

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1595 OF 2018

Binabi Majidkhan Pathan ... Petitioner
Vs.
Mohd. Hayat Mohd. Sharif Panse (decd) through LR's ... Respondents

Mr. I. M. Khairdi for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : MARCH 12, 2018

P.C. :

Not on Board. At the request of Mr. Khairdi, learned Counsel for the petitioner, taken up for admission. The matter was listed for admission on 16.03.2018 at Sr. No.11. He submitted that on 11.03.2018, Bailiff came to execute the decree. He, therefore, got the papers produced today for interim protection.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'obstructionist', has challenged the judgment and order dated 26.09.2017 passed by the learned Joint Civil Judge, Junior Division, Barshi below exhibit-54 in R.D. No.11 of 2016. By that order, the learned trial Judge rejected the application made by the obstructionist under Order XXI, Rule 97 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), raising objection to the execution of the decree.

3. Predecessor-in-title of respondents No.1 to 5, hereinafter referred to as 'decree-holders', had instituted R.C.S.No.78 of 1987 against Ismail Fareed Saheb Shaikh., since deceased, for recovery of possession of the suit premises. The Suit was decreed on 30.09.1995. Aggrieved by that decision, respondent No.6 - Ismail Faridsab Shaikh preferred Civil Appeal No.341 of 1995. During the pendency of the appeal, he died on

26.07.2000. Widow and three sons of the original defendant No.1 were brought on record as his legal representatives. Appeal was dismissed on 26.11.2012. Aggrieved by this decision, the legal representatives of defendant No.1 preferred C.R.A.No.468 of 2013, which was dismissed on 09.07.2013. The obstructionist took out application exhibit-54 on 26.09.2017 under Order XXI, Rule 97 of C.P.C. raising objections to the execution of the decree and for holding enquiry. On the same day, decree-holders filed the reply. By the impugned order, the learned trial Judge rejected the application. It is against this order, obstructionist has instituted the present Petition.

4. In support of this Petition, Mr. Khairdi submitted that the learned trial Judge committed serious error in rejecting the application on the same day on which the application was filed by the obstructionist and the Civil Application was filed by the decree-holders. The learned trial Judge should have conducted the enquiry and decided the objections raised by the obstructionist by permitting the parties to adduce evidence in support of their respective case. The learned trial Judge, without following this procedure, straightway, rejected the application without giving opportunity to the obstructionist. He has taken me through paragraphs 8 to 10 of the impugned order. He submitted that this is contrary to the law laid down by the Apex Court in ***Brahmdeo Choudhary Vs. Rishikesh Prasad Jaiswal, (1997) 3 SCC 694.***

5. I have considered the submissions advanced by Mr. Khairdi. I have also perused the material on record. It is not in dispute that the decree-holders have instituted Suit against original defendant No.1- Ismail Fareed Saheb Shaikh. The suit was decreed. Original defendant No.1 preferred appeal. During the pendency of the appeal, a widow and three sons of the original defendant No.1 were brought on record as legal representatives. The learned trial Judge observed that if at all the

obstructionist was and is residing in the suit premises, she ought to have been brought on record in the appeal in the capacity of legal representative of the original defendant No.1 (since deceased). She did not intervene in the pending appeal. It is, therefore, impermissible to accept her contention that she was and is residing in the suit premises.

6. The learned trial Judge also found that the explanation given by the obstructionist that she was totally unaware of the litigation between the decree-holders and the judgment-debtors is unacceptable. She also kept quiet for last 17 years without any reason and this conduct speak for itself. The learned trial Judge also observed that obstructionist does not have any proof to show that she had indeed paid the rent to the decree-holder. It is no doubt true that the learned trial Judge disposed of the application on the same day. A perusal of paragraph 6 of the application exhibit-54 shows that obstructionist contended that she was paying rent of Rs.200/- per month to the predecessor in title of the decree-holders and the present decree-holders. However, it is material to note that not a single rent receipt was produced either in the trial Court or in the present proceedings. In view thereof, it cannot be accepted that the obstructionist is residing in the suit premise as a tenant and has an independent right in respect of the suit premises.

7. Mr. Khairdi relied upon the decision in **Brahmdeo Choudhary** (*supra*). In that case, respondent No.1 had instituted eviction suit in respect of six and a half dhurs of the suit land against respondent no.2 and his mother. The suit was decreed against the judgment debtor – respondent No.2 in 1988. Respondent No.1 filed execution proceedings being execution case No.25 of 1990 against respondent No.2-judgment debtor. On 25.04.1991, respondent No.1 obtained warrant for delivery of possession from the Executing Court against respondent no.2. When the bailiff went on spot to execute the warrant, he was resisted by the

appellant and his brothers along with 20-25 persons. Respondent No.1 filed application dated 06.05.1991 requesting to help of Magistrate and armed forces at his cost for executing the decree. It was at that stage, appellant filed a written application on 22.01.1996 before the executing Court for staying the warrant and deciding his objections. By rejoinder dated 01.02.1996, respondent No.1 raised the question of maintainability of such an application before handing over actual possession to the decree-holder. The Executing Court without adjudicating upon the objections of the appellant on merits and without deciding whether the obstruction or resistance offered by him was legally justified or not dismissed the application on 15.02.1996. The High Court of Patna confirmed that order on 17.05.1996. It is in that context, the Apex Court posed the following question for consideration:

“Whether the appellant who claims to be a stranger, occupying decretal premises in his own right and who has offered resistance to the execution of the decree obtained by the decree-holder against the judgment-debtor qua such property can request the Executing Court to adjudicate upon his resistance and obstruction without being insisted upon that first he must hand over possession and then only move an application under Order XXI Rule 99 Code of Civil Procedure ('CPC' for short)?

(emphasis supplied)"

8. It is in that context, the Apex Court held that the executing court as also the High Court were not justified in dismissing the application by observing that the only remedy to the appellant was to file application under Order XXI, Rule 99 after he is dispossessed of the suit premises. In the present case, it cannot be said that the obstructionist is a stranger. The decision in **Brahmdeo Choudhary's** case (*supra*) is not applicable to this case. For the reasons stated in paragraphs 8 to 10 of the impugned order, I do not find that any case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)