Survey Nos 118 and 119.
- (iii) The plan of the DILR reveals that survey No.118 is not forming a part and parcel of land acquired for the highway.

5. In paragraph 11, it is stated thus :

“I say that since MMRD has surveyed the respective structures acquired under the Bombay Highway Act and prepared their Anenxure “2”, the suit premises is obviously falling on Survey No.120 and is not concerned with Survey No.118, which is a subject matter of decree. I say that the P.W.D. Has also confirmed in reply to the Right to Information Application that the suit premises is falling within the boundary of the highway land which is acquired by the Highway Authorities.”

6. In paragraph 14, it is stated that during pendency of the above obstructionist Chamber Summons, Affiant had applied and obtained the following documents which are crucial documents and evidence in support of their submissions. He relied upon the following documents:

- (a) Property Cards.

- (b) 7/12 Extracts of Survey No.120 and Survey No.118;
- (c) Government Gazette and Notification of Maharashtra Government of Land Acquisition for Highway;
- (d) DILR Plan;
- (e) Gat Book Nakasha/Plan;
- (f) Kami Jasta Patra;
- (g) Gaon/Village Nakasha/Plan.

Mr. Damle has taken me through:

- (1) Plan annexed to the decree passed in Suit No. 1173 of 1971,
- (2) Map prepared by DILR and which is exhibited and,
- (3) Village Map of 1961.

7. Mr. Damle submitted that basically it is the case of the obstructionists that the decree is in respect of Survey No.118 and they have no concern whatsoever with that property. They are in survey No.120, that is to say, other than the suit property. Under the garb of executing decree passed in S.C.Suit No.1173 of 1971, the respondents-decree holders will dispossess them from Survey No.120. It is, in these circumstances, the Chamber Summons was taken out for amending the pleadings. By the impugned order, the learned trial Judge has rejected the Chamber Summons principally on the ground that no case is made out as contemplated by proviso to Order 6, Rule 17 of C.P.C. He submitted that the said finding is totally unsustainable as the said provision is applicable to the suit and not to execution proceedings. In support of this submission he relied upon Section 141 of C.P.C. as also decision of the Apex Court in the case of Dokku Bhushayya Vs

Katragadda Ramakrishnayya, AIR 1962 SC 1886. He submitted that the obstructionists should be given opportunity to amend the pleadings as per Schedule of the proposed amendment and to bring on record these documents.

8. On the other hand, Mr. Vaishnawa has supported the impugned order. He submitted that the obstructionists have submitted draft issues on 28.11.2013. Issues no. 7, 8 and 15 are to the following effect;

“7. Do the applicant prove that the plaintiffs are not entitled to execute the decree dated 15.4.1997 against the tenement occupied by the applicant **as the plot of land whereon the said tenement is situated, do not constitute and form the subject matter of the suit plot in the decree obtained by the plaintiffs in the above suit**”?

8. **Do the applicant prove that the plaintiffs under the guise of execution of the decree is attempting to grab the surrounding land and areas which do not form and constitute the suit plot under the decree obtained by the plaintiffs in the above suit?**

15. Do the plaintiffs prove that the plot of land whereon the tenement of the applicant is situated, constitutes and forms part of the suit plot under the decree obtained by them in the above suit?

(emphasis supplied)

Though draft issues to the above effect were submitted, the obstructionists did not apply for producing documents at appropriate time and the present Chamber Summons is taken out on 12.6.2015. He submitted that there are 36 obstructionists, evidence of the parties is complete and the matter is kept for arguments. He further submitted that the obstructionists in their affidavit-in-support of Chamber Summons No. 1852 of 2013 dated 27.8.2013 have asserted in paragraph 8 that they are claiming through defendant no.2. Defendant no.2

claimed and represented himself to be landlord and owner of structures and the suit premises and issued rent receipts to the obstructionists in respect of the suit premises. He submitted that defendant no.2 is bound by the decree passed in the suit instituted in the year 1971 which is confirmed right upto the Supreme Court. He submitted that during pendency of the suit, Court Receiver was appointed in the year 1984 and Court Receiver will execute the decree in respect of Survey No.118. He submitted that attempt on the part of the obstructionists is to delay execution of decree passed in the suit instituted in the year 1971 and the learned trial Judge rightly observed that the obstructionists have not exercised due diligence while applying for amending the pleadings. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The question is whether the amendment proposed by the obstructionists is bonafide or malafide. The Apex Court in the case of Rewajeetu Builders and Developers Vs. Narayanswamy and Sons and Ors, 2009 (10) SCC 84, has laid down factors to be taken into consideration in paragraph 63 while dealing with applications for amendments. Paragraph 63 reads as under:

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is *bona fide* or *mala fide*;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case, and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive."

(emphasis supplied)

10. As noted earlier, the respondents-decree holders have instituted suit in the year 1971. The suit was decreed on 15.4.1997. The obstructionists have submitted draft issues. Perusal of Issue no.7, extracted herein above shows whether the obstructionists prove that the plaintiffs are not entitled to execute the decree dated 15.4.1997 against the tenement occupied by the obstructionists as the plot of land whereon the said tenement is situate, do not constitute and form the subject matter of the suit plot in the decree obtained by the plaintiffs in the suit. Issue No.8 requires the obstructionists to prove that the plaintiffs under the guise of execution of the decree is attempting to grab the surrounding land and areas which do not form and constitute the suit plot under the decree obtained by the plaintiffs in the suit and finally issue no.15 shows that the plaintiffs have to prove that the plot of land whereon the tenement of the obstructionists is situate, constitutes

and forms part of the suit plot under the decree obtained by them in the suit.

11. Even in the order dated 10.10.2014 passed by this Court, by consent of the parties, issue not. 1 permitted the obstructionists to raise pleas to the effect that they are not on the land in respect of which there is a decree. Thus, as far back as in the year 2013 the obstructionists are fully aware of their contentions which they are agitating, namely, they are not concerned with Survey no.118 as their tenements are situate in Survey No.120.

12. It is in that context relevant to consider the averments made in the affidavit in support of the Chamber Summons. Perusal of the averments clearly show that the obstructionists have contended that they have applied and obtained the documents which are crucial documents. Mr. Damle was not in a position to give exact date as to when the obstructionists made application and obtained documents. He, however, invited my attention to paragraph 12 of the impugned order wherein it is observed that all these documents were issued in the month of February 2015. In other words, for the first time, the documents were obtained by the obstructionists in Feb, 2015. Though the obstructionists are claiming that they are not concerned with the said property as they are in Survey No.120, there is no explanation in the entire affidavit in support as to what steps they have taken right from 2013. It is material to note that almost after the entire evidence is over, the obstructionists have taken out present Chamber summons in the year June 2015 and now the matters are posted for arguments. Applying the tests laid down by the

Apex Court in the case Rewajeetu Builders and Developers (supra), I am more than satisfied that this is one more attempt on the part of the obstructionists to delay the proceedings. If at all the obstructionists are claiming that they are not concerned with the suit property and are in Survey No.120, they ought to have obtained documents in 2013 itself and should not have waited till framing of issues by the trial Court or by the High Court.

13. In the impugned order, the learned trial Judge has observed that the documents on which the obstructionists want to rely and on the basis of which they want to add amended pleadings in Chamber Summons were available with them before commencement of trial. However, they did not place on record the same at pre-trial stage. In paragraph 13, it was further observed that the respondents are bound to execute decree in respect of survey no. 118 and not 120 and while executing decree the plaintiffs would not be permitted to execute the decree against Survey no.120. Mr Vaishnawa reiterated that the plaintiffs will execute the decree only in respect of survey no.118 and that the decree will be executed by the Court Receiver appointed by the Court. Mr. Damle relied upon Section 141 of C.P.C as also the decision of the Apex Court in the case of Dokku Bhushayya (supra).

14. In that case, the question that fell for consideration was construction of provisions of Order 32, Rule 7 of C.P.C. The minority view was delivered by Honourable Mr. Justice Sarkar. After considering various decisions, it was held that provisions of Order 32, Rule 7 applies to proceedings in the execution and applications in execution are the

proceedings in the suit. Even the majority view handed down by Hon'ble Mr. Justice Subba Rao held that Order 21 provides a self-contained machinery for executing a decree and for deciding disputes that may arise in connection with the execution. The execution is not closed till the decree is discharged or barred by limitation. It was held that application under Order 21, Rule 90 filed by Judgment debtor to set aside a sale is an application in execution of a decree. Thus, the majority and minority view held that provisions of Order 32, Rule 7 apply to proceedings in execution. I see no good reason as to why provisions of Order 6, Rule 17 will not apply to execution proceedings.

15. Mr. Damle relied upon paragraph 26 of that report to contend that Section 141 does not apply for execution of the decree. In paragraph 26, Section 141 was reproduced which is to the following effect:

The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals".

It was further observed that there was a conflict on the question whether the said section applied to proceedings in execution. To steer clear of the conflict the following Explanation was added to the section by the Civil Procedure Code Amendment Act 6 of 1892 :

"Explanation :- **This section does not apply to applications for the execution of decrees which are proceedings in suits**".

(emphasis supplied)

16. In view thereof, it was held that the application by the judgment debtor under Order 21, Rule 90 to set aside the sale is a proceeding in execution and, therefore, section 141 will not apply. Section 141 was

amended and explanation thereto was inserted by the Code of Civil Procedure (Amendment) Act, 1976 which came into force with effect from 1.2.1977. Section 141 reads thus:

“141. Miscellaneous proceedings – The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation – In this section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.”

Perusal of the above extracted provisions clearly shows that the procedure provided in C.P.C. in regard to suits are to be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. Explanation thereto lays down that the expression 'proceedings' includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution of India. In view thereof, it cannot be said that Order 6, Rule 17 does not apply to execution proceedings.

17. That apart, in the case of Brahmdeo Chaudhari Vs. Rishikesh Prasad jaiswal, (1997) 3 SCC 694, the Apex Court considered provisions of Order 21, Rules 97, 98, 99 and 101. In paragraphs 8 and 9, it was observed thus:

“A conjoint reading of Order XXI, Rules 97, 98, 99 and 101 projects the following picture:

(1) If a decree-holder, is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order XXI, Rule 35 then the decree-holder has to move an application under Order XXI, Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist the Court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined

by Order XXI, Rule 97 Sub-rule (2) read with Order XXI, Rule 98. It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without just cause by the judgment-debtor or by some other person at his instigation or on his behalf then such obstruction or resistance would be removed as per Order XXI, Rule 98 Sub-rule (2) and the decree-holder would be permitted to be put in possession. **Even in such an eventuality the order passed would be treated as a decree under Order XXI, Rule 101 and no separate suit would lie against such order meaning thereby the only remedy would be to prefer an appeal before the appropriate appellate court against such deemed decree.**

(2) If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under Order XXI, Rule 99, CPC claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication than as enjoined by Order XXI, Rule 98 Sub-rule (1), CPC the Executing Court can direct the stranger applicant under Order XXI, Rule 99 to be put in possession of the property or if his application is found to be substance less it has to be dismissed. Such an order passed by the Executing Court disposing of the application one way or the other under Order XXI, Rule 98 Sub-rule (1) would be deemed to be a decree as laid down by Order XXI, Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order XXI, Rule 101.

9. **In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather.** Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order XXI, Rule 97 Sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and

then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI, Rule 99. This view of the High Court on the aforesaid Statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order XXI, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. **On the contrary the statutory scheme envisaged by Order XXI, Rule 97, CPC as discussed earlier clearly guards against such a**

pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order XXI, Rules 97 to 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves."

(emphasis supplied)

18. In view thereof, I am of the opinion that the provisions of Order 6, Rule 17 will apply to the execution proceedings. I, therefore, do not find any merit in the submission of Mr. Damle based upon Section 141 and the decision in the case of Dokku Bhushayya (supra).

19. In the light of the above discussion, no case is made out for invocation of powers under Article 227 of the Constitution of India, more so when I have held that the amendment proposed by the obstructionists is malafide and not bonafide and is made with a view to delaying execution of the decree. Hence, these Petitions fail and the same are dismissed.

(R.G.KETKAR, J.)