

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10093 OF 2016**

Mr. Nisar Ahmed

..Petitioner.

Vs

Rajkumar Shimurat Singh & Ors.

.. Respondents

Mr. Wasim Siddiqui i/b Kunal Bhanage, Advocate for Petitioner.

Mr.Tushar Dahibawkar i/b Dahibawkar & Co, Advocates for Respondents

**CORAM : R.G.KETKAR,J.
DATE : 31/08/2016**

PC:

1. Not on Board. At the request of Mr. Siddiqui, taken up for admission. Heard Mr. Wasim Siddiqui, learned counsel for the petitioner and Mr.Tushar Dahibawkar, learned counsel for the respondents at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 3.5.2016 passed by the learned Judge presiding over Court Room no. 15 of the Small Causes Court at Mumbai below Exhibit-11 in Obstructionist Notice No.313 of 2012 arising from R.A.E. & R. Suit No.147/239 of 2001. By that order, the learned trial Judge rejected the prayer made by the obstructionist for framing additional Issue and struck out Issues no.1, 2 and 3 framed at Exh.5 and framed following issues:

“Whether the obstructionist proves that he is having any independent right, title or interest in the suit premises or he is having any sufficient cause to obstruct execution of the decree?”

3. In support of this Petition, Mr. Siddiqui strenuously contended that vide Exhibit 5, following Issues were framed:

1. Does plaintiff proves that Obstructionist Niser Ahmed is the illegal occupant?
2. Whether the Obstructionist proves with the provisions of L.L.Kamlakar Singh the suit premises was assigned to him by original tenant from 16.3.1992?
3. Whether Obstructionist proves that L.L. used to accept rent of S.P and continuously issuing rent receipts?

4. On behalf of the decree holder, Application Exhibit-7 was made for recasting Issues framed vide Exhibit-5 and prayer was made for framing additional issue so as to place burden on the obstructionist to prove his independent right. By order dated 1.8.2014, the learned trial Judge rejected the application. He submitted that the decree holder did not challenge that order and thus it attained finality. The obstructionist thereafter filed application Exh.11, inter alia, praying for recasting Issues and framing Issue as regards maintainability of the obstructionist notice filed by the decree holder is misconceived and not maintainable. He submitted that the learned trial Judge not only

dismissed the application made by the petitioner but struck out Issues which were already framed vide Exh.5. At the highest, the learned trial Judge could have dismissed the application made by the petitioner. In any event, the learned trial Judge was not justified in striking out the Issues framed at Exh.5 and framed additional Issue, extracted herein above. He submitted that this amounts to modifying the order dated 1.8.2014 without any challenge by the decree holders.

4. On the other hand, Mr. Dahibawkar supported the impugned order. He invited my attention to paragraph 4 of the impugned order and further submitted that the petitioner herein is the obstructionist. He has obstructed execution of the decree. The only material issue is whether the obstructionist has proved his independent right, title or interest in the suit premises. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

5. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the decree holder has instituted Darkhast proceedings. During the course of Darkhast the petitioner has obstructed execution of the decree. The only material Issue is whether the obstructionist has independent right, title or interest. In paragraph 4 of the impugned order, the

learned trial Judge has rightly observed that the Issues framed at Exh.5 were not properly framed. For the reasons recorded in paragraph 4, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)