

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 638 OF 2018

Radhabai w/o Ramesh Ghule,
Age 43 years, Occupation Household,
R/o Khandoba Bazar, Parbhani
Dist. Parbhani.

...Appellant.

VERSUS

1. Panchappa s/o Maharudrappa Dharne,
Age 43 years, Occupation Agri. and
Service, R/o Jewali Tq.Omarga
Dist. Osmanabad.
(matter disposed of against R/1 as per
Court's Order dtd.05-02-2019).
2. Mallikarjun s/o Gurusangayya Swami,
Age 42 years, Occupation Service,
R/o LIC Colony, Khopegaon Road,
Latur Dist. Latur.
3. Bhiva s/o Pandurang Shendge,
Age 25 years, Occupation Agriculture,
R/o as above.
4. Dhondabai w/o Pandurang Shendge,
Age 57 years, Occupation Household,
R/o as above.
5. Vilas s/o Pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.
6. Shivaji s/o Pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.
7. Prakash s/o Pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.

8. Dnayaneshwar s/o Pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.
9. Somnath s/o pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.
10. Arjun s/o Pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.
11. Annapurna w/o Pandurang Shendge,
Age Major, Occupation Agriculture,
R/o as above.

...Respondents.

....
Advocate for appellant : Mr. Dr. Tawshikar S. D.
Advocate for Respondent No.2 : Mr. S. N. Morampalle
Advocate for Respondents No.3 to 8 and 10 :Mr. Shaikh
Mazhar A. Jahagirdar
....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
20-03-2019**

**Date of Pronouncing the Order :
25-04-2019**

ORDER :

1. Present appeal has been filed by the original objection petitioner. She has challenged the concurrent findings/ decisions in order below Exhibit 46 dated 17-06-2016, in Regular Darkhast No.33 of 2010. by learned Jt. Civil Judge, Senior Division, Latur, and the Judgment and decree passed in Regular Civil Appeal No.121 of 2016, by learned District Judge - 2, Latur on 26-02-2018.

2. The present appellant had filed application Exhibit 46 under Section 47 read with Order XXI Rule 97, 99 and 101 of Code of Civil Procedure. The present respondents are the original decree-holders in Regular Darkhast No.33 of 2010. A decree was passed in their favour in Regular Civil Suit No.465 of 1998 for possession. In order to get the said decree executed, they had filed the said execution proceedings, and the said suit was against the judgment-debtors No.1 to 9. It was contended by the present appellants in Exhibit 46 before the learned executing Court that, the subject matter of the suit as well as execution proceeding viz. plot Survey No.19/1 was belonging to her grandfather Tukaram Shendge. He was having Survey No.19/1 and 19/B. After death of Tukaram, the family partitioned the property left by him. In the said partition two landed properties and other properties were allotted to Pandurang Shendge who was the father of the present appellant and the judgment-debtors. The appellant contended that, her father is no more and the two lands are the joint family properties of her father. She is having 1/10th share in the said properties. She had no knowledge about the property bearing Survey No.19/1 as it was not included in RCS No.338 of 1984, which was a suit for partition amongst judgment-debtors. In fact original judgment-debtor No.2 had filed the said suit for herself and her minor children including the objection petitioner against Pandurang i.e. father of the objection

petitioner in respect of land Survey No.19/B. The said suit was compromised on 18-02-1987. It is stated that, all of them have got the share in that suit land, that is Survey No.19/B. It is stated that, she has incurred expenses for the medical treatment of judgment-debtor No.2. She was in need of money, and therefore, she had requested the judgment-debtors for the financial aid. When they expressed their inability, she requested them to effect the partition of Survey No.19/1. At that time they refused, and therefore, she has filed Special Civil Suit No.108 of 2014 for partition and separate possession in respect of land Survey No.19/1 as well as 19/B situated at village Kanheri Tq. Dist. Latur. Even the present decree-holder No.2 is a party to that suit. It was contended by her that, since she is having share in the suit property, the execution petition should be quashed and set aside as it is on the basis of a void decree.

3. The application was strongly opposed by the decree-holders by fling say at Exhibit 57. It is stated that, the application is nothing but result of a collusion between the petitioner and the judgment-debtors. She was aware about the litigation and still she did not do anything. She has no concern with the suit plot as well as no locus standi to file any objection in the execution petition. It is stated that, the decree has been confirmed up to this Court.

4. After hearing both the sides, the learned trial Court has rejected application Exhibit 46 on 17-06-2016, and the First Appellate Court has dismissed Regular Civil Appeal No.121 of 2016. Hence, second appeal.

5. Heard learned Advocate Mr. Dr. Tawshikar S. D. for appellant, learned Advocate Mr. S. N. Morampalle for Respondent No.2, learned Advocate Mr. Shaikh Mazhar A. Jahagirdar for Respondents No.3 to 8 and 10.

6. It has been vehemently submitted on behalf of the appellant that, both the Courts below have not considered the objections raised by appellant properly. Proper procedure has not been adopted. When application Exhibit 46 was contested by the decree-holders it ought to have been dealt with as suit by framing issues. When no such procedure is adopted and proper opportunity to lead evidence is not given, it is necessary to set aside the orders. Both the Courts have considered that, since the appellant is not in possession of the property, she cannot resist the application under Rule 97 to 101 of Order XXI of CPC. It was a wrong notion, and therefore he relied on the decision in, *Sardar Hasanbhai Attar Vs. Usman Papamiya Attar Shaikh and Ors.*, reported in 2008 (1) MhLJ 340, wherein it has been observed that,

“The scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97,

the Court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit."

Relying upon the decision in *Shreenath V. Rajesh*, reported in (1998) 4 SCC 543, it has been observed that,

"Expression "any person" under Sub-clause (1) is used deliberately for widening the scope of power so that the executing Court could adjudicate the claim made in any such application under Order 21, Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger."

Thus, it is held that,

"It was wrong to observe that a person who is not in possession cannot obstruct or resist the delivery of possession of immovable property in the execution application filed by the decree-holder."

He therefore, submitted that, the substantial question of law is arising in this matter.

7. Per contra, it has been submitted on behalf of the respondents- original decree-holders that, application Exhibit 46 is nothing but a good example to avoid execution of the decree and to prolong the matter. In fact the appellant was aware about all the proceedings. She was knowing hot and cold at the same time by saying at one breath that she has share in the property and at another breath she was claiming that there was a partition and in that she has received certain portion in the property. There was no documentary evidence to support the contention of appellant, and therefore, both the Courts below have rightly rejected the objections raised by the appellant.

8. Taking into consideration the checkered history what is required to be seen as to whether the present appellant had any right, title or interest which could have been protected by raising objection under Rule 97 to 101 to Order XXI of CPC. Here it is to be noted that, as per the claim of the appellant Regular Civil Suit No.338 of 1984 was filed by her mother when she was minor claiming partition. Survey No.19/1 was not the subject matter of that suit. Definitely a question would have been raised by the decree-holders for not including all the properties in hotch pot while claiming partition, however, that suit was compromised on 18-02-1987. The interest of the minor was protected by the mother herself. But now the appellant is coming with a case that, the

present property was not the subject matter in that suit, however she has share in the suit property. No doubt in view of the decision in *Shreenath Vs. Rajesh* (Supra) as well as *Sardar Vs. Usman* (Supra) it can be said that even a person who is not in possession of the property but having interest, title or right can file application for obstruction in respect of delivery of possession of immovable property. But here the basic question is as to whether the application has been filed with bonafide intention or not. The obvious answer is that, it is not filed with bonafide intention. She had filed Special Civil Suit No.108 of 2014 in 2014 whereas she filed the application Exhibit 46 on 29-11-2014. Even if we considered that it might have been simultaneous act on her part, yet there is no explanation as to why Plot No.19/1 was not the property for partition in Regular Civil Suit No.338 of 1984. At no point of time during the entire suit, first appeal or second appeal which was in favour of decree-holder, the judgment-debtors had ever tried to contend that, the proceedings are bad for non-joinder of the present appellant as party. The entire branch of Pandurng was represented, how and why the interest of appellant was either not protected or not cared by other judgment-debtors ought to have been explained by the decree-holder. She is not claiming independent right, title or interest on the basis that the property was already partitioned and she has 1/10th share as she had claimed in respect of land Survey

No.19/1 and 19/B. At another breath she was saying that, her father who was allegedly addicted to liquor and vices, he had sold the suit property. If she want to get read of the transaction executed by her father then definitely the remedy is elsewhere and not by way of obstruction to the execution petition. The appellant was also seeking protection contending that she has undivided share in the joint family property. Thus she cannot claim severance of status due to partition and as against it. Having undivided share that means partition not yet taken place in respect of suit property.

9. Important point to be noted is that, the said decree which was put to execution has been confirmed up to this Court and therefore definitely the decree-holder should enjoy the fruits of the decree. At any earlier point of time the other judgment-debtors had not raised any objection in respect of interest or right of the present appellant in the suit land. Both the Courts below have considered the facts properly, so also the basic point that application Exhibit 46 is nothing but an attempt to protract the execution of the decree, and therefore, the appellant has not come with bonafide intention; the application as well as appeal has been rightly dismissed. No substantial question of law is arising in this case, hence the second appeal is disposed of as **not admitted**.

(SMT. VIBHA KANKANWADI)
JUDGE