

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

WRIT PETITION NO. 2398 OF 2020

1. Kumari Asha Parekh
Aged about 77 years,
Occ. Artist, R/at. Iona,
7th Floor, Juhu Koliwada,
Mumbai – 400 049.

2. Dr. Mugatlal Bhagwandas Shah
Age 89 years, Occ. Doctor,
Rajni Villa, Jame Jamshed Road,
Matunga, Mumbai – 400 019.

3. Dr. Suketu Manohar Shah
Age 66 years, Occ. Doctor,
Indian Inhabitant, R/at.
16/C, Laxmi Estate, Old
Nagardas Road, Andheri (E),
Mumbai – 400 069.

...Petitioners

Vs.

1. M/s. Madhav Motors Stores Pvt. Ltd.
A Company registered under provisions
of Companies Act, 1956 and having its
Registered Office at 11, S. V. Road,
Andheri (West), Mumbai – 400 058.

2. Bharat Petroleum Corporation Ltd.
A Company registered under the Companies
Act, 1956, having its registered office at
Bharat Bhavan, 4 & 6, Currimbhoy Road,
Ballard Estate, Mumbai – 400 038.

3. Mr. Ashish Vinodkumar Aggarwal
Age 43 years, Occ. Business,
Nos.1 to 3 R/at. Aggarwal House,
49-A, Presidency Co. Op. Housing Society,
JVPD Scheme Road No.7,
Mumbai – 400 049.

...Respondents

**WITH
CIVIL REVISION APPLICATION NO. 430 OF 2018**

M/s. Madhav Motor Stores Pvt. Ltd.
A Company registered under provisions
of Companies Act, 1956 and having its
Registered office at 11, S. V. Road,
Andheri (West), Mumbai – 400 058 and
at S. V. Road, Santacruz (West)
Mumbai – 400 054.

..Applicant

V/s.

1. Dr. Mugatlal Bhagwandas Shah,
Adult, Practicing Doctor of Mumbai,
Indian Inhabitant, R/at. Rajni Villa,
Jam-e-Jamshed Road, Matunga,
Mumbai – 400 019.
2. Dr. Jayesh Nagardas Doctor,
Adult, Practicing Doctor of Mumbai,
Indian Inhabitant, R/at. Chitrakunj
18, New India Co. Op. Hsg. Society,
JVPD Scheme, Mumbai – 400 056.
3. Mr. Chandrakant Chhaganlal Tambawala
(Since deceased), substituted by
Shri Sudhin C. Mazumdar,
Adult, Hansrajwadi, Tagore Road,
Santacruz (West), Mumbai – 400 054.
4. Dr. Suketu Manohar Shah
Adult, Occ. Doctor,
Indian Inhabitant, R/at. 16/C,
Laxmi Estate, Old Nagardas Road,
Andheri (East), Mumbai – 400 069.
5. Mr. Navnitlal Chhaganlal Dalal,
(Since deceased), substituted by
Shri Navin I. Marafatia
Adult, A/7, Hari Preet,
St. Andrews Road, Santacruz (E),
Mumbai – 400 054.

6. Kumari Asha Parekh
Adult, Occ. Artist,
R/at Jone, 7th Floor, Juhu
Koliwada, Mumbai – 400 049.

7. Shri Vinodkumar Aggarwal,
Adult, Occ. Business,

8. Shri. P. K. Aggarwal,
Adult, Occ. Business,

9. Mr. Ashish Vinodkumar Aggarwal
Adult, Occ. Business,
No.7 to 9 R/at. Aggarwal House,
49-A, Presidency Co. Op. Housing Society,
JVPD Scheme Road No.7,
Mumbai – 400 049.

..Respondents
(Orig. plaintiffs)

10. Bharat Petroleum Corporation Ltd.
A Company registered under the Companies
Act, 1956, having its registered office at
Bharat Bhavan, 4 & 6, Currimbhoy Road,
Ballard Estate, Mumbai – 400 038.

...Respondent
(Orig. defendant)

Mr. S. C. Naidu a/w. Mr. Manoj Gujar, Aniketh Poojary, Sudeshkumar Naidu i/b. C.R. Naidu & Co. for the Petitioners in WP No.2398 of 2020 and for the Respondent Nos.1,4 and 6 in CRA No.430 of 2018.

Mr. Ranjit Thorat, Senior Advocate for the Respondent No.1 in WP No.2398 of 2020 and for the Applicant in CRA No.430 of 2018.

Mr. S. R. Page for the Respondent No.2 in Writ Petition No.2398 of 2020 and for the Respondent No.10 in CRA No.430 of 2018.

CORAM : C.V. BHADANG, J.

RESERVED ON : 10th MARCH 2021

PRONOUNCED ON : 4th MAY 2021

:COMMON JUDGMENT:

. This is yet another case which fortifies that it is easy to obtain a decree than to get it executed.

2. This is a case, where the obstructionist (who according to the decree holder is a sub-lessee/dealer of the original defendant) is obstructing the execution of the decree, for eviction, although the original lessee is willing to surrender possession, and at the same time is also resisting the claim for compensation/occupation charges, although being in possession of the suit property, which is commercial in nature.

3. The Writ Petition and the Civil Revision Application are between the same parties and have been directed to be heard together. This Court had also indicted that the matters will be taken up for final disposal. Accordingly, the parties are heard and the civil revision application and the writ petition are being disposed of finally by consent of parties. For the sake of convenience, the facts are narrated with reference to the Writ Petition.

4. The Petitioners in Writ Petition No. 2398 of 2020 are the Trustees of Santacruz Resident Association ('SAR' for short), which is a public charitable trust registered under the Maharashtra Public Trust Act, 1950.

5. The first Respondent M/s. Madhav Motor Stores Pvt. Ltd, (the obstructionist) is a company incorporated under the Companies Act, 1956. The second Respondent, Bharat Petroleum Corporation Limited ('BPCL') (original defendant) is the successor of the erstwhile Burmah Shell Oil Storage and Distribution Company of India Ltd. ('Burmah Shell' for short). The first respondent was appointed as a dealer by BPCL to run a Fuel Outlet and a 'Lubritorium' on the suit property.

6. The property in dispute is a land admeasuring about 1890 sq. ft. from out of CTS No. G-111 and G-115(part), bearing plot No. 43 and 91 TPS-II at Bandra, Mumbai, with a built up structure admeasuring 758 sq. ft. There is no dispute about the description of the suit property.

7. The plaintiff SAR under an indenture of lease dated 04.01.1957 had leased out the suit property to Burmah Shell, for the

purpose of installation and operation of a petrol pump for dispensing fuel and other petroleum products. As stated earlier, BPCL is the successor of Burmah Shell and the tenancy rights had vested in BPCL. The lease expired on 30.07.1975. However, BPCL continued to be in possession of the suit property as a tenant at sufferance.

8. It appears that SAR (plaintiff) by virtue of a notice dated 20.06.2000 terminated the tenancy rights of BPCL w.e.f. 01.08.2000 calling upon BPCL to handover vacant and peaceful possession of the suit property, which notice went uncomplished.

9. The then trustees of SAR filed an eviction suit being Suit No. T.E. & R. Suit No. 86/96 of 2001 before the Small Causes Court at Mumbai (Bandra Branch) for eviction, *inter alia* on the ground of bonafide requirement amongst others. It may be mentioned that BPCL was the sole defendant in the said suit. The suit came to be decreed on 27.04.2005, which was challenged by BPCL before the Appellate Bench of the Small Causes Court in Appeal No. 152 of 2005. It appears that BPCL sought leave to withdraw the appeal which was accordingly dismissed as withdrawn on 07.10.2005. The eviction decree has thus attained finality.

10. The plaintiff filed Misc. Notice No. 185 of 2005 for determination of the mesne profits from August, 2000. According to the plaintiff, based on the valuation, the compensation was Rs.94,300/- per month as on 01.08.2000.

11. However, BPCL issued a letter to the plaintiff on 12.09.2005 proposing to surrender the possession of the suit property subject to withdrawal of the notice for mesne profits. It appears that BPCL also issued a letter dated 26.09.2005 to the first Respondent (obstructionist) to remove its belongings from the suit property *inter alia* on the ground that the licence has been withdrawn by the explosive department since 1989, as the site does not comply with the minimum safety distance stipulated by the explosive department. It was also intimated that BPCL had decided to handover vacant possession of the suit property to the plaintiff. The first respondent (obstructionist), refused to comply with the instructions of its principal BPCL. The obstructionist filed RAD Suit No. 681 of 2005 claiming protection on the ground that it was a 'deemed tenant' of the suit property. That suit is still pending.

12. The first Respondent did not secure any interim order in the RAD Suit. The first respondent however opposed the execution

of decree in favour of the SAR (plaintiff). The plaintiff/decreed holder filed Obstructionist Notice No. 12 of 2010. The first Respondent opposed the said notice by filing application (Exh.4) on the ground of limitation and also on the ground that it was a 'deemed tenant' of the suit property and sought dismissal of the obstructionist notice.

13. The learned Trial Court by an order dated 13.08.2015 refused to dismiss the obstructionist notice holding that it is filed within limitation. That was challenged by the first respondent in revision application No. 151 of 2015, which was dismissed by the Appellate Bench on 14.03.2018. The first Respondent has challenged the said order in CRA No. 430 of 2018.

14. In the meanwhile, BPCL challenged the judgment and order dated 13.08.2019 passed by the learned Trial Court in Misc. Application No. 185 of 2005 determining mesne profits, which was confirmed by the Appellate Bench of the Small Causes Court vide judgment and order dated 08.05.2015. The second Respondent BPCL challenged the said order before this court in CRA No. 727 of 2015, which was dismissed on 04.07.2016 and that has not been

carried any further. Thus the order for payment of mesne profits by BPCL has also attained finality.

15. The Petitioner (plaintiff) filed execution application No. 7 of 2018 (in Misc. Application No. 185 of 2005) for a direction to the original defendant BPCL to deposit the amount as ordered w.e.f. 01.08.2000 (the date of determination of the tenancy) till handing over of the possession.

16. The second respondent BPCL preferred an application (Exh.8) seeking to deposit a sum of Rs.65,64,000/- towards mesne profits for the period from 01.08.2000 to 31.07.2010 along with interest of Rs.46,82,274/-. According to BPCL, it was not liable to make payment of mesne profits on and after 01.08.2010 on the ground that BPCL was ready and willing to surrender the possession of the suit property and consequently, were not in occupation of the same.

17. The second Respondent BPCL deposited an amount of Rs.1,12,46,274/- in the Trial Court towards mesne profits for the period from 01.08.2000 to 31.07.2010, which has been withdrawn by the Petitioner (original plaintiff).

18. The Petitioner filed application (Exh.12) in the obstructionist notice No. 12 of 2010 seeking a direction to the first Respondent (obstructionist) to deposit interim compensation at the rate of Rs.54,700/- per month (at the same rate at which mesne profits are granted against BPCL) from 01.08.2010 till the date of filing of the application and to continue to deposit the same. The Trial Court by an order dated 02.02.2019, placing reliance on decision of the Supreme Court in *Marshall Sons & Co. (I) Ltd. v/s Sahi Oretrans (P) Ltd and Another*¹ allowed the application Exh.12 directing the first Respondent to deposit the interim compensation/ mesne profits as prayed.

19. The first Respondent challenged the said order before the Appellate Bench in revision application No. 101 of 2019. The Appellate Bench by a judgment and order dated 20.01.2020 has allowed the revision application. As a result of which, application Exh.12 stands rejected. This order is subject matter of challenge in Writ Petition No. 2398 of 2020.

¹ (1999) 2 SCC 325

20. I have heard the learned counsel for the parties. With the assistance of the learned counsel for the parties, I have gone through the record.

CRA 430/2018

21. It is submitted by Mr. Thorat, the learned Senior counsel for the applicant that the application (Exh.12) filed by the plaintiff / decree holder on 12/8/2010 was clearly barred by limitation under Article 129 of the Limitation Act. It is submitted that thus the objection raised by the applicant on the ground of limitation, ought to have been upheld. Mr. Thorat, in this regard has submitted that the first application was numbered as Misc. Notice No.256/2005 followed by the R.A.D. Suit No.685/2005. He further pointed out that there were two caveats filed, one in the execution application and other in Appeal No.152/2005 on 21/10/2005. He pointed out that the learned Additional Chief Judge by a judgment and order dated 29/10/2005 recorded the objection and did not pass any order in the execution application nor any possession warrant was issued. He pointed out the judgment and order passed in the Misc. Notice No.185/2005 for fixation of mesne profits and the judgment and decree dated

8/5/2015 passed by the Appellate Bench in Misc. Appeal No.53/2010 where the Courts have noticed the obstruction / objection raised by the applicant. It is therefore submitted that on more occasions than one the Courts have noted the obstruction / objection of the applicant and the application (Exh.12) filed by the plaintiff / decree holder on 12/8/2010 was clearly barred by limitation as it was not filed within 30 days of the date of resistance or obstruction as per Article 129 of the Limitation Act. Mr. Thorat, submitted that it is open in such a case for the decree holder to seek a fresh warrant of possession and if there is yet another obstruction to the said warrant, it is open to the decree holder to seek orders under Order XXI Rule 97 of Code of Civil Procedure (CPC). For this purpose, reliance is placed on the decision of this Court in ***Subhan Bi Sheikh Noor and Another (Decree-holders) Vs. Abdul Samad Haji Abdul Raheman and Others (Obstructors)***².

22. On the contrary, it is submitted by Mr. Naidu, the learned counsel for the respondent / decree holder that the ground of bar of limitation has rightly been negated by the Courts below. The learned counsel has placed reliance on the decision of this Court

² 1978 Mh.L.J. 519

in *Harish Kawa Vs. P. T. Mehta*³ in order to submit that the ground of limitation has rightly been negated. It is submitted that the legislative mandate as noticed by the Supreme Court is that the persons armed with decrees for possession have been suffering endlessly because of procedural wrangles and obstruction. He pointed out that after amendment of 1976, the CPC envisages determination of all disputes, under one set of procedural laws, so that, the parties do not have to litigate by filing a fresh suit. It is submitted that this Court in the case of *Harish Kawa (supra)* has also noted the decision of the Supreme Court in *Challamane Huchha Gowda V/s.M.R. Tirumala and Another*⁴ and has held that the execution is the enforcement by the process of the Court of its orders and decrees. It has been held to be in furtherance of the inherent powers of the Court to carry out its orders or decrees. He pointed out that there is a power coupled with a duty in the executing Court to execute the decree. Otherwise it will result in negation of justice and Rule of law. He submitted that Article 129 of the Limitation Act would not apply from the date of the judgment and order dated 29/10/2005 or on the basis of the observations in

³ 2006(1) Bom.C.R. 70

⁴(2004) 1 SCC 453

the judgment of the Trial Court or the Appellate Court arising out of the mesne profits proceedings.

23. I have carefully considered the rival circumstances and the submissions made.

24. It is a matter of record that the eviction decree is passed on 27 April 2005 and the execution is pending before the trial court. It is also a matter of record that the applicant/obstructionist had filed his objection to the execution in October 2005 being Misc notice no 256/2005 on the ground that it was in possession of the suit property. That objection was pending. In 2010 a submission was made on behalf of the plaintiff/decreed holder to record the objection/obstruction. The trial court recorded the obstruction on 20 July 2010 and the said notice was disposed off. The plaintiff thereafter filed application Exh.12 on 12 August 2010 for possession after removal of the obstruction/resistance. The petitioner raised an objection Ex 4 thereto on the ground of limitation which has been concurrently negated by the courts below.

25. The trial court has held that the matter is not governed by Article 129 as it speaks of possession 'after removal of

obstruction' and on the ground that even otherwise the obstruction is recorded on 20 July 2010 and as such the obstructionist notice filed on 12 August 2010 is within limitation. In short the trial court finds that the starting point of limitation is 20 July 2010. The appellate Bench has concurred with the same on the additional reason that in view of the decision in the case of *Smt. Tahera Sayeed Vs. M. Shanmugam and Others*⁵ and *Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and Anr.*⁶ even the application of the obstructionist or the counter of the plaintiff or the bailiff report about obstruction/resistance and the consequent failure to execute the decree can be treated as an application under Order XXI Rule 97 of CPC.

26. At the outset, it is necessary to note that the Courts below are not justified in holding that Order XXI Rule 97 of CPC would operate and can be availed of only after the removal of resistance or obstruction. There is a separate Rule 99 under which the obstructionist can seek restoration, on the ground that he has been wrongly dispossessed. Thus, although the reading of the provisions of Order XXI Rule 97 to that extent, by the Courts below,

5 AIR 1987 Andhra Pradesh 206

6(1997) 3 SCC 694

may not be correct, I do not find that the ultimate rejection of the contention that the application / action under Order XXI Rule 97 of CPC was barred by limitation, requires interference. It is now well settled that the claim as to right, title or interest of ‘any person’, who offers resistance / obstruction to the execution of the decree, inter alia on the ground that he is not bound by the decree, being a stranger, has to be adjudicated by the executing Court in accordance with the provisions contained in Rule 98 to 103 of Order XXI of CPC. It is further well settled that these provisions are a complete code in itself and they aim at the execution of the decree without any further delay or multiplicity of proceedings. The mandate of Order XXI Rule 97 of CPC and the subsequent provisions has been noted by the Supreme Court including in its decision in *Challamane H. Gowda (supra)*. The Supreme Court in the said case (which has been noted by this Court in the case of *Hari Kawa (supra)*) has held that the execution is the enforcement by the process of the Court of its orders and decrees and it is in furtherance of the inherent powers of the Court to carry out its orders and decrees.

The Division Bench of this Court in *Hari Kawa (supra)* has held that “to say the least this power is coupled with a duty, otherwise, it would result in negation of justice and rule of law”.

27. Coming to the present case, it is a matter of record that although the applicant had filed, the notice being Misc. Notice No.256/2005, the executing Court had noted the obstruction and had disposed of the said notice on 28/7/2010 after which the respondent / decree holder had sought for execution of the decree under Order XXI Rule 97 of CPC, on 12/8/2010. Thus, in my considered view, no exception can be taken to the finding recorded by the Courts below refusing to uphold the ground of limitation.

28. At this stage, a brief reference can usefully be made to the decision of the Supreme Court in the case of *Brahmadev Choudhary (supra)* in which the Supreme Court has inter alia held that the words “any person” under Rule 97(1) includes a stranger. The Supreme Court has further held that once the resistance is offered by a purported stranger to a 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(1) of CPC. It has further been held that the scheme envisaged by Order XXI Rule 97 of CPC, provides a statutory remedy both to the decree holder, as well as the obstructionist to get proper adjudication before the executing Court, which adjudication is subject to the hierarchy of appeals.

29. The question before the Supreme Court in the case of *Brahmadev Choudhary (supra)* was whether the stranger / obstructionist can be asked to wait till he is dispossessed and then to approach the executing Court under Order XXI Rule 99 of CPC, for restoration of possession, on the ground that he is wrongfully dispossessed. In the wake of such a question the Supreme Court, has observed that the statutory scheme of Order XXI Rule 97 provides remedy both to the decree holder as well as to the obstructionist. Thus, in my humble view, even assuming that the initial obstruction / objection (not the physical obstruction to the warrant of possession on the spot but by filing the notice in the year 2005) was by the applicant, the same alongwith the application filed by the respondent / decree holder can be considered by virtue of the provisions of Order XXI Rule 97 and can be adjudicated upon on merits. It is trite that neither objection raised by the applicant nor the application filed by the respondent / decree holder under Order XXI Rule 97 has yet been adjudicated on merits. In view of the decision of the Supreme Court in the case of *Brahmadev Choudhary*, I do not find that the objection on the ground of limitation can be sustained.

30. A brief reference at this stage may be made to the other decisions on which reliance is placed on behalf of the applicant. In the case of *Ram Chandra Verma V/s. Manmal Singhi & Anr.*⁷ before the Sikkim High Court, the objection raised by the obstructionist, to the execution of decree, by filing an application that he was not bound by the decree, was rejected by the executing Court without holding any inquiry, as to whether the obstructionist was bound by the decree or not. It can thus be seen that the case turned on its own facts. The High Court in the circumstances held that the executing Court should have stayed its hands in the matter leaving it to the decree holder to proceed under Rule 97 or in such other manner as he might have thought fit.

31. In the case of *Smt. Tahera Sayeed Vs. M. Shanmugam and Others*⁸, the Andhra Pradesh High Court held that when the third party, not bound by the decree approaches the Court to protect his independent right, title or interest before he is actually dispossessed from the property and files an application under Order XXI Rule 97 of CPC, it has to be treated as an intimation to the Court, and as caveat to the decree holder or purchaser and the

⁷ AIR 1983 Sikkim 1

⁸ AIR 1987 Andhra Pradesh 206

Court would be obliged to adjudicate the same under Rule 98 or Rule 101 of Order XXI of CPC. Thus, even in the case of *Tahera Sayeed (supra)* the Court has held that the application given by the obstructionist can be treated as an intimation which needs to be adjudicated in accordance with Rule 98 onwards of Order XXI of CPC.

32. In the case of **Ubaldino Oliveira Vs. Sadanand Ladu Borkar, Since deceased represented by LRs.**⁹ the petitioner was the obstructionist whose application under Order XXI Rule 97 obstructing the execution of the decree was rejected by the Courts below, without adjudicating upon his independent right to the suit premises on the ground that the application at the instance of the obstructionist was not maintainable under Order XXI Rule 97 of CPC. In short, the executing Court had found that it is only the decree holder in possession who can apply in such a case for removal of obstruction to the execution of the decree and it was held that the remedy of the obstructionist would only lie under Rule 99 to seek restoration of possession after he is dispossessed. This Court found that the application by the obstructionist could not have been dismissed on a technical ground and ought to have been

⁹ 1996(5) Bom.C.R. 425

adjudicated in accordance with the provisions contained in Rule 98 onwards.

33. In my considered view, the legal position which emerges is that the obstruction including an attempt to obstruct or oppose the execution of the decree by a person / stranger on the ground that he is not bound by the decree can also be considered, alongwith the specific claim by the decree holder for execution of the decree, after removal of such obstruction / resistance under Order XXI Rule 97 of CPC. At the cost of repetition, it is necessary to emphasis that the claim of the applicant as a stranger, that he being not bound by the decree has not been adjudicated by the executing Court on merits. Looked from any angle, the rejection of the objection on limitation does not suffer from any infirmity. Consequently, the revision application is liable to be dismissed.

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34. It is submitted by Mr. Naidu, the learned counsel for the Petitioner that admittedly, on account of the obstruction / resistance of the first respondent /obstructionist, the decree cannot be executed and the first respondent continues to be in possession of the suit property. He pointed out that the obstructionist was a mere

dealer / agent of BPCL and after the decree for eviction was passed against BPCL, the possession has become unauthorised. He pointed out that there is no privity of contract between the petitioner and the obstructionist. He submitted that the basis for grant of mesne profits, is the unauthorised possession of a party and in that view of the matter, the respondent / obstructionist is liable to pay the mesne profits. He pointed out that BPCL has taken a stand that it is not liable to pay the mesne profits on and after August 2010 as it was and is ready and willing to surrender possession. It is submitted that the decree holder cannot be placed in a situation where it would be deprived of the mesne profits although the possession has become unauthorised. He placed reliance on the decision of the *Patna High Court in Damodar Narain Choudhry and Others Vs. S. A. Miller and Others*¹⁰ and of the *Calcutta High Court in Chhagmull Agarwalla Vs. Amanatulla Mahammad Prodhan*¹¹ and *Marshall Sons (supra)*. He submitted that the Appellate Bench was in error in interfering with the order passed by the Trial Court directing the respondent / obstructionist to pay the mesne profits. The learned counsel was at pains to point out that the obstructionist, although a mere agent / dealer of BPCL, is obstructing the execution of the

10 AIR 1921 Patna 102

11 MANU/WB/0531/1924

decree and even opposing the claim of mesne profits, which is highly unjust and inequitable.

35. Mr. Thorat, the learned Senior counsel for the respondent / obstructionist has pointed out that by virtue of the judgment and decree dated 13/8/2009 in Misc. Notice No.185/2005, BPCL has been held to be liable to pay the mesne profits till delivery of possession. He pointed out that BPCL has been directed to pay the mesne profits from 1/8/2000 till the date of handing over of possession which order has been upheld by the Appellate Bench and confirmed by this Court in Civil Revision Application No.727/2015. It is submitted that thus the order fixing liability to pay the mesne profits on BPCL having attained finality, the petitioner cannot seek a similar order for recovery of the mesne profits/compensation from the respondent / obstructionist. It is submitted that thus in the facts and circumstances of the case, the Appellate Bench was justified in reversing the order passed by the Trial Court.

36. It is undisputed that the decree of eviction passed against BPCL, has attained finality. Even the order of mesne profits passed by the Trial Court in Misc. Notice No. 185 of 2005 directing

BPCL to pay the mesne profits at the rate of Rs.50 Sq. ft., per month for the built up area of about 758 sq. ft and at the rate of Rs.30 Sq. ft. per month for the open land of about 560 sq. ft. has also been confirmed by this Court. It is a matter of record that the mesne profits are directed to be paid by BPCL w.e.f. 1/8/2000 till delivery of possession alongwith interest at the rate of 6% per annum. It is further undisputed that BPCL has deposited the amount of mesne profits alongwith interest for the period from 1/8/2000 to 31/7/2010 which have been withdrawn by the petitioner. The question is about the payment of mesne profits from 1/8/2010 onwards.

37. The record discloses that the petitioner filed application (Exh.12) in the obstructionist Notice No.12/2010 seeking direction to the obstructionist to pay compensation at the same rate of Rs.54,700/- per month as determined in the mesne profits Application No.185/2005 by which the judgment debtor was directed to pay equivalent sum by way of mesne profits. That application was allowed by the Trial Court which order has been set aside by the Appellate Bench.

38. A perusal of the impugned judgment and order shows that the order has been set aside on the ground that (i) the original defendant (BPCL) has been directed to pay the mesne profits till delivery of possession, (ii) the contention of the defendant (BPCL) that the obstructionist is liable to pay the mesne profits has been rejected by the Courts all along which has been confirmed by this Court, (iii) there cannot be two decrees / orders for payment of mesne profits in respect of the suit premises at the one and the same time, (iv) the impugned order passed by the Trial Court would result into modification / overlapping of the final decree of mesne profits which is not permissible in law, (v) the petitioner / plaintiffs without taking recourse to all the modes to execute the final decree of mesne profits against the defendant, cannot seek compensation from the obstructionist which would amount to taking of double benefit and lastly, (vi) the plaintiff is 'estopped' and barred by principles of 'Constructive res-judicata' from claiming interim compensation from the obstructionist.

39. The Appellate Bench has also found that the decision of the Supreme Court in the case of *Marshall Sons & Co (Supra)* and ***of this Court in Shri Dnyandev Kshirsagar Vs. M/s. Pyramid***

Corporation and Anr in Writ Petition No.10003/2015 decided on 16/11/2015, were distinguishable on facts.

40. I have carefully considered the rival circumstances and the submissions made, in the context of order passed by the Trial Court and the judgment and order passed by the Appellate Bench and I do not find that the impugned judgment and order of the Appellate Bench can be sustained. Before advertng to the same, it is necessary to note that the petitioner has obtained a decree against BPCL as per back as on 22/4/2005 which has attained finality after BPCL which was the sole defendant in the suit, has withdrawn the appeal. It is further a matter of record that the decree still remains unexecuted on account of the obstruction / resistance by the respondent No.1 / obstructionist. The respondent has filed RAD Suit No.681/2005 claiming protection on the ground that it is 'deemed tenant' of the suit property which suit is pending. The obstructionist did not secure any interim order in the said suit as yet. The obstructionist has also raised his objection to the execution of the decree on the ground of his alleged independent right and it not being bound by the decree. The fact remains that although the original lessee / defendant (BPCL) is willing to hand over the possession, the same is obstructed by the respondent. The question

is whether in such a case the respondent no.1 can be directed to pay the compensation.

41. In the case of *Marshall Sons and Co. (supra)*, in similar facts and circumstances, the Supreme Court had found that the obstructionist who was in possession, can be directed to pay the mesne profits / compensation. In that case, the appellant *Marshall Sons and Co. (Supra)* had obtained a decree for possession against M/s. United Artists Corporation and three others which was confirmed up to the Supreme Court. The respondent Sahi Oretrans (P) Ltd. filed a RAD Suit for declaration that it was having tenancy rights in respect of the premises since 1973 through M/s. Halda Engineering Co. (defendant No.3). It was in that suit that the appellant filed an application for direction to the respondent Sahi Oretrans (P) Ltd. (the plaintiff in the suit) to deliver possession and to pay the compensation. The Supreme Court, although refusing to direct deliver of possession on the ground that the suit filed by the Sahi Oretrans, was pending, had confirmed and enhanced the compensation awarded to the appellant, the original decree holder. This Court in similar circumstances placing reliance on the decision of the Supreme Court in *Marshall Sons and Co. (supra)* had by an order dated 16/11/2015 in Writ Petition No.10003/2015 in *Shri*

Dnyandev Tukaram Kshirsagar (supra) had confirmed the order passed by the Small Causes Court directing the petitioner therein (the obstructionist) to deposit the mesne profits / compensation.

42. In my considered view, in both *Marshall Sons and Co. (supra)* as well as in the case of *Dnyandev Kshirsagar (supra)* there was a decree of eviction obtained by the decree holder and even in the wake of said fact, the obstructionist was directed to pay compensation / mesne profits. Thus, the Appellate Bench in my considered view was in error in refusing to place reliance on the decision in the case of *Marshall Sons and Co. (supra)*. Although the Appellate Bench has observed that the respondent obstructionist was not a party to the mesne profits application filed by the petitioner, has held that the Courts below have held that the respondent / obstructionist is not liable to pay the mesne profits. It is necessary to note that the Court in those mesne profits proceedings against the original defendant (BPCL), were primarily concerned with the liability of BPCL. The Courts in those proceedings had no occasion to consider the independent liability of the obstructionist to pay the mesne profits. The obstructionist was not even a party to those proceedings. It is significant to note that the Courts in those proceedings were examining the defence by BPCL, to absolve itself

of the liability to pay mesne profits on the ground that the obstructionist is liable to pay the same. The said defence was negatived. It is true that BPCL has been directed to pay mesne profits till delivery of possession. However, as noted earlier, inspite of the willingness of the BPCL to deliver the possession the decree is not being executed on account of the obstruction by the obstructionist / respondent. It is necessary to note that the BPCL is claiming that it is not liable to pay the mesne profits from 1/8/2010 on the ground that an account of obstruction by the respondent, the possession cannot be delivered.

43. It is difficult to see as to how the principle of Estoppel can be invoked against the Petitioner/Plaintiff. Estoppel pre supposes a representation made by one party, on the basis of which the other party acts to its detriment, which is neither here nor there in the present case. Even so far as the reasoning of constructive res-judicata is concerned the same cannot be accepted inasmuch as the obstructionist was not a party to the proceedings for recovery of mesne profit and as noticed earlier the liability of the obstructionist to pay the compensation, was not at all adjudicated in the earlier proceedings.

44. Coming to the point of the petitioner deriving double benefit is concerned in my considered view the petitioner will have to seek the actual recovery of the mesne profit either from BPCL or the obstructionist. However, that would not have any bearing on the liability of the obstructionist to pay the compensation. It hardly needs to be stressed that the petitioner/plaintiff would have an option to recover the compensation and to execute the order of mesne profits/compensation, either against the BPCL or against the obstructionist.

45. To conclude the obstructionist is admittedly in possession/occupation of the premises. The decree of eviction passed against the original lessee BPCL has attained finality. BPCL has even expressed willingness to hand over the possession which cannot be done on account of the resistance/obstruction of the respondents. In such circumstances, in my considered view the present case is covered by the decision of the Supreme Court in the case of *Marshall Sons and Co. (Supra)*. For the aforesaid reasons the impugned judgment in my considered view cannot be sustained.

46. In the result the following order is passed.

ORDER

(i) The Civil Revision Application No.430/2018 is hereby dismissed.

(ii) It is made clear that this Court has not expressed any opinion on the merits of the objection raised.

(iii) The Writ Petition No.2398/2020 is hereby allowed.

(iv) The impugned judgment and decree dated 20/1/2020 passed by the Appellate Bench of the Small Causes Court is hereby set aside.

(v) Consequently, the order dated 2/2/2019 passed by the Small Causes Court, is restored.

(vi) It is made clear that the petitioner/decreed holder would have the option to execute the order of mesne profits either against BPCL or from the respondent no.1/obstructionist.

(vii) In the circumstances, there shall be no order as to costs.

C.V. BHADANG, J.