

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

923 SECOND APPEAL NO.723 OF 2016  
WITH  
CIVIL APPLICATION NO.14016 OF 2016

UDDHAV RAJARAM BADGUJAR  
VERSUS  
JIVAN VITTHAL BADGUJAR AND OTHERS

...

Mr. V.B. Patil, Advocate for the appellant  
Mr. M.M. Bhokarikar, Advocate for respondent Nos.1 to 12

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CORAM : SMT. VIBHA KANKANWADI, J.  
DATE : 23<sup>rd</sup> SEPTEMBER, 2021

**ORDER :**

1 Present appeal has been filed by the obstructionist, who had filed applications at Exhs.38 and 47 in Regular Darkhast No.52/2007 before learned Civil Judge Junior Division, Chopda, Dist. Jalgaon under Section 47 of the Code of Civil Procedure, 1908, though it has been later on considered by the Courts under Order XXI Rule 97 of CPC. Both the applications came to be rejected by the executing Court on 09.12.2015 and the appeal filed by the present appellant i.e. Civil Appeal No.70/2015 has been dismissed by learned District Judge, Amalner, Dist. Jalgaon on 30.09.2016.

2            Heard learned Advocate Mr. V.B. Patil for the appellant and learned Advocate Mr. M.M. Bhokarikar for respondent Nos.1 to 12.

3            It has been vehemently submitted on behalf of the appellant that both the Courts below failed to consider the provisions of Section 47 read with Order 21 Rule 97 to 101 of the Code of Civil Procedure. Those provisions are complete Code in itself. Both the Courts failed to record the reasons in proper and perspective manner, so also, the learned Trial Judge failed to give an opportunity to the applicant to lead evidence. In fact, when such objection has been taken, then it should be decided as a suit. Issues ought to have been framed and parties would have been allowed to lead evidence. It was contended by the present appellant by filing applications Exhs.38 and 47 in the execution proceedings that he is third party. He was not party to Regular Civil Suit No.204/1996, which was filed by the predecessor of the present respondent Nos.1 to 12 for eviction against one Manohar Badgular, predecessor of present respondent Nos.13 to 16. The decree passed in that proceeding has been confirmed up to this Court and Manohar and his legal representatives were directed to hand over the vacant possession of the suit property to the original plaintiffs. In fact, the appellant and his deceased brother Manohar were tenants in the suit property and they are enjoying the suit property in that capacity. The appellant is also having

his share in the suit premises since 1982 and he is also residing in the premises. They were tenants since 1952. According to the appellant, after he came to know about the confirmation of the decree by this Court, he approached the Executing Court and moved applications Exh.38 and 47 praying the Executing Court that the possession should not be handed over and he may be permitted to lead evidence. Since he was not party to the previous litigation, the decisions are not binding on him. Both the Courts below failed to consider the legal principles in not allowing the applicant to lead evidence.

4 Reliance has been placed by the learned Advocate for the appellant on the decision in **Sardar Hasanbhai Attar vs. Usman Papamiya Attar Shaikh, 2008 (1) AIR Bom.C.R. 646**, wherein it has been held that –

“The First Appellate Court rejected the plea of the applicant on the ground that for an objection under Rule 97 of Order 21, objector has to show a prima facie right to property and possession is a necessary ingredient of it.”

Then it was held that –

“Appellants were admittedly co-sharers of the property in dispute for which suit was pending in other Courts. In view of it Courts rejecting their objection without giving them an opportunity to prove their right is not correct. There is no proposition that under Rule 97, Order 21, only a party in possession of property can object to execution.

Order 21, Rules 97 to 101 are a complete Code by themselves and Executing Court has to redress their grievances by finally adjudicating same in execution proceedings itself.”

4.1 Further reliance has been placed on the decision in **Noorduddin vs. K.L. Anand, 1995 (1) SCC 242**, wherein it has been held that -

“The execution court dismissed the application against execution proceedings which was not proper. The executing court and the High Court did not appreciate the scheme under Order 21 Rule 97 properly. The adjudication before execution is an efficacious remedy to prevent fraud oppression, abuse of process of the court or miscarriage of justice. The court has to wisely evolve its process to aid expeditious adjudication and would preserve the possession of the property in the interregnum based on factual situation.”

4.2 Further reliance has been placed on **Shreenath vs. Rajesh, 1988 AIR (SC) 1827**, wherein it has been held that - *“A third party who is in possession claimed independent rights as tenant is competent to raise objections against execution of the said decree and can get his claim adjudicated when he is sought to be disposed.”*

4.3 Further reliance has been placed on **S. Rajeshwari vs. S.N. Kulasekaran and others, 2006 BCI 49 (SC)**, which is also on the same line.

4.4 Further reliance has been placed on **Sarojini Visitacao Nunes vs. Lennet Godinho (Smt.) and others, 2008 BCI 105** (Bombay High Court)

(PNAJI BENCH), wherein it has been held that -

“Court considered if appropriate in interest of justice to set-aside impugned order and direct Executing Court, first go into question whether objection raised by respondents are tenable under Section 47 of Code and if answer affirmative, Court shall make enquiry. Executing Court however, at liberty to permit evidence for purpose of determining whether objections are pertaining to execution or otherwise.”

5           Relying upon these factual aspects and also on the documents, which were produced before the Trial Court, the learned Advocate appearing for the appellant submitted that substantial questions of law are arising in this case and, therefore, the Second Appeal deserves to be admitted and the stay to the further proceedings in the execution needs to be granted.

6           Per contra, the learned Advocate appearing for the respondent Nos.1 to 12 supported the reasons given by both the Courts below and further submitted that no substantial questions of law are arising in this case. It was submitted that since 1996 the original plaintiff and his successors are fighting for getting possession of the suit property. At no earlier point of time the present appellant had raised objection. He had not tried to get himself added as a party defendant/respondent. The decree passed in favour of the respondent-plaintiff is confirmed up to this Court and then the appellant has

come forward with a case that he was not aware about the proceedings and in fact, he is in possession of the property. Both the Courts below have considered the documents, those have been produced before the Executing Court, and have arrived at a conclusion that none of those documents accept that the appellant was possessing the suit property as tenant. He cannot raise the objection under Section 47 read with Order 21 Rule 97 to 101 of the Code of Civil Procedure. No substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, are arising as there are concurrent findings.

7           Reliance has been placed on the decision in **Suresh Kumar through GPA vs. Anil Kakaria and others, AIR 2017 SC 5239**, wherein it has been held that - *“Concurrent findings of facts based upon appreciation of evidence are binding in nature and cannot be interfered with when such findings are neither perverse nor against the provisions of law.”*

8           At the outset, the document is required to be considered. Original plaintiff Vitthal Nimba Badgujar is admittedly the owner of the suit property. He had come with a case in Regular Civil Suit No.204/1996 that original defendant Manohar Rajaram Badgujar was monthly tenant. Plaintiff claimed that his son is in need of suit property to run new business in the suit premises and also the family is growing. Thus, on the ground of bona fide

requirement the possession of the suit property was claimed. The suit was resisted by Manohar by filing written statement. Though he contended that the suit suffers from non joinder of necessary parties, he had not named the person, who should have been made party to the suit. Other allegations were denied regarding bona fide requirement. It was then also stated that earlier also there was a suit filed for possession bearing Regular Civil Suit No.157/1977 and that went up to this Court and the decisions were in favour of him. It was then contended that his father was earlier tenant and after the demise of his father the suit property is in possession as tenant. He is running a business under the name "Subhash Iron Works". He contended that his family consists of defendant Nos.1 to 4 (this was the contention of the legal representatives of Manohar, who were brought on record after his death). They run the business which was started by Manohar. Thus, important point to be noted is that when the written statement was filed on 08.02.2000, no contention was taken by them that any part of the suit premises is in possession of the present appellant, that too, in the capacity as tenant. Neither in the cross to the plaintiff's witness nor in his examination-in-chief the original defendant No.2 Subhash had ever stated that present appellant has possessed of any part of the property as tenant. It was not even contended that any other person or the family of the said person reside along with legal representatives of Manohar.

9           The present appellant is then contending that he is running the business under name and style as “Sunil Electrical and Mechanical Iron Works” since 1982. None of the documents, produced by him, are in the name of this business. He has not produced the Shop Act licence standing in the name of “Sunil Electrical and Mechanical Works”. No doubt, he has filed certain rent receipts but it is to be noted that they are in the name of Manohar and not in the name of present appellant. It appears that he has filed certain documents such as - Electricity receipts, Shop Act licence, property holder’s information card, application made to M.S.E.B. etc., but they are not in his name or they are not showing that the original plaintiff had accepted him as tenant, at any point of time. Important point to be noted is that in the suit it was contended that the business, which is run from the suit premises is under the name and style as Subhash Works. Present appellant does not contend that business under the name and style as “Subhash Works” is the family business and he is also having interest therein. Why he allegedly started another business under name and style as “Sunil Electricals” has not been explained by him. Under these circumstances, both the Courts were justified in holding that mere production of those documents do not confirm the character or status of the applicant/appellant. It is hard to believe that the appellant would not have come to know about the litigation, which Manohar was fighting since 1996, if the appellant was

residing in the same premises and carrying on business. The applications at Exhs.38 and 47 are nothing but an attempt to protract the matter and keep the plaintiff/plaintiff's legal representatives away from the fruits of the decree.

10           The decisions on which the learned Advocate for the appellant has relied, the ratio laid down therein cannot be disputed, however, the appellant cannot get benefit of the said ratio, for the simple reason, firstly that the facts are different and another that the appellant has come before the Executing Court at a very belated stage. In almost all the authorities, relied by the learned Advocate for the appellant, the party who was raising objection had independent right, as it has been so held and there was evidence in their favour to show their prima facie case. Even in **Sardar Hasanbhai Attar** (supra) what was tried to be conveyed that the First Appellate Court had rejected the plea on the ground that the objector could not show prima facie right to the property, but then on the facts it was held that the appellants before this Court was admittedly the co-sharers of the property in dispute. Here, there is absolutely no record to show that the appellant was admittedly co-tenant. The original defendant or his heirs had not accepted the present appellant as one of the heirs or tenants to the suit premises. Further, this Court in **Sarojini Visitacao Nunes** (supra) has also

observed that the Executing Court, however, had liberty to permit evidence for the purpose of determining whether objections are pertaining to execution or otherwise, that means, the discretion has been given. The discretion should therefore be exercised judiciously. Here, in this case, both the Courts after scanning the evidence on record had come to the conclusion that there are no such documents with the defendant to show his character as tenant. Some reference to the address of the suit property on his documents will not make him tenant.

11 Under such circumstance, no substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, are arising in this case requiring admission of the Second Appeal. It deserves to be dismissed. Accordingly, it is dismissed. Pending Civil Application is disposed of.

**( Smt. Vibha Kankanwadi, J. )**

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