

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

SECOND APPEAL NO. 325 OF 2011

1. Sambhaji s/o Shivaji Rajebhosale
Age : 60 Yrs., Occ.: Agri.,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
2. Babaji @ Bhausahab s/o Shivaji
Rajebhosale, Age : 55 Yrs.,
Occ.: Agri., R/o : Rashin, Tq.
Karjat, District : Ahmednagar.
3. Nitin s/o Shivaji Rajebhosale
Age : 43 Yrs., Occ.: Agri., **APPELLANTS/**
R/o : Rashin, Tq. Karjat, **[ORI. THIRD PARTY**
District : Ahmednagar. **APPLICANTS]**

V E R S U S

1. Nirmalabai Sadashiv Renukar
Age : Major, Occ. : Household,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
[abated as per court's order
dated 28/08/2013].

2. Arun Sadashiv Renukar
Age : Major, Occ. : Business,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
3. Ravindra Sadashiv Renukar
Age : Major, Occ. : Business,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
4. Shrikant Sadashiv Renukar
Age : Major, Occ. : Business,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
5. Udaykumar Sadashiv Renukar
Age : Major, Occ. : Business,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
6. Avinash Sadashiv Renukar
Age : Major, Occ. : Business,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
7. Jayashri Devidas Thorat
Age : Major, Occ. : Household,
R/o : H.No. 676, Shrikrishna
Bungalow, Shridarshan colony,
Binfika Nagar, Thergaon,
Chinchwad, Pune – 33.

8. Vidya Ashok Ekvire
Age : Major, Occ. : Household,
R/o : Rashin, Tq. Karjat,
District : Ahmednagar.
9. Sunita Chandrakant Gurav
Age : Major, Occ. : Household,
R/o : 'Agasti', Behind Court,
Akole, Tq. Akole, District :
Ahmednagar.
10. Suwarna Nandakumar Gadhe
Age : Major, Occ. : Household,
R/o : H.No. 677, Shrikrishna
Bungalow, Shridarshan colony,
Binfika Nagar, Thergaon, **RESPONDENTS/**
Chinchwad, Pune – 33. **[ORI. PLAINTIFFS/D.H.]**

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Mr. R.L.Kute h/f Mr. V.R.Dhorde, Advocate
for Appellants.

Mr. N.V.Gaware, Advocate for R – 3 to 5,
7,8 and 10.

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CORAM : SUNIL P. DESHMUKH, J.
DATE OF JUDGMENT : 8th FEBRUARY, 2017

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ORAL JUDGMENT :

1. Heard the learned counsel for the parties.
2. The Second Appeal emanates from resistance to execution of decree pursuant to the course available under Order XXI, Rule 97 of the Code of Civil Procedure by third party to the litigation between plaintiffs – decree holders and defendants – judgment debtors in regular civil suit No. 129 of 1983.
3. Regular civil suit No. 129 of 1983 had been instituted by predecessor of present respondents as plaintiffs seeking recovery of possession of H.No. 701/A-2 of village Rashin, taluka Karjat, district Ahmednagar. The suit was decreed on 24/03/1993. Raghunath – defendant – judgment debtor had preferred regular civil appeal No. 230 of 1993 which had been dismissed on 10/06/1998. Thereafter, execution proceedings bearing regular darkhast No. 20 of 1999 had been filed in the executing court by the decree holders i.e. present respondents and the same is pending, yet.
4. Present appellants/third party filed application

[Exhibit 14] in regular darkhast No. 20 of 1999 contending that suit property is part and parcel of their ancestral property and is in their possession. The entry of names of decree holders in Gram Panchayat record has been surreptitious and illegal and that house property bearing No. 701/A-2 and other properties bearing houses No. 701/A-1 and 701/A-3 are not in existence at all. The appellants/third party are owners of land bearing survey No. 461. While city survey had been carried out, aforesaid house properties did not find place in said survey in gaathan of Rashin Gram Panchayat area.

5. Aforesaid contentions on behalf of the appellants/third party were countered by the decree-holders/respondents stating that Gram Panchayat house property No. 701/A-1 to A-3 are within the area of Rashin Gram Panchayat and properties were in possession of Dwarkabai Baburao Renukar and Nirmala Sadashiv Renukar and after them of decree holders. The appellants/third party had been aware of the proceedings instituted against predecessor of decree holders and also the decision thereof. The applicants/appellants in regular civil appeal No. 31 of 2007 filed regular civil suit No. 113 of 1993 against Dwarkabai Baburao for declaration of

ownership. However, said suit of was dismissed. Third party had been aware of the litigation pending in respect of house property No. 701/A-2 and if really the third party was having any concern, they ought to have approached the pending litigation between decree holders and judgment debtors, however they have chosen to remain silent and did not take any action.

6. The executing court, with reference to above, had framed points for determination as would be required under the relevant rules of Order XXI, particularly Rules 100 to 103 and dealt with the matter accordingly. The trial court found that the third party is not in possession of the property under execution. It had been held that the third party failed to show that the property is not situated within the area of Rashin Gram Panchayat and further held that the third party is not entitled to the declaration as sought.

7. Against aforesaid decision rendered by the executing court, regular civil appeal No. 31 of 2007 had been preferred by the appellants/third party and the same was dismissed under order dated 12-11-2010. The appellate court had considered that the appellants/third

party have failed to prove that they were in possession of the property under execution and further considered that it cannot be said that they would legitimately cause obstruction to decree holders' claim to obtain possession.

8. While deciding the appeal, the appellate court has considered that appellant Sambhaji would not be said to be aware about the particulars of his claimed property. It was found that no material can be produced in support of the contention that disputed land is not part of Gram Panchayat. The appellate court further considered that area of land Sy.No. 461 was 12 Acre. It has come on record that plots of land have been sold from aforesaid 12 Acre to many persons and that Sambhaji was not aware of their locations/positions and could not give any particulars of the same and further that there had been no measurement carried out after the sale of properties. It has further come on record that the persons to whom the properties were sold, were residing there by constructing houses over the land plots.

9. The appellate court has observed in paragraph No. 15, as follows :

" It has also come on record that the person to whom property was sold out, are residing there, by constructing their houses. For the first time, the appellant Sambhaji states that he came to know that the suit property was given on rent to defendant Raghunath Rajaram. However, there is no pleading made by the appellants, in their application. According to him, at the time of possession warrant, Raghunath told him that father of appellants gave the property on rent to him. From the judgment and decree in R.C.S. No. 129/1983, there is no whisper made by defendant Raghunath Rajaram about his land. The appellants never demanded rent to said Raghunath. Though appellant has denied that he had no knowledge about the suit filed by respondents/decreed-holders and appeal filed by defendant Raghunath, evidence on record prima facie shows that he was having knowledge about pendency of the suit, in respect of the suit property. It has also come on record that the appellant Sambhaji came to know about entry in extract of property as Gurav Pujari, after death of his father in the year 1984, but he

has not taken any steps to challenge the same till 1993. "

10. The appellate court further went on to consider evidence given by Trimbak, the clerk of Gram Panchayat and appreciated that there are indeed properties bearing No. 701/A-1 to A-3 in the Gram Panchayat record, but that was stated to be open land and had found that Trimbak was not exactly aware of the area in possession of the appellants/third party. The appellate court found that evidence on behalf of the decree holders was specific in respect of ownership and possession over the suit property and nothing could be brought on record to shatter evidence given on behalf of decree holders. The appellate court had also referred to Exhibits 30,57 and 64 which were considered to make clear that suit property is independent property of decree holders and the third party would not have any concern with it and as such it is considered obstruction by the third party, would not be legitimate, legal and proper and thus dismissed the appeal.

11. Mr. R.L.Kute holding for Mr. V.R.Dhorde, learned counsel for the appellants contends that the owner

of land Sy.No. 461 had never parted with the suit property to any one and continued to be in possession of the same. The decree holders have not been able to show that they have any nexus or source of title to the suit property. He submits that, it has come on record that Gram Panchayat houses No. 701/A-1 to A-3 fall in Sy.No. 461. Sy.No. 461 is agricultural land and is not situated in gaothan. He, therefore, submits that while source of title of H.No. 701 has not come-forth on behalf of the decree holders and undisputedly the third party being owner of Sy.No. 461, the objection and the resistance by the appellants/third party to the execution of the decree in regular darkhast No. 20 of 1999 ought to have been upheld, the proceedings regular civil suit No. 129 of 1983 ought to have been dismissed.

12. Learned counsel for the appellants submits that the evidence by clerk of the Gram Panchayat was being discarded for the reason that he had appeared as witness without his name being in the witness list. He submits that it is not an absolute rule that the court should discard such evidence. He relied on a decision of the Apex Court in the case of *Mange Ram Vs. Brij Mohan* reported in 1983 DGLS (Soft.) 194 1983 (4) SCC 36. He

further refers to the case of *Ashok Sharma Vs. Ram Adhar Sharma* reported in (2009) 11 Supreme Court Cases 47 to stress that production of document by witness can be permissible and can be taken on record and it may not be necessary to file copies of the same on record. He submits that his evidence does indicate that there are no houses and as such Gram Panchayat could not have given house numbers to the properties without there being houses. As such, there is no substance in the contention of the decree holders that there are houses No. 701/A-1 to A-3. He submits that evidence of the clerk of Gram Panchayat shows that houses No. 701/A-1 to A-3 are open lands. He, under the circumstances, purports to submit that on the face of such record when there is no dispute that Sy.No. 461 being owned by the appellants/third party and the same having not been dealt with to the predecessor of decree holders, the claim for possession by them under the decree is unsustainable.

13. Mr. N.V.Gaware, learned counsel for the respondents-decree holders submits that it would not be said that the second appeal raises any question of substantial nature amenable for consideration. He submits that all the events and occurrences which have

been referred to, are the questions of facts and the questions of facts have been considered, appreciated and adjudicated by the executing court and the appellate court. The findings and observations of the courts hitherto being not against the facts, circumstances and evidence as is appearing on record, are not liable for re-consideration within the parameters of Second Appeal. As far as merits are concerned, he contends that a decree in respect of specific property i.e. 701/A-2 has been passed by trial court, confirmed by appellate court and its execution has been pending since 1999 and the appellants have thus far been successful, in holding up the execution proceedings. He submits that even evidence given by the appellants/third party shows that there subsists Gram Panchayat record showing house properties No. 701/A-1 to A-3. As such, contention on behalf of the appellants that there is no existence of house properties No. 701/A-1 to A-3 is baseless. In view of aforesaid, there is no possibility of third party being in possession of the same. That apart, assuming the contention of the appellants is accepted that property No. 701 exists in Sy.No. 461, the observations and evidence recorded and the findings given by the courts show that it cannot be said that Sy.No. 461 in the whole is still in possession and ownership of the

appellants. The appellate court has categorically recorded that the deposition of the appellant/third party shows that he does not know and is ignorant about the particulars of the properties dealt with. Thus, according to the learned counsel, it would not be open for being said by the appellant/third party that property No. 701 being not situated in Sy.No. 461, and the same being in possession of the appellants.

14. After having heard the learned counsel for the parties and the perusal of the judgments rendered by the two courts, it emerges that evidence given by the clerk of Gram Panchayat, which is appreciated by the courts, shows that Gram Panchayat maintains record in respect of house properties No. 701/A-1 to A-3. Observations of appellate court, as reproduced would show appellants are not legitimately making claims and appear to be rather casual. Appreciation as appearing on record by the courts would not be said to be not adhering to evidence and as such would hardly be amenable for relook by this court u/s 100 of the Code of Civil Procedure or for that matter an other view may be possible.

15. In view of aforesaid, I am not inclined to

accept the arguments advanced by Mr. R.L.Kute, learned counsel for the appellants.

16. Second Appeal as such stands dismissed. Consequently, civil application No. 8154 of 2011 filed in this Second Appeal seeking stay to the further proceedings of regular darkhast No. 20/1999, also stands disposed of.

[SUNIL P. DESHMUKH, J.]

KNP/S.A. 325.2011 - [J]