

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**FIRST APPEAL NO.1190 OF 2015
WITH
CIVIL APPLICATION NO.3746 OF 2015**

Gunvant M. Patel ... Appellant
vs.
Kanaiyalal Purshottamdas Shah and Others ... Respondents

ALONGWITH

**FIRST APPEAL NO.1281 OF 2015
WITH
CIVIL APPLICATION NO.3651 OF 2015**

Rambali A. Vishwakarma ... Appellant
vs.
Kanaiyalal Purshottamdas Shah and Others ... Respondents

ALONGWITH

**FIRST APPEAL NO.1282 OF 2015
WITH
CIVIL APPLICATION NO.3655 OF 2015**

Ramesh A. Lad ... Appellant
vs.
Kanaiyalal Purshottamdas Shah and Others ... Respondents

ALONGWITH

**FIRST APPEAL NO.1283 OF 2015
WITH
CIVIL APPLICATION NO.3659 OF 2015**

Chimanbhai M. Patel ... Appellant
vs.
Kanaiyalal Purshottamdas Shah and Others ... Respondents

ALONGWITH

**FIRST APPEAL NO.1284 OF 2015
WITH
CIVIL APPLICATION NO.3666 OF 2015**

Abhijit R. Bari ... Appellant
vs.
Kanaiyalal Purshottamdas Shah and Others ... Respondents

ALONGWITH

**FIRST APPEAL NO.1285 OF 2015
WITH
CIVIL APPLICATION NO.3665 OF 2015**

Natwarlal M. Mistry ... Appellant
vs.
Kanaiyalal Purshottamdas Shah and Others ... Respondents

ALONGWITH

**FIRST APPEAL NO.1286 OF 2015
WITH
CIVIL APPLICATION NO.3658 OF 2015**

Jaswant Rai J Mehta and Others ... Appellants
vs.
Kanaiyalal Purshottamdas Shah ... Respondents

ALONGIWITH

**FIRST APPEAL NO.1287 OF 2015
WITH
CIVIL APPLICATION NO.3656 OF 2015**

Mayank Thakkar ... Appellant
vs.
Kanaiyalal Purshottamdas Shah ... Respondents

ALONGIWITH

**FIRST APPEAL NO.1288 OF 2015
WITH
CIVIL APPLICATION NO.3667 OF 2015**

Hamendra K. Patel ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1289 OF 2015
WITH
CIVIL APPLICATION NO.3661 OF 2015**

Inderpreet Kaur Anand ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1290 OF 2015
WITH
CIVIL APPLICATION NO.3652 OF 2015**

Pravinbhai R. Lad ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1291 OF 2015
WITH
CIVIL APPLICATION NO.3664 OF 2015**

Dalpatbhai N. Mistry ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGIWITH

**FIRST APPEAL NO.1292 OF 2015
WITH
CIVIL APPLICATION NO.3649 OF 2015**

Jaswant Rai J. Mehta ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1293 OF 2015
WITH
CIVIL APPLICATION NO.3650 OF 2015**

Mahesh Anant Kurdekar ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGIWITH

**FIRST APPEAL NO.1294 OF 2015
WITH
CIVIL APPLICATION NO.3657 OF 2015**

Girishbhai G. Mistry and Another ... Appellants
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1295 OF 2015
WITH
CIVIL APPLICATION NO.3660 OF 2015**

Mukesh S. Parmar ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1296 OF 2015
WITH
CIVIL APPLICATION NO.3662 OF 2015**

Akshay C. Desai ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

ALONGWITH

**FIRST APPEAL NO.1297 OF 2015
WITH
CIVIL APPLICATION NO.3648 OF 2015**

Paramjeet Singh Sadhusingh ... Appellant
vs.
Kanhaiyalal Purshottamdas Shah & Ors. ... Respondents

Appearances :

Mr. A.S. Rao a/w. Mr. Prashant Kamble i/b. Ms. Pratibha Borade, for the Appellant in F.A. No. 1190 of 2015 and for the Applicant in CAF. No. 3746 of 2015.

Mr. M.M. Vashi, Senior Advocate a/w. Ms. Prachi Khardge i/b. M.P. Vashi & Associates, for the Appellant in 17 matters.

Mr. S.N. Vaishnava a/w. Ms. Nupur Mukherja i/b. Mr. Vipul Shukla, for Respondent Nos. 1 to 4, 7, 8 and 10 in all matters.

JUDGMENT RESERVED ON : 29th JANUARY, 2016

JUDGMENT PRONOUNCED ON : 24th FEBRURY, 2016

CORAM : MRS.MRIDULA BHATKAR, J.

JUDGMENT:

. Admit. The learned counsel for the Respondents waives service. By consent, the Appeal is heard finally and disposed of at the stage of admission.

2. All the First Appeals along with Civil Applications are heard and decided together by this common order as the issues involved, relief claimed and the Respondent-parties are the same.

3. The First Appeals are filed against the different chamber summonses filed by the obstructionists under Order 21 Rule 97 of the Code of Civil Procedure seeking declaration that decree passed in suit No. 1173 of 1971 dated 15th April, 1997 passed by the learned Judge, City Civil Court, Mumbai cannot be executed against them. So also the judgment and order passed in Chamber Summons No. 397 of 1999 on 19th September, 2000 to take forcible possession of the suit land by removing the original Defendant Nos. 1 and 2 from the property and also the structures standing thereupon is also challenged. All the chamber summonses filed by the 18 Appellants

were heard and rejected by different orders passed by the learned Judge of the City Civil Court, Mumbai and the said 18 Chamber Summons are challenged in separate 18 First Appeals before this Court. In those 18 First Appeals, the interim Civil Applications for stay are pressed. While hearing those applications, I found that though the parties who moved the Chamber Summons claiming that they are having their structures on different lands and moved different Chamber Summons as the main issue is common, all these First Appeals alongwith Civil Applications can be conveniently disposed of finally by the common order.

4. Kanaiyalal Shah, Usha Shah and others have filed suit No. 1173 of 1971 against Dayashankar Mishra, Tarachand Mishra and others who are the original Defendants for declaration that the suit plot No. 92 Hissa No.4(Pt.), Survey No. 118 Hissa No. 1(Pt.) and Survey No. 120,Hissa Nos. 3, 4 and 5 at village Pahadi, Tal.Borivali corresponding to CTS No. 442/A/3 belong to them and the consequential prayer for possession was made against the original Defendants No. 1 and 2. The said suit was decreed and prayer for declaration and possession were granted in favour of the Plaintiff on

15th April, 1997. The order was confirmed till the Supreme Court. Pursuant to that, Chamber Summons No. 397 of 1999 was taken out by the original Plaintiff i.e. decree holders against the original Defendant Nos. 1 and 2 for possession. The said Chamber Summons was allowed. The said order was challenged upto the Hon'ble Supreme Court and the order passed by the learned trial Judge of the City Civil Court is maintained. Thus the execution proceeding is taken out by the decree holder i.e. original Plaintiff pursuant to the decree confirmed by the Supreme Court. However, the present Appellants moved separate Chamber Summonses as the obstructionists claiming that the decree is not executable against them. All the Chamber Summonses were rejected, hence, these Appeals.

5. The learned senior counsel Mr. Vashi appearing in 17 First Appeals and the learned counsel Mr. A.S. Rao appearing in one Appeal have submitted that the total land admeasuring 34000 sq.yards was purchased by the Plaintiff. The decree is passed against original Defendant No. 2. He submitted that in the present matters, Defendant Nos. 1 and 2 are the brothers. Out of the suit land the present Appellants are concerned with Survey No. 118 only i.e.

owned by the original Defendant No. 2 i.e. Tarachand Mishra. The main contention on which the submission of the learned senior counsel are based is that the suit land is not appropriately described and the structures do not stand on the suit land which is a part of Survey No. 118. Hence, the decree is not executable against them. The Survey No. 118 is a huge area and out of which a portion admeasuring 1094 sq.yards suit land is not identifiable. He submitted that there is no description of the suit property as per the requirement under Order 7 of the Code of Civil Procedure and therefore the suit land cannot be identified. The Court Receiver was appointed at the time of execution proceeding and it is a matter of record that the Court Receiver has surveyed the premises and the boundaries were fixed. He submitted that after taking search of the record of the Court Receiver's office nothing is available to show that the boundaries were fixed of the suit land. He relied on the copy of the map produced by the Plaintiff. He submitted that the portion of Survey No. 118 is found elsewhere than the boundaries given in the plaint. He submitted that symbolic possession was taken by the Court Receiver at that time. The list of the persons who were on the land were mentioned in the report. However, the names of the Appellants were not found in the

list when the symbolic possession was taken. He submitted that it shows that the Appellants are occupied their structures standing on the land other than the suit land since 1997 and if the names are not seen in the report given by the Court Receiver, then it is to be inferred that the land which is occupied by them is not the suit land and hence decree is not executable against them and it should fail. He further argued that the Appellants has moved an application for the measurement by D.I.L.R of the suit plot however, it is not allowed.

6. On the point of burden of proof, it was argued that the obstructionists have filed Chamber Summons wherein it is prayed that the measurement of the Survey No. 118 is to be carried out by DILR. The learned senior counsel Mr. Vashi however submitted that the trial Court in its finding was wrong to draw adverse inference against the Appellants. He submitted that at the most adverse inference could have been drawn to the extent that the Appellants were not interested for bringing evidence before the Court. However, it cannot be held that therefore the Appellants are occupying the suit land. However, that application was not entertained at all by the trial Court. It is argued that the finding given by the trial Court that the Appellants

did not press the prayer at all is incorrect and once the prayer is made, it was the duty of the Court to appoint the surveyor and direct the surveyor to measure the suit premises. He submitted that the burden is on the Respondents to prove the area of the suit structure and also it is not on the Appellants.

7. The learned senior counsel further submitted that in suit No. 1173 of 1971, the suit property is described in para 10 and claimed that the purchase of land of 34000 sq. yards. Survey No. 92, H.No. 4 (Pt.), Survey No. 118 H.No.1(Pt.), Survey No. 120 H.Nos. 3, 4 and 5 situate at village Pahadi, Tal. Borivali. The said property is described at Exhibit A of the Complaint and the map is also shown at Exhibit B. The learned senior counsel submitted that on this land, the original Defendants, as per the case of the Plaintiff, have encroached jointly and out of the entire area of Survey No. 118, the area of 1094 sq. yards area only is claimed. He submitted that the entire burden lies on the Plaintiff to show encroachment on the said portion however Plaintiff have failed to discharge it. There can be a land encroached from Survey No. 92 or 120 or other portion of Survey No. 118 and not the suit land. There may be a valid decree but said

decree is not executable for want of correct identification of the area. He further submitted that the trial Court has also lost site that the suit area of Survey No. 118 is declared as a slum and to that effect a Government Notification dated 30th June, 1978 in the Government gazette dated 20th July, 1978 were issued. He relied on the applications moved by the Appellant in Chamber Summons whereby the land admeasuring 7000 sq.mtrs was declared as a slum from CTS No. 442/A/3 which is a suit land. It was re-notified in December, 1991 and also in December, 1993. Thus, including the suit premises to the extent in the said notification admeasuring 7000 sq.mtrs. is declared as a slum. The Plaintiff cannot claim the said area as it continued to be notified as a slum. He submitted that there is bar under Section 22 of the S.R.A. Act of 1971 and it is necessary to obtain permission of the competent authority for the eviction of the occupants of the slum. The original Plaintiff has suppressed this material fact from the Court and therefore the decree is not executable. Thus after deduction 664 sq. yards area is excluded from the area for which the suit is decreed. He submits that there may be possibility that the Appellant are having their structure on this remaining portion of the land i.e. 664 sq. yards.

8. The learned senior counsel criticized the manner in which the execution proceeding were carried out by the trial Court. He argued that under Order 21 of the Code of Civil Procedure, the application ought to have been made before the executing Court by the decree holder and should not have approached the Court Receiver. Moreover, in the Chamber Summons taken out by the Plaintiff, the Appellant filed the respective applications as the obstructionist. Thus, the application under Order 21 Rule 97 of the Code of Civil Procedure ought to have been entertained as a Plaint and tried like a Suit. The learned counsel further objected the manner in which the Plaintiff has conducted the matter before the trial Court. He submitted that the Appellant have tendered their evidence by stepping in witness box for the cross examination. He read over the relevant portion in the affidavits in chief that the allegations made by the Appellants in the affidavits are not refuted on oath by the decree holder. Therefore, they are to be accepted as proved especially on the point of declaration of the suit area as slum and so also identification of the area. On the point of S. 47 of C.P.C., learned senior counsel Mr. Vashi has relied on “Sri Bhasker Saikia vs. Smt Tatari Devi & Ors.”¹.

1 MANU/GH/0721/2011.

9. He argued that cross examination of the Appellants taken by the learned counsel of the decree holder was short and the contentions raised by the Appellants are not denied properly before the trial Court. Under such circumstances, the trial Court ought to have been accepted the case of the Appellants. He further submitted that suit structures as per the case of the decree holder were constructed after the Court Receiver took symbolic possession. At no stage of the proceeding, the Plaintiff moved an application to Court Receiver for demolition of the suit structures. Under such circumstances, the Appeals should succeed.

10. The learned counsel Mr. Vaishnava in reply has submitted that none of the Appellants are claiming independently but they are claiming through Defendant No. 2. The structures which are occupied are called "*Tarachand Mishra and Dayashankar Mishra chawls*". The Appellants are in possession of the suit property not prior to filing of the suit for possession but after filing of the suit. They are brought on the suit land by Defendant No. 2. He submitted that the Respondent/original Plaintiff have taken care of producing a plan to identify the suit land from Survey No. 118. On the contrary, no

documents are produced by the Appellants to show their independent claim.

11. The learned counsel Mr. S.N. Vaishnava for the Respondents/original Plaintiffs submitted that the learned judge has passed correct order and the Appeals are to be dismissed. He submitted that the Appellants are claiming through Defendant No. 2 who is the judgment debtor. The decree against Defendant Nos. 1 and 2 is confirmed till Supreme Court. The Appellants are the occupants of Tarachand and Dayashankar Mishra chawl. He submitted that there is no privity of contract between the Appellants and the original Plaintiff but they are claiming through Defendant No. 2. The present Appellant-obstructionist filed a declaratory suit and also for the other consequential reliefs against Defendant Nos. 1 and 2 in the Small Causes Court. He further submitted that the Appellants had filed suits under the Rent Act against the original Plaintiff and the Defendants for declaration that they are tenants of the suit premises of Defendant No. 2. However, the said suits were subsequently withdrawn from Small Causes Court at Bandra. He submitted that in the said suits the rent receipts issued by Defendant No. 5 are relied by the Appellants in

these Chamber Summonses. In support of his submission, he relied on the relevant portions from the Chamber Summonses of the Appellants. He further submitted that the Appellants have not filed a single document in support of their contention either to show their independent right or to substantiate their contention that it is a slum land. He read over the oral evidence tendered by the obstructionists.

12. The learned counsel Mr. Vaishnava further submitted that by an order dated 27th October, 1980 Bombay City Civil Court had appointed the Court Receiver with direction to take possession of the suit property from Defendant Nos. 1 and 2. The said order was confirmed by the High Court on 9th February, 1984 and directed the Court Receiver to take symbolic possession from Defendant Nos. 1 and 2. He further submitted that Defendant No. 2 had filed RAD suit No. 421 of 1971 in Small Causes Court against the original owners for his declaration of tenancy right and the Small Causes Court at Bandra had passed the decree in the said RAD suit No. 421 of 1971 in favour of the original Defendant No. 2. The Appeal No. 822 of 1984 preferred against Defendant No. 2 by the original Plaintiff and the said Appeal was allowed in favour of the Plaintiff. The learned

counsel further submitted that the Plaintiffs have filed a map to specify the location of the land in Survey No. 118. Thus, there is no confusion about the location of the land as argued by the learned senior counsel Mr. Vashi. He submitted that there is no defect in the Plaint about the identification of the suit land and if at all there was, then by the amendment and filing of the map, such lacuna under Order 7 of the Code is removed. In the execution application No. 102 of 1999, Chamber Summons No. 397 of 1999 was taken out for direction to the Court Receiver and the executing Court allowed the said Chamber Summons on 19th September, 2000 against Defendant No. 2 and his tenant occupants. Defendant No. 2 had challenged that order by filing Writ Petition No. 5680 of 1998. However, the writ Petition was also dismissed by this Court on 10th January, 2013. The SLP challenging the said order was dismissed by the Supreme Court. All these proceedings resulted into confirmation of the order of execution till the Apex Court. The Court Receiver in the month of March, 2013 went to the spot, measured the premises and demolished the bungalow of the Defendant No. 2 in the structures standing on the suit land. The learned counsel relied on the Court Receiver's report dated 30th March, 1980. Thereafter, a symbolic

possession was taken by the Court Receiver on 27th October, 1980 and the suit land become *Custodia Legis* and Defendant has no right in the suit property. However, it appears that the suit structures were allowed and the present Appellants were put in the possession. On the point of description of the suit property, he relied on the judgment of “Pratibha Singh and Another vs. Shanti Devi Prasad and Another”². On the point of Order 21 Rule 97 of Code of Civil Procedure, he relied on the judgment in the case of “Sujata Sanzgiry vs. Ankush R. Naik and Ors.”³.

13. The learned counsel further argued that it is not necessary for the original Plaintiff-decree holder to make application for execution when the Court Receiver is appointed. In support of his submission, he relied on in the case of “Aboobakar Abdulrehman and Co. vs. Shreeji Properties”⁴. On the point of Section 47 and Order 21 Rule 97 of Code of Civil Procedure, he relied on the case of “N.S.S. Narayana Sarma and Ors. vs. Goldstone Exports (P) Ltd. and Ors.”⁵ wherein the Hon'ble Supreme Court held that, the trial

2 (2003) 2 Supreme Court Cases 330.

3 AIR 2005 Bombay 404.

4 AIR 1993 Bombay 265(1).

5 (2002) 1 Supreme Court Cases 662.

Court where the application under Order 21 Rule 97 of Code of Civil Procedure has filed to examine the evidence on record. On the same point, he further relied on the ratio in the case of “*Silverline Forum Pvt. Ltd. vs. Rajiv Trust and Anr.*”⁶. The Hon'ble Supreme Court has discussed the scope of Order 21 Rule 97, 99 and 101 of the Code. The Supreme Court also referred the case of “*Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal*”⁷. Lastly, he relied on “*R.S.I. Limited vs. The Property Company Private Limited and Anr.*”⁸ decided on 24th May, 2001.

14. Heard both the learned counsel for the parties. Perused the record and proceeding. So also the evidence and the judgment dated 7th September, 2015 which is under challenge. In all these First Appeals and formulate the points of determination as follows:

- a) Whether the structures occupied by the Appellants are standing on the suit land or not ?*
- b) Whether the Appellants are protected and Civil Court has no jurisdiction to pass any order as the suit land is declared slum ?*

6 (1998) 3 Supreme Court Cases 723.

7 (1997) 3 Supreme Court Cases 694.

8 MANU/WB/0164/2001.

15. The suit land is described in the Civil suit No. 1173 of 1971 as the land admeasuring 3000 sq. yards at Survey No. 92 Hissa No. 4(Pt.), Survey No. 118 Hissa No. 1(Pt.) and Survey No. 120 Hissa Nos. 3, 4 and 5, village Pahadi, Tal. Borivali. The said suit was decreed on 15th April, 1997. When the decree is confirmed upto Supreme Court, this Court cannot go into the merits of the suit and beyond the decree but can deal with the only limited issue whether the structures occupied by the Appellants are standing on the suit land or they are out of the suit land. The Appellants claim their structures standing on other portion of the land than the land admeasuring 1094 sq. ft. of the total suit land of 1700 sq. yards from Survey No. 118 Hissa No. 1(Pt.).

16. The main grievance of the obstructionists is that though they moved applications for the appointment of DILR to measure the land, no order was passed on those applications by the executing Court. I have perused the said application. The application with such prayer was made before the executing Court. However, the learned Judge of the trial Court while dismissing the Chamber Summons, has observed that this application was never pressed by the Appellants.

The Plaintiff produced a map by way of amendment. The said map discloses some portion of the land from Survey No. 118 is carved out as the land occupied by Defendant Nos. 1 and 2. From the record, it appears that in the year 2010, the Court Receiver has taken a symbolic possession. So also while dealing with the Chamber Summonses, the learned Judge of the trial Court has gave directions of execution to the Court Receiver in the year 2013.

17. The facts of appointment of Court Receiver and directions given to him for execution by order dated 23rd August, 2000 and order dated 19th September, 2000 in Chamber Summons No. 397 of 1999 are not disputed. Subsequently, in the month of July, 2013 the Court Receiver pursuant to the order dated 19th September, 2000 passed by this Court was directed to execute the decree by taking forcible possession of the suit land which is described at Exhibit A to the Plaint i.e. the map. The report of the Court Receiver discloses that Court Receiver went to the site along with the Plaintiff and the architect. They carried out inspection of the site and the Court Receiver found that in all 35 structures are standing on the suit plot including the bungalow of the Defendant No. 2. It is mentioned by the

Court Receiver that there was a mob on the suit plot and they provided a list of the persons who are occupying the suit structures standing on the suit land. The names of the Appellants are mentioned in the said list. Accordingly, the Court Receiver submitted the report dated 5th July, 2013 about the site visit. It also mentions that some portion of the bungalow of Defendant No. 2 was demolished. It was argued that no list was found along with Court Receiver's report. While going through the report, I found that the list was not in the record and the Court Receiver subsequently produced it. But it was submitted by the Court Receiver that it was negligently misplaced by him. Lot of hue and cry was made by the learned counsel for the Appellants as the names of the occupants are not mentioned in the list, then it was pressed that the inference is to be drawn that the suit structures which are occupied by the Appellants are not forming part of the suit land.

18. The arguments advanced and the logic applied to set up such proposition is fallacious. I do not find any reason to disbelieve the report of the Court Receiver of the year 2013 as the fact of visit of Court Receiver is not disputed in the year 2010 and also in 2013. It

appears that the list of occupants is provided by the Advocate of the Appellants who have formed their tenant's association. Overall thirty five small structures were found on the suit land as per the report of the Court Receiver. The evidence of the Plaintiff was recorded in the year 1996, at that time he did not speak about exact number of structures. However, he deposed about the structures standing on the land and the possession of the suit land by Defendant Nos. 1 and 2. The Appellants claimed that they came in possession of the structures in the year 1990. The Plaintiff has given the description of the suit land. So also the report of the Court Receiver is before the Court and therefore it is believed that the portion of the Survey No. 118 is a suit land. Naturally, a question crops up in mind, how the Appellants came in possession of the suit structures. Whether they have constructed these structures or whether they were inducted by somebody. On perusal of the record especially RAD suit filed by the Appellants against Defendant No. 2, they have specifically mentioned in the respective Plaints on oath that they are the tenants of Defendant No. 2 and therefore they wanted declaration of their tenancy by filing of this RAD suit. However, who is occupying the premises is not immaterial. What matters is that the structures are standing on the

land i.e. a suit premises might have been occupying by either by either A, B or C. The persons may change but the structures remain there in the form of encroachment on the suit premises. The Appellants when claim that the structures they are occupying are different structures than those standing on the suit land then the burden is on them to show and prove this fact.

19. In the case of “**Aboobakar Abdulrehman**”(supra) the single judge held that,

“After going through the various decisions cited before me, the principle of law that emerges may be stated thus: During the time the property is in custody/charge of the Court in the hands of the Receiver on behalf of the Court, no rights of the Receiver on behalf of the Court, no rights can be created in the property which would defeat the ends of justice and incapacitate the Court from giving relief to the one who is entitled to it according to the decree or final order of the Court.”

In the case of “**Pratibha Singh**”(supra) as per Order 7 Rule 3 of Code of Civil Procedure, it is necessary for the Plaintiff to give proper description of the property so that the decree can be drawn

accordingly. It is also held that if such specification was not given by the Plaintiff, then it is obligatory for the Court to ask for the map of the immovable property forming the subject matter of the suit and if the property is not described then it is a curable error. The Supreme Court held that after success in the suit, the Plaintiff should not be deprived of the fruits of the decree. In the present case, a map (Exhibit AA) was produced by way of amendment by the Plaintiff. Moreover, there is a report of the Court Receiver which helped the Court to identify the land.

20. In the case of “**Sri Bhasker Saikia**”(supra), the learned Judge of the High Court of Guahati deal with Section 47 of the Code related to delivery of possession. The Court held that,

“The decretal land, in the execution proceeding, needs to be identified first. This identification is, thus, a step in the execution proceeding not a subject for adjudication in the suit. Even when the suit, property is correctly and fully described in the plaint and also in the decree, identification of the suit property at the time of the execution of the decree is imperative, for, it is upon identification of the suit property that delivery of khas possession of suit land, to decree holders can take place.”

Though the ratio laid down in the case of “*Sri Bhasker Saikai*” (supra) can not be disputed, it is the duty of executing Court to identify and to see the decretal land is identified correctly to avoid any unjust taking over of the land against which the decree is passed. In the present case, the suit area is identified and there is no confusion about it. Hence, this ratio is not helpful to the Appellants.

21. In the case of **Brahmdeo Chaudhary** (supra), the Apex Court has defined the word “*any person*” as contemplated in Order 21 Rule 97 of the Code. So if at all there is resistance or obstruction by third party then it is squarely covered by Order 21 Rule 97 of the Code and this Court had to proceed to adjudicate upon the application in accordance with provisions under Order 21 Rule 97.

22. In the case of “***R.S.I. Limited***” (supra), the High Court of Calcutta has held that,

“The tenancy was created during the pendency of Title suit not proved, then such tenancy is hit by the provision of Section 52 of the Transfer of Property Act and so also by the provision of Order 21 Rule 102 of the Civil Procedure Code.”

There is concrete documentary evidence to hold that the Appellants were claiming their right of possession through Defendant No. 2 who is a judgment-debtor. Thus, whether the Appellants could show their independent right or not is a crucial question which is very much interlinked with the claim of the Appellant that they are not on the suit land. If the Appellants are claiming through Defendant No. 2 then they are bound by the decree which is against Defendant No. 2. if they are successful in showing that they have independent right than Defendant No. 2 then their stand of not having their structure not on the suit land can be considered. The application under Order 21 Rule 97 is tried as suit and so evidence was tendered by the Appellants about their respective structures.

23. In the case of “**Sujata Sanzgiry**”(supra), the single judge of this Court at Panji Bench while dealing with the issue of obstructionist under Order 21 Rule 97 of C.P.C. held that,

“Respondent No. 2 can successfully resist the execution of the decree only if he is able to establish his independent title over the property. Respondent No. 2 has not acquired any title nor is he a transferee within the meaning of clause (b) of Section 19. He cannot

resist the decree passed in favour of the appellant on the ground that the was put in possession by Respondent No. 1 under the Agreement for Sale.”

In the present case also, the Appellants are claiming through Defendant No. 2 as a tenant.

24. After going through the cross examination of the obstructionists in Chamber Summons, it is found that the obstructionists could not state satisfactorily through whom they are occupying the suit structures i.e. the name of the landlord. I rely on the judgment in the case of “**Silverline Forum**” (supra). It is held in the case of “**Silverline Forum**”(supra) that,

“When the application is made under Order 21 Rule 97 of the Code, the executing Court can decide whether resister or obstracter is bound by the decree and refuses to vacate the property, adjudication need not be based on detailed enquiry or evidence but if deemed necessary Court can require adduction of evidence. The decree of ejectment shall be binding on every sub-tenant unless he falls within the ambit of either sub-section (2) or sub-section (4) of Section 13 of West Bengal Act.”

25. My attention was drawn to the rent receipts which are produced by the Appellants in RAD suit and which is also a part and parcel of the Chamber Summons. These receipts are of *Rajendra Brothers*. It discloses that it is of Tarachand Chawl. The learned counsel Mr. Vaishnava explained that *Rajendra* is a son of Tarachand Mishra and on the receipts the address of Tarachand Mishra Chawl is mentioned which shows the structure standing on the suit land. My attention is also drawn to the cross examination of the Appellants about the respective structures. They have admitted that they have no document to show that how they came in possession of the suit rooms in the year 1983 and 1990. They have admitted that they have filed declaratory suit before the Small Causes Court.

26. It is a settled position of law that “*a person who asserts should prove*”. The Plaintiff has to prove the title of the suit land for which he is claiming a decree. The Plaintiff has come with a map. So also the description of the suit property and the symbolic possession of the suit land was taken by the Court Receiver in the year 2010. On the other hand, when the Appellants claimed that they are not on Survey No. 118 and it is not expected from them to prove a negative

fact but however their contention can be proved by leading a positive evidence that on which Survey number their structures are standing.

Had the Appellants produced the documents disclosing the survey number of the land where their structures are standing other than S.No.118, then there would have been ground to believe the case of the Appellants that their structures are not on the suit land and they are not bound by decree. However, not a single document showing where their structures are standing is produced before the trial Court.

27. Under such circumstances, the trial Court is fully justified in rejecting the claim of the Appellants. Hence the Appellants have failed to establish that they are having an independent right and they are not claiming through Defendant No. 2 or Defendants. The defence taken by the obstructionist *dehors* legal position if it is believed then no decree will be executable as tenant, sub-tenant, agent or sub-agent of the judgment-debtor will go on putting different parties in possession during the execution and they all will come as an obstructionists having sole ground that we were not the party to the proceedings. Such defence is not sustainable in law. The decree holder who has got the relief from the Court and confirmed by the

Appellate Court, then he should get the fruits of the decree and shall not be denied to him. In the present case, the Plaintiff has come to the Court in the year 1971. The decree is passed in the year 1997 and since last 20 years the decree could not be executed due to number of Court proceedings taken out by the Defendants and so also by the Appellants from trial Court to the Supreme Court.

28. The learned senior counsel Mr. Vashi raised the point that the suit premises is declared as a slum and therefore the Appellants are protected being slum dwellers by SRA and so the civil Court has no jurisdiction. The learned trial Judge has dealt with this issue in detail. My attention is drawn to the cross examination of the Appellants wherein the question was put to them whether any notice was issued to them either by SRA/MMRDA. It was answered that SRA and MMRDA never issued notice to them. They filed a suit in the Small Causes Court for declaration in the year 2013 but at that time they did not mention that suit premises are declared slum by SRA and MMRDA. No photo-passes for their structures were issued by the authority for the survey or CTS number as claimed on which the slum is standing. The learned senior counsel submitted that the authority

declared slum in the year 1977 to 1993. If that would have been true, then SRA and MMRDA must have taken steps by issuing necessary notices to the slum dwellers that the entire land of survey No. 118 is declared as slum and these dwellers should not create any other right and should not sale the property to some other persons as the SRA is going to launch the project. Nothing is produced before the Court in respect of these submissions. It appears from record that Survey No. 120 is a slum. However, the present suit pertains to Survey No. 118 which was occupied by Defendant No. 2. The learned trial Judge has considered this aspect and held that the notifications of Government of Maharashtra dated 27th July, 1978 and 19th December, 1991 are produced wherein Survey No. 120 is declared as slum and nowhere Survey No. 118 is mentioned. The burden was on the Appellants to produce the reliable documentary evidence that the part of Survey No. 118 is declared as slum or alternatively their structures are on Survey No. 120. However, no document was produced. So case of the Appellants is not believed.

29. Lastly, the objection of learned senior counsel Mr. Vashi that the Court Receiver has no power to take possession is not

sustainable in view of the procedure laid down under Section 51 of Code of Civil Procedure. The power of executing Court are stated under Section 51(d) of the Code that the Court may on application of decree holder order execution of decree by appointing the Court Receiver and in such other manner as the nature of the relief granted. In the present case, the Court Receiver was already appointed in the year 2010 and therefore the execution by the Court Receiver with the help of police is appropriate procedure followed by the executing Court.

30. Thus, the finding given by the trial Court that the Appellants are not entitled to obstruct the decree passed in favour of the Plaintiff as they are claiming through Defendant No. 2 and have failed to prove to show their structure on other Survey number than Survey No. 118.

31. In view of this, the point of determination are answered in favour of the Plaintiff. The order passed in Short Cause suit No. 1173 of 1971 dated 15th April, 1997 by the City Civil Court is hereby confirmed.

32. All the First Appeals stand dismissed accordingly.
33. In view of the above, all the Civil Applications for stay are also dismissed and accordingly disposed of.
34. The learned counsel for the Appellants prayed that the order be stayed for four weeks. The learned counsel for the Respondents made statement that they would stay off their hands from the execution to continue for four weeks from today. The statement is accepted.

(MRS.MRIDULA BHATKAR, J.)