

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

**915 SECOND APPEAL NO.811 OF 2018
WITH
CA/12297/2018 IN SA/811/2018**

**KASHINATH SHIVAJI PAWAR
VERSUS
MANGALABAI DNYANESHWAR POPALGHAT**

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Mr. S.V. Suryawanshi and Mr. G.V. Mohekar, Advocates for the appellant

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**CORAM : SMT. VIBHA KANKANWADI,J.
DATE : 13th MARCH, 2019**

PER COURT :

1 Present appeal has been filed by judgment debtor No.3, challenging the judgment and decree passed in Regular Civil Appeal No 50 of 2014 by learned District Judge-1, Ambajogai, Dist. Beed on 11.07.2018; whereby appeal filed by him came to be dismissed. In the said appeal, the present appellant had challenged the orders below Exhs.41 and 45 in Regular Darkhast No.16 of 2013 by learned Civil Judge Senior Division, Ambajogai, dated 12.06.2014.

2 Present appellant had filed application Ex.41 in the said execution proceedings under Order 21 Rule 98 of the Code of Civil Procedure, 1908. The said execution petition was filed by the present respondent/original decree holder in order to put the decree passed in Regular Civil Appeal No.7 of 2009 arising out of Regular Civil Suit No.48 of 2006. Judgment debtor/appellant contended that he has constructed house on the suit property bearing CTS No.3809 in 1994. He had issued public notice about the construction. The suit property involved in the said decree was different. The boundaries are different. House No. 222/1 is open space and the house constructed by him is bearing No. 220/1. Without ascertaining the identity of property, the decree cannot be put to execution. Therefore, he raised obstruction to the execution of decree. Application Exh.45 was filed seeking permission to submit arguments.

3 Objection was raised by the decree-holder saying that applicant has not right to resist the execution of decree. He is judgment debtor No.3. The suit has been finally adjudicated and then in the execution proceedings, warrant for possession has been issued. Now, the objection in respect of identity of the property cannot be challenged.

4 Both the applications Ex.41 and 45 are rejected by the learned

Executing Court. Hence, judgment debtor No.3 preferred the said appeal. His appeal has been rejected after hearing both sides. Therefore, this Second Appeal has been filed.

5 Heard learned Advocate for appellant Mr. G.V. Mohekar. He submitted that both the Courts below have not followed proper procedure. The application was filed under Order 21 Rule 98 of the Code of Civil Procedure. The learned executing Court ought to have framed issues and opportunity ought to have been given for leading evidence. The said applications have been dismissed *in limine*. The learned Executing Court was duty bound to determine the points raised under Rule 101 of Order 21 of Code of Civil Procedure and ought to have passed Rule 100 thereof. In fact, the decree holder has given wrong description of the property in the suit. The possession warrant was therefore, earlier returned on the ground that the property is not traceable. Both the properties i.e. property belonging to appellant is different from the suit property. Under such circumstance, the decree cannot be executed as against the present appellant. The rights of the appellant i.e. right of audience has been denied. Hence, substantial questions of law are arising in this matter.

6 Learned Advocate for appellant has relied on the decision in

Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and another [AIR 1997

SC 856]; wherein it has been held that

“A conjoint reading of Order XXI Rules 97, 98, 99 and 101 projects the following picture:

(1) If a decree-holder is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order XXI Rule 35, then the decree-holder has to move an application under Order XXI Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist the Court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined by Order XXI Rule 97 sub-rule (2) read with Order XXI Rule 98. It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without just cause by the judgment-debtor or by some other person at his instigation or on his behalf then such obstruction or resistance would be removed as per Order XXI Rule 98 sub-rule (2) and the decree-holder would be permitted to be put in possession. Even in such an eventuality the order passed would be treated as a decree under Order XXI Rule 101 and no separate suit would lie against such order meaning thereby the only remedy would be to prefer an appeal before the appropriate appellate court against such deemed decree.

(2) *If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under Order XXI Rule 99, CPC claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication then as enjoined by Order XXI Rule 98 sub-rule (1) CPC the Executing Court can direct the stranger applicant under Order XXI Rule 99 to be put in possession of the property or if his application is found to be substanceless it has to be dismissed. Such an order passed by the Executing Court disposing of the application one way or the other under Order XXI Rule 98 sub-rule (1) would be deemed to be a decree as laid down by Order XXI Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order XXI Rule 101.*

In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order XXI Rule 97

sub-rule (1) and he cannot bypass such obstruction and insist on re- issuance of warrant for possession under Order XXI Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order XXI Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI Rule 99, CPC and pray for restoration of possession”.

Learned Advocate for appellant has submitted that the said guidelines have not been followed.

7 Taking into consideration the order and judgment passed by both the Courts below and submissions on behalf of appellant, it is not necessary to issue notice to respondent. Unless, the appellant shows possibility of framing of substantial question of law, it is not even necessary to issue notice to the other side.

8 The first and the foremost fact that is required to be considered is that, the present appellant was the party to the suit. He is judgment debtor No.3. He had the opportunity to bring all those points on record during the

course of trial and appeal etc. in the earlier round. The Second Appeal filed by the judgment debtors bearing S.A. No.411 of 2013 was dismissed by this Court on 31.07.2013. A submission was made by the appellants before learned Executing Court that they have preferred revision. However, the Court considered that there is no stay granted by this Court. That means, when appellant had the knowledge of dismissal of Second Appeal, yet proceed to file application for obstruction to execution of the decree, is nothing but an act of prolonging the matter.

9 The procedure laid down in AIR 1997 SC 856 cannot be disputed, but it relates to obstruction by stranger. Here, present appellant is not a stranger. The learned First Appellate Court has relied on the decision in Silver line Forum Pvt. Ltd. vs. Rajiv Trust and another [AIR 1998 SC 1754]; wherein it has been held that, the Executing Court is not obliged to determine a question merely because the resistor raised it. The question requiring determination should satisfy to adjuncts viz. it should arise legally between the parties and should be relevant for consideration and determination between the parties". Thus, it was not necessary for the executing Court, in this case, to proceed to frame questions for determination, merely because they were raised. Appellant in this case, is the judgment debtor and therefore, had every opportunity to raise all the

defences/obstructions at the time of trial. He failed in the said attempt. There is no question of giving him another chance. Therefore, no substantial question of law is arising in this matter requiring matter to be admitted.

10 For the aforesaid reasons, the appeal is disposed of as '**Not Admitted**'. Pending civil application is also disposed of accordingly.

(Smt. Vibha Kankanwadi, J.)

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