

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

**SECOND APPEAL (ST.) NO. 24544 OF 2017
ALONG WITH
CIVIL APPLICATION NO. 1283 OF 2017**

Prashant Purshottam Bacchav and others

... Appellants
(Orig. Obstructionists)

Vs.

Nimba Keshav Wani (deceased) through her LRs

..Respondents

Mr. P.K. Dhakephalkar, Senior Advocate, instructed by Mr. J.G. Reddy for the Appellants/Applicants.

Mr. Milind Sathaye for Respondent Nos. 2 and 3.

CORAM: S. J. KATHAWALLA, J.

DATE: 13th September, 2017

P.C.:

1. The present Appellants are the original Applicants/Obstructionists who have filed an Application under Order 21 Rule 97 of the Code of Civil Procedure, 1908 (the Code) in Regular Darkhast No. 83 of 2010 which application has been rejected by the 4th Joint Civil Judge, (Junior Division), Malegaon vide order dated 29th March, 2017 and in Appeal the said order of rejection is confirmed by the learned District Court-II, Malegaon, vide order dated 24th July, 2017. Being aggrieved by the concurrent findings, the Appellants have filed the present Second Appeal.

2. Original Plaintiff—Nimba Keshav Wani (now deceased) filed Regular Civil Suit No. 615 of 1974 against the original Defendants (Respondent Nos. 4 to 6 herein) contending that the Plaintiff was the owner of the land bearing Survey No. 35, Gat No. 359, which is now re-numbered as Gat No. 185, situated at Vadner, Taluka Malegaon, Dist. Nasik (the suit property) and was entitled to possession of the same. On 12th March, 1987, the Learned Civil Judge (Junior Division), Malegaon decreed the suit in favour of the Plaintiff. The heirs of Defendant No. 1 filed Appeal No. 270 of 1987 which was renumbered as 265 of 1989 in the District Court (first Appellate Court). By a judgment and order dated 12th August, 1996, the first Appellate Court dismissed the Appeal filed by the original Defendants challenging the order passed by the learned Civil Judge (Junior Division) , Malegaon. Again being aggrieved by the judgment and order of the Appellate Court dated 12th August, 1996, the heirs of the original Defendant No.1 filed Second Appeal No. 407 of 1996 before this Court.

3. Therefore, when the Second Appeal was filed and was pending, there were two judgments dated 12th March, 1987 and 12th August, 1996 of the trial Court and the Appellate Court respectively holding that the original Plaintiff was the owner of the suit property. It was therefore, clear that neither the original Defendants nor any other person owned the suit property. Despite that,

obstructionist No. 2 by a Sale Deed dated 07-07-1999 purchased land bearing gat No.185/3 from Uday Singh Dharma Tawar. On 25th January, 2000 and 25th February, 2000, obstructionist no. 1 purchased land bearing gat Nos. 185/4 to 185/6 and 185/1 and 185/2 respectively from Narmadabai Popat Bacchav (who in turn had purchased the said land from the Defendants to the proceeding and/or their heirs). It is therefore, pertinent to note that the suit land was purchased by the obstructionists from persons (Defendants) against whom concurrent findings were rendered by two Courts viz. that they were not the owners of the suit property or from an individual like Narmadabai Bacchav, who had purchased the suit land from such Defendants and/or their heirs and who themselves had no right title and/or interest in the suit property. In other words, obstructionists have claimed to have purchased the suit property from individuals who were not the owners of the suit property and who had not even challenged the Decree of the Trial Court dated 12th March, 1987.

4. Interestingly, on 25th January, 2010, even the Second Appeal being No.407 of 1996 filed by the original heirs of original Defendant No.1 was dismissed by this Court. In view thereof, the original Plaintiff, Nimba Keshav Wani filed Regular Darkhast No. 83 of 2010 in the Court of Civil Judge, Junior Division, Malegaon, Dist. Nasik, pursuant to which on 24th October, 2013, the

Joint Civil Judge, Junior Division, Malegaon issued possession warrant under Order 21 Rule 35 of the Code in respect of the suit property. On 10th February, 2015, the Appellants/obstructionists filed Application below Exh. 106 under Order 21 Rule 97 of the Code in the Court of Civil Judge, Senior Division, in Regular Darkhast No. 83 of 2010 contending that the Appellants are the bona fide purchasers for value without notice. By an order dated 31st July, 2015, the Judicial Magistrate, First Class Court No. 5, Malegaon, rejected the application filed by the Obstructionists/Appellants. The Appellants filed Regular Civil Appeal No. 99 of 2015 before the District Court at Malegaon, The District Court, in the year 2016, remanded the matter back to the trial Court for deciding the Application Exh, 106 afresh.

5. Before the Court of 4th Joint Civil Judge, Junior Division, Malegaon, it was interalia submitted on behalf of decree holders that no title ever existed in Budhesingh and his legal heirs or in Devisingh Budhesing, Dharam Jamsingh and Daya Jamsing and therefore, they could not have passed over any right title or interest in the suit property in favour of Narmadabai Popat Bacchav and/or the obstructionists. The Appellants/Obstructionists submitted that after purchasing the suit property, they have spent substantial amount on the property by taking loans from the Banks. They had prior to the purchase taken search and had also

advertised their intention to purchase the suit property to which no objections were received. The obstructionists have also contended that the decree holders were aware of their sale and in any event since they were negligent in protecting their property they are not entitled to attach the same. Both the Obstructionists did not enter the box, instead the husband of Obstructionist No. 2 entered the box as a Power of Attorney of the Obstructionists on the ground that Obstructionist No. 1 was suffering from kidney problems and Obstructionist No. 2 was a housewife who is not aware of any proceedings. The trial Court framed an issue whether the Obstructionists are bona fide purchasers of the suit property and by its very detailed order answered the said issue in the negative. The trial Court has, inter alia, observed as follows:

- 5.1 That the Obstructionist No. 1 is the member of the Zilla Parishad and except for the statement of the Power of Attorney that Obstructionist No. 1 is suffering from kidney ailment no document is produced in support of the same. The Obstructionist No.1 has therefore, knowingly avoided to enter the witness box. Again, though it is claimed that Obstructionist No. 2 is a housewife, it can be seen from the documentary evidence produced before the Court that she has appeared before the Banks, applied for loans and obtained loans in lakhs of rupees from banks after executing various documents and there is no evidence on record to show that it is the

husband of the Obstructionist No. 2 who has dealt with the Banks or has taken loans on her behalf and/or has executed the documents on her behalf and therefore Obstructionist no. 2 is also not entitled to claim unavailability to enter into the witness box to depose. In fact, the husband of Obstructionist No. 2 who is the Power of Attorney holder of Obstructionist Nos.1 and 2 has no personal knowledge of the matter, which only the obstructionists can have. Since the Court is of the view that the obstructionists have avoided to offer themselves to the test of evidence, an adverse inference is drawn against the Obstructionists.

- 5.2 It is not the testimony of O.W.No.1 Pramod that the obstructionists were misguided or were kept in dark about the pending litigation by the said Ramesh Daga, Daga Jamsingh, Vimlabai Daga, Budhesingh etc. No evidence is led by the obstructionists to establish that Ramesh Daga, Daga Jamsingh, Budesingh, Dharma, Lalsingh have by playing fraud executed the sale deed (Exhibit 150 and Exh.151) and cheated them. To establish that due care was taken by the obstructionists it was incumbent upon them to call and examine the vendor Ramesh Daga, Daga Jamsingh, Vimlabai Daga, Dharma Jamsingh, Udaysingh etc. Had these vendors been examined by the obstructionists the truth of negotiation at the time of said Sale Deeds would have surfaced. The vendors Ramesh Daga,

Daga Jamsingh, Vimlabai Daga, Dharma Jamsingh, Udaysingh etc., and their Legal Heirs are also party to the present execution but they avoided to cross-examine the witnesses of the obstructionist or the decree holders which has resulted into throttling of the evidence. The status about availability of these vendors to testify is also not disputed by the obstructionist.

5.3 The title to Gat Nos.185/4, 185/5 and 185/6 as per sale deed (Exhibit 150) has flown from Narmadabai Popat who had herself purchased it from the defendants of RCS No.615/1974. There is no evidence to reveal the due care taken by said Narmadabai prior to purchasing the land vide sale deed Exh. 150, nor the said Narmadabai has been called as witness by the obstructionist to bring on record that the said Narmadabai had assured herself of the rights, title and ownership of the vendors of the sale deed Exhibit 150. The non-examination of the previous vendors who were parties to the Regular Civil Suits, Appeal and Second Appeal and are also Judgment debtor in the present execution shows that obstructionists have not taken due care for ascertaining the title.

5.4 That as regards the paper publication notices dated 1-10-1998, 3-5-1999 and 20-01-2000 in Daily Balekilla and the oral testimony of the Editor of the said newspaper Shri Nivrutti, the oral testimony of Nivrutti is not

believable. His testimony does not establish that daily Balekilla is widely circulated at Malegaon and at Nasik. His cross-examination reveals admission that he was an accused in Criminal Case No. 312 of 1994 which was for extortion. His testimony further reflects that in the year 2012, Maharashtra Government has stayed the publication of Daily Balekilla. In the cross-examination he has shown willingness and readiness to produce on record copies of the issues dated 30-9-1998, 2-10-1999, 2-5-1999, 4-5-1999, 19-1-2000 and 21-1-2000 but he failed to file the same. He has further admitted that Municipal Corporation, Malegaon has given notice to the Anti Corruption Bureau against him. He has showed his willingness to produce the said notice on record but avoided to file the same. He also agreed to produce the audit reports containing details about Exhs. 173 to 175 but failed to do so.

- 5.5 That the Public notices (Exhibits 173, 174 and 175) speaks about the ownership and possession of Ramesh Daga Tawar, Daga Jamsingh Tawar, Vimalbai Daga Tawar, Budhesingh Dharma Tawar, Dharma Jamsingh and Lalsingh Tawar over the suit properties. However, these assertions about the ownership and title are not supported by any of the title deeds or any other instruments conferring any rights to dispose of the property on the said individuals. The said notices are therefore insufficient to establish

that reasonable care was taken by the Obstructionists to verify the ownership and title of the vendors over the suit properties.

5.6 The manner in which the title search was taken is not proper and not in tune with ordinary conduct or prudence. In fact, Receipt (Exhibit-190) for taking search was issued by the office of Sub-Registrar, Malegaon on 16th March, 2013 i.e. after the search report (Exhibit-191) dated 22nd February, 2013. The law requires that receipt has to be prepared first and thereafter only the Advocates are permitted to carry out the search of the record of the Registrar's office. In the given case the search reports are prepared first and thereafter amounts towards such search were deposited with the office of the Sub-Registrar.

5.7 Again the analysis of search report reflects that the search report (Exhibit 191) is prepared on the basis of 7/12 extract dated 2nd February, 2013 and mutation entry Nos. 1798, 3459, 3344, 1906, 1259, 1758 and 1791. The search report (Exh. 193) is prepared on the basis of 7/12 extracts dated 9th September, 2014 and mutation entry Nos. 1798, 3459, 3549, 3344, 1906, 1259, 1758 and 1791. Both these search reports maintain complete silence as to how the Obstructionists have become owners and title holders of the suit properties. There reflects no effort on the part of Obstructionist Witness No. 5 Advocate Deore to take search for the

mandated 30 years time period. In fact, both Exhibits 191 and 193 shows that search was carried out for the period 8th February, 2013 and 9th September, 2014 respectively. Therefore, the purpose of title search was limited i.e. only to the extent of advancing loans. The search reports are prepared by Obstructionist Witness No. 5 Advocate Deore who has himself admitted that he was not authorised by the concerned Bank in writing to prepare such search report. In fact the Bank Official Obstructionist Witness No. 3 Amol has admitted that no authority or appointment of Advocate Deore is on record.

- 5.8 That the Obstructionists have produced copies of the decree in RCS No. 615/1974 at Exh. 166 and copy of the decree in RCA No. 265/1989 at Exh. 167. A careful perusal of both these decree reveals that on 16th August, 1996, Advocate Bagade had applied for certified copy which was delivered on 29th August, 1996. Thus it is evident that Exh. 166 and Exh. 167 were delivered on 29th August, 1996 and there is no explanation from the Obstructionists as to how and when they came in possession of Exhibits-166 and 167, which are produced by them. There is not a whisper as to who had supplied Exh. 166 and Exh. 167 to them. However, it is clear that Exh. 166 and Exh. 167 were delivered by the office of the Additional District and Sessions Court, Nashik years prior to execution of sale deeds

in favour of the Obstructionists. The absence of any explanation regarding the time, manner and way in which the Obstructionists got knowledge about Exh. 166 and Exh. 167 requires drawing of inference that the said exhibits are in their possession since 29th August, 1996.

5.9 That the doctrine of bona fide purchase is attracted only if the vendor has a better title. In the given case, the title of the vendors was denied in RCS No. 615 of 1974 wherein issue No. 5 regarding title of the Defendants i.e. vendors was answered in negative. The vendors Dharma Jamsingh, Daga Jamsingh, etc. have failed to establish their title over the suit property as well as in the Second Appeal. The Obstructionists have failed to establish that the title had existed in the vendor Dharma Jamsingh and Daga Jamsingh.

5.10 The Application was therefore rejected by an order dated 29th March, 2017.

6. The Obstructionists filed Civil Appeal No. 71 of 2017 before the Court of District Judge-2, Malegaon at Malegaon impugning their rejection of the Application by the order dated 29th March, 2017. The Appellate Court raised the following points for consideration.

Points

- (i) *Whether the Appellants/obstructionist have Title over the suit property which is subject Matter of Regular Darkhast No. 83/2010?*
- (ii) *Whether the Appellant/Obstructionist are Bona fide purchasers for value without notice?*
- (iii) *Whether decree in RCS No. 615/74 as confirmed In Appeal is binding upon the obstructionists/Appellant?*
- (iv) *Whether the appellant/obstructionist are Entitled to any relief?*
- (v) *Whether the judgment i.e. order below Exh. 106 In Regular Darkhast No. 83 /2010 is required to be interfered with?*
- (vi) *What order?*

The Appellate Court answered Point Nos. 1, 2, 4 and 5 in the negative and Point No. 3 in the affirmative by its detailed judgment dated 24th July, 2017.

7. Being aggrieved by the decision of the District Court-II, Malegaon, the Obstructionists have filed the above Second Appeal impugning the same.

8. The Learned Senior Advocate appearing for the Obstructionists has submitted that the Courts below have not appreciated that Rule 102 of Order XXI of the Civil Procedure Code, 1908 is deleted. The submission qua deletion of Rule 102 of Order XXI of the Civil Procedure Code, has no merit. Rule 102

speaks about non-application of Rules 98 and 100, therefore, deletion of Rule 102 will mean that Rules 98 and 100 will apply. Appellants' application in the Executing Court was under Rule 97 and not under Rule 98 or Rule 100. That apart, Rule 102 was deleted with effect from 01-10-1983. Perusal of record shows that the Appellants/Obstructionists have purchased suit property between July 1999 to February 2000. Therefore, when the Appellants purchased the suit property, Rule 102 was not on the statute book and Rules 98 and 100 of Order XXI were applicable to the facts of this case. Rule 98 speaks about necessary orders that the Executing Court can pass against the Obstructionist/s or his/their transferee/s. Rule 100 speaks about the necessary orders that the Executing Court can pass to put the decree holder in possession of the Suit Property or such other orders which it may deem fit. Both Rules 98 and 100 are empowering provisions, which the Executing Court has, to pass orders, upon determination of the questions under Rule 101. Deleted Rule 102 has no connection with Rule 101. It is therefore, obvious in the facts of the present case, that, the Executing Court was well within its powers, to pass orders against the Appellants who are transferees of the Judgment Debtor. It is therefore, clear that deletion of Rule 102 has no bearing at all, on the facts of the present case, let alone raising any substantial question of law. Orders against transferees of the Judgment Debtors, such as the Appellants, can very well be passed by the Executing Court.

9. The learned Senior Advocate for the Appellants has further submitted that both the Courts below have failed to appreciate that the Obstructionists are the bona fide purchasers of the suit property. As set out earlier, both the Courts below have, after considering the facts in the matter as well as the oral and documentary evidence come to the conclusion that the Obstructionists cannot be heard to say that they are the bona fide purchasers of the suit property more so when they have purchased the property from individuals who themselves had no ownership rights in the same and held that it is the Plaintiff who is the owner of the suit property. In view of these concurrent findings of fact, in my view no question of law much less substantial question of law arises in the present Appeal. The same is therefore dismissed. However, the parties shall maintain status quo in respect of the suit property for a period of two weeks from the date of uploading of this order i.e. upto 20th December, 2017. As a sequel to the above, no orders are required to be passed in the Civil Application and the same is accordingly disposed off.

(S.J. KATHAWALLA, J.)