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

**SECOND APPEAL NO.492 OF 2017
WITH
CIVIL APPLICATION NO.9599 OF 2017
IN
SECOND APPEAL NO. 492 OF 2017**

Remabai w/o Rajusing Chauhan,
Age: 49 years, Occ: Household,
R/o. Dattanagar, Nanded,
Tq. & Dist. Nanded.

..APPELLANT

VERSUS

1. Sitaram s/o Bhagwanrao Patil
(died)
- 1.1. Girijabai w/o Sitaram Patil,
Age: 67 years, Occ: Household,
- 1.2. Nana s/o Sitaram Tidke,
Age: 39 years, Occ: Agri.,
- 1.3. Datta s/o Sitaram Tidke,
Age: 27 years, Occ: Agri.,
- 1.4. Mainabai w/o Hausaji Shinde,
Age: 35 years, Occ: Agri.,
- 1.5. Gadabai w/o Shivaji,
Age: 33 years, Occ: Agri.,
Through GPA
Maroti s/o Bhagwan Patil Tidke,
2. Sambhaji s/o Bhagwan Patil,
Age: 62 years, Occ: Agri.,
3. Maroti s/o Bhagwan Patil,
Age: 50 years, Occ: Agri.,
4. Ganpat s/o Bhagwan Patil,

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Age: 47 years, Occ: Agri.,

5. Baliram s/o Bhagwan Patil,
Age: 42 years, Occ: Agri.,

Respondent Nos. 1 to 5
R/o. Digras, Tq. Ardhapur,
Dist. Nanded.

6. Gangabai w/o Pandoji,
Age: 57 years, Occ: Household,
R/o. Niwgha, Tq. Mudkhed,
Dist. Nanded.

7. Kondabai w/o Uttamrao Kadam,
Age: 53 years, Occ: Household,
R/o. Marlak, Tq. & Dist. Nanded.

8. Rukhminibai w/o Anand Yedke,
Age: 49 years, Occ: Household,
R/o. Mudkhed, Tq. Mudkhed,
Dist. Nanded.

Respondent Nos. 2 and 3 are
G.P.A. holder of all the
respondent No. 1 to 8.

9. Kazi Siddiqui Mahiyoddin s/o
Mohd. Muniroddin,
Age: 65 years, Occ: Pensioner,
R/o. Kazi Galli, Nanded.

(Orig. Respdt. No.2)

..RESPONDENTS

Mr P.V. Mandlik, Senior Counsel i/b Mr P.P.
Mandlik, Advocate for appellant;
Mr S.S. Gangakhedkar, Advocate for respondent
Nos.1/1 to 1/5 and 2 to 8

CORAM : N.W. SAMBRE, J.

DATE : 20th JULY, 2017

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ORAL ORDER :

This second appeal is by one of the legal heir of judgment-debtor. The judgment-debtor suffered decree for delivery of vacant and peaceful possession of the suit property, which was described in the plaint clause and plaint map. The J.D. was directed to remove/demolish tin shed vide judgment and decree dated 23rd January, 2003 passed by 2nd Joint Civil Judge, Junior Division, Nanded. I am informed that the said decree is confirmed by first appellate Court.

2. Against the said decree, for execution, Regular Darkhast No. 113 of 2004 came to be filed before the Court of Joint Civil Judge, Junior Division, Nanded on 28th July, 2004.

3. In the said Darkhast, pursuant to the provisions of Order 21 Rules 97 to 105 of the Code of Civil Procedure, decree holder moved application stating that present appellant through one Kazi Siddiq Mohiyoddin has got executed lease deed of

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the suit property and as such, he is creating hurdle in the execution of the decree. It is stated in the application/objection Exhibit-29 that it be declared that the appellant has no interest or concern with the suit property.

4. The said application came to be decided by learned Executing Court on 24th September, 2016, which was subject matter of appeal, being Regular Civil Appeal No. 100 of 2016. The appellate Court confirmed the decree of the trial Court against the present appellant. As such, this second appeal.

5. Mr. Mandlik, learned Senior Counsel for the appellant, while questioning both the judgments, would urge that the Courts below have committed error of law in misdirecting itself while exercising power under Order 21 Rule 97 of the Code of Civil Procedure. According to him, said rule contemplates eventuality when Executing Court can exercise powers, particularly as regards overcoming resistance or obstruction to the possession of the

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immovable property in execution of decree. According to him, it is not the case of present respondent-decree holder that the present appellant while executing decree has caused physical obstruction while handing over possession. In addition, he would urge that provisions of Order 21 Rule 97 of Code of Civil Procedure if read with Article 129 of Limitation Act, it has to be inferred that even claim of present respondent-decree holder was not within time. He would then urge that on facts, mutation entry in favour of the appellant is worth appreciation.

6. Per contra, learned Counsel for the decree-holder, while inviting attention of this Court to the provisions of Order 21 Rule 97 of the Code of Civil Procedure would urge that the said rule cannot be interpreted to mean obstruction has to be physical obstruction. According to him, the fact remains that the decree in question of which execution was sought, was passed on 23rd January, 2003, in spite of knowledge of same, appellant got

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executed registered lease deed in 2007 knowing fully well that there is a decree in relation to the suit property qua eviction. He would then urge that in any case, Executing Court, in view of pleadings raised in the application at Exhibit-29, has inferred obstruction on the part of present appellant-judgment debtor and has recorded concurrent findings against the appellant, which in his submission, does not call for interference.

7. Considered rival submissions. It is required to be noted that the application at Exhibit-29 appears to be unsuccessful attempt on the part of objector/obstructionist to stop the execution of decree passed on 23rd January, 2003 by 2nd Joint Civil Judge, Junior Division, Nanded in Regular Civil Suit No.428 of 2001 instituted by respondent-plaintiff. The said suit came to be decreed, whereby defendants were directed to hand over possession of the suit property by demolishing the structure. It is required to be noted that the respondent having noted execution of lease deed in

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favour of the appellant herein by the original J.D. in spite of decree has caused application Exhibit-29 stating that there is obstruction. Though learned Counsel for the appellant has stated that property, details of as are described in the plaint and that of lease deed varies, however, still the fact remains that Executing Court proceeded to exercise powers under Order 21 Rule 97 of the Code of Civil Procedure, thereby inferring obstruction at the best of present appellant. The Executing Court noticed that the present appellant being legal heir of original judgment-debtor, in law, is duty bound to honour the decree and as such, proceeded to infer that there was an obstruction on the part of present appellant.

The act on the part of J.D. in executing lease deed in relation to property in relation to which decree is passed has been rightly viewed as obstruction as same is with an intention to resist delivery of possession. The appellant has failed to demonstrate difference between property covered

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in decree under execution and one under lease deed.

8. The appellant against the said order of the Executing Court being Regular Civil Appeal No. 100 of 2016 suffered fate of dismissal. While dealing with objection in the back drop of the provisions of Order 21 Rule 97 of the Code of Civil Procedure, the appellate Court relied upon the judgment of the Apex Court in the matter of ***Shrinath and others vs. Rajesh and others***, reported in ***1998(4) SCC 543***. The appellate Court then inferred in para-10 of the said judgment that the Apex Court while dealing with the issue as to the use of word 'any person' in sub clause (1) of Order 21 Rule 97 of the Code of Civil Procedure includes all persons resisting the delivery of possession, claiming right in the property including those who are not bound by decree.

9. So far as on facts, lawful possession of appellant as is sought to be canvassed by learned Counsel for the appellant is concerned, in the

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backdrop of absence of physical obstruction in the execution of the decree, both the Courts below, on facts, have held that there was obstruction at the behest of present appellant. In support of such findings recorded by both the Courts below, learned Counsel for the respondent-decree holder has invited attention of this Court to the judgment of the this Court in the matter of **Avinash Uttam Kadam and others vs. Hajira Begum Nisar Ahmed and others** reported in **2016(1) Bom.C.R. 548**, particularly paragraph-24 thereof, wherein it is held that while invoking the provisions of Order 21 Rule 97 of the Code of Civil Procedure, for the purpose of application for issuance of warrant of possession after obstruction is noticed, limitation prescribed is that of 30 days. This Court then noted that the objection that was raised by the decree-holder in the form of application under Order 21 Rule 97 of the Code of Civil Procedure since is tried as independent suit, the issue of limitation as sought to be canvassed relying upon Article 129 of the Limitation Act and further

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basing argument on the issue of obstruction, learned Counsel for the appellant, in my opinion, has been rightly dealt with and rejected by both the Courts below. Apart from above, it is to be noted that provisions of Code of Civil Procedure, particularly Order 21 Rule 97 thereof is *stricto sensu*, particularly in the backdrop of factual matrix of the present case, cannot be given strict meaning to mean that obstruction has to be a physical obstruction.

10. In view of above, in my opinion, cause as is cited by learned Counsel for the appellant for calling interference under Section 100 of the Code of Civil Procedure is wholly misplaced. As such, second appeal lacks merit and stands dismissed.

11. Consequently, civil application also stands dismissed.

(N.W. SAMBRE, J.)