

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

WRIT PETITION NO. 3748 OF 2018

1. Eknath S/o Harishchandra Chormal
Age: 70 years, Occu: Agril.,

2. Devidas S/o Anna Chormal
Age: 67 years, Occu: Agril.,

3. Bhikaji S/o Narayan Sangale
Age: 69 years, Occu: Agril.,

All R/o Mahankal-Wadgaon,
Tq. Shrirampur, District Ahmednagar

... Petitioners

Versus

1. Dilip S/o Bhagwat Joshi
Age: 58 years, Occu: Agril.,
R/o Revenue Colony,
Kopargaon, Tq. Kopargaon,
District Ahmednagar

2. Sudhakar S/o Bhagwat Joshi
Age: 54 years, Occu: Agril.,
R/o Godavri Housing Society,
6, Wiskim Upendra Nagar,
CIDCO, Nashik

3. Sunita Sudhakar Gaydhane
Age: 60 years, Occu: Household,
R/o "Samartha" Bungalow
Behind Sainath Nagar Bus-stop,
Patharde Road, Nashik
District Nashik

4. Shantabai Shakuntala Bhagwat Joshi
Since deceased through legal heirs
Respondent Nos.1 to 3
5. Prakash S/o Changdeo Joshi

Age: 58 years, Occu: Agril.,
R/o Taklibhan, Tq. Shrirampur,
District Ahmednagar

6. Ashok S/o Changdeo Joshi
Since deceased through L. Rs.
Respondent Nos.5 to 7

7. Kamal Dattatraya Kulkarni
Age: 54 years, Occu: Agril.,
R/o Taklibhan, Tq. Shrirampur,
District Ahmednagar

8. Sushil W/o Changdeo Joshi
Since deceased through L.Rs.
Present respondent Nos.5 to 7
Are the legal heirs

9. Laxman S/o Gopal Chormal
Since deceased through L. Rs.

9-A Muktabai S/o Laxman Chormal
Since deceased

9-B Nivrutti S/o Laxman Chormal
Age: 65 years, Occu: Agril.,

9-C Balu S/o Laxman Chormal
Age: 60 years, Occu: Agril.,

9-D Tukaram S/o Laxman Chormal
Age: 58 years, Occu: Agril.,

Respondent Nos.9-B to 9-D
R/o Mahankal-Wadgaon,
Tq. Shrirampur, Dist. Ahmednagar

... Respondents

...

Mr. R. R. Karpe, Advocate for the Petitioners
Mr. S. P. Chapalgaonkar, Advocate for Respondent Nos.1 to 3

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 15th March, 2022

ORAL JUDGMENT :

. **RULE.** Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the respective parties.

2. This petition challenges the order dated 5th March, 2018 passed below Exhibit-225 in Regular Darkhast No.237/1985, by the learned 2nd Joint Civil Judge, Junior Division, Shrirampur, thereby rejecting the application for amendment in the say of third party.

3. Respondent Nos.1 to 4 filed Regular Civil Suit No.112/1974 seeking partition and separate possession of suit property bearing Gat Nos.194 and 204, situated at Village Mahankal-Wadgaon. The suit was decreed in the year 1978, appeal challenging, the said judgment and decree was dismissed. Respondent Nos.1 to 4 filed Regular Darkhast No.25/1982 for execution of the said judgment and decree.

4. The respondent Nos.1 to 4 filed application (Exhibit-186) seeking appointment of Court Commissioner to effect partition of house properties, situated on Gat No.194. It is stated in the application that Devidas Annasaheb Chormal, Bhikaji Narayan

Sangale, Eknath Harishchandra Chormal and Balu Laxman Chormal have constructed their houses in Gat No.194 during the pendency of the suit. Therefore, respondent nos.1 to 4/deGREE holders are entitled to the possession of the land on which these persons have constructed their houses. For giving possession of the same, Court Commissioner be appointed. The Executing Court allowed the application (Exhibit-186) by order dated 09/10/2017 and appointed Court Commissioner to effect partition of house properties situated on Gat No.194.

5. Pursuant to the order passed by the Executing Court below Exhibit-186, notice was issued on 20/11/2017, thereby calling upon the petitioners to remain present for handing over the possession. The petitioners therefore filed application (Exhibit-206) requesting for cancellation of order passed on Exhibit-186.

6. The petitioners and four others being third party filed application (Exhibit-214) contending that they are in possession of 56 R and 57 R portion out of gat No.194. They have constructed farm houses and others have constructed their residential houses on the said portion. Though respondent nos.1 to 4/deGREE holders were having knowledge of the same, the petitioners were deliberately not made party in the suit. Therefore, the respondents/deGREE holders

have no right to claim possession of Gat No.194. Hence, their prayer for possession be rejected and their Darkhast Proceedings may be stayed. By order dated 11/01/2018, application filed by the petitioners at Exhibit-206 was partly allowed and the effect of order passed below Exhibit-186 was stayed till adjudication of objection (Exhibit-214), filed by the petitioners.

7. The respondents/decreed holders, thereafter, filed application under Order XXI Rule 97, 98 and Rule 35 of Order XXI of the Code of Civil Procedure praying for dismissal of the objection filed by the petitioners and seeking possession warrant. Since the petitioners have constructed their houses on the suit properties, compensation of Rs.2,00,000/- is sought. The petitioners being third party resisted the said application.

8. By filing application (Exhibit-225) under Order VI Rule 17 of the Code of Civil Procedure, the petitioners sought amendment in their say contending that they have filed say on 05/01/2018. At that time, they being old were not physically present and the say was filed on incomplete information. The real facts therefore could not be brought on record. Therefore, it is necessary to give them an opportunity to put their defence before the Court. Hence, they

proposed amendment.

9. The respondents opposed the application (Exhibit-225). The Executing Court has rejected the application (Exhibit-225) filed by the petitioners holding that the Execution Proceeding is pending before it since 1985. The say of the petitioners is not in the form of written statement but the same is filed on application (Exhibit-211) itself. The Executing Court held that by way of proposed amendment, the petitioners proposed a different defence and the proposed amendment creates a new case, which is not included in their say. Therefore, the proposed amendment is of destructive nature and the same is adverse to the decree holder's claim. Therefore, by placing reliance in **N.S.S. Narayana Sharma and Ors. Vs. M/S. Goldstone Export Pvt. Ltd. Spl., Leave Petition (Civil) 2461 of 199** and **Arif Abdul Hanif and Others Vs. S. Maheshwarrao and Others** reported in **1999 (4) A.L.D. 300** and **Shiromani Gurdwara Prabhandak Vs. Jaswant Singh** reported in **1996 11 SCC 690**, the Executing Court rejected the application. Hence, the present petition.

10. I have heard the rival submissions of the learned Advocate for the petitioners and learned Advocate for the respondents.

11. It is not in dispute that the petitioners have their houses constructed on the portion of Gat No.194 and they are resisting the execution of the decree. The Executing Court has adopted a hyper technical approach in rejecting the application holding that the say must be in the form of written statement. Executing Court has noted that due to old age, the third party/petitioners were unable to appear and for that reason, their say was filed on insufficient information. In that view of the matter, the Executing Court ought to have given a fair opportunity to the petitioners to amend their say and permit them to file proper say in a prescribed proforma. By denying the amendment, the Executing Court has failed to give reasonable opportunity to the petitioners to put their case before the Executing Court. The issue before the Executing Court admittedly falls under Rule 97 and 98 of Order XXI and the same has to be treated as a suit and its decision is deemed to be a decree. In this view of the matter, Executing Court ought to have allowed the application filed by the petitioners.

The Executing Court has erred in coming to the conclusion that third party must satisfy the terms of amendment and by the proposed amendment, the third party has proposed a different defence. The Executing Court has ignored the settled legal position that inconsistent defences/stand can be taken in written statement.

The finding of the Executing Court that proposed amendment is in destructive nature and it is adverse to the decree holder's claim and also cannot be sustained in view of the settled legal position that merit of the amendment cannot be taken into consideration, at the time of considering the application for amendment.

12. In N.S.S. Narayana Sharma and Ors. (Supra), the Apex Court has held thus:

“So, under Order 21 Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the executing court. A party is not thrown out to relegate itself to the long- drawn-out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21 Rule 35 deals with cases of delivery of possession of an immovable property to the decree-holder by delivery of actual physical possession and by removing any person in possession who is bound by a decree, while under Order 21 Rule 36 only symbolic possession is given where the tenant is in actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to the decree- holder or purchaser is resisted by any person. Any person, as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including a stranger.

So far sub-clause (1) of Rule 97 the provision is the same but after the 1976 Amendment all disputes relating to the property made under Rules 97 and 99 are to be adjudicated under Rule 101, while under unamended provision under sub-clause (2) of Rule 97, the executing court issues summons to any such person obstructing possession over the decretal property. After investigation under Rule 98 the court puts back a decree-holder in possession where the court finds obstruction was occasioned without any just cause, while under Rule 99 where

obstruction was by a person claiming in good faith to be in possession of the property on his own right, the court has to dismiss the decree-holders application. Thus even prior to 1976, right of any person claiming right on his own or as a tenant, not party to the suit, such persons right has to be adjudicated under Rule 99 and he need not fall back to file a separate suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the property on the own, if resists delivery of possession to the decree-holder, the dispute and his claim has to be decided after the 1976 Amendment under Rule 97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99. However, under the old law, in case order is passed against the person resisting possession under Rule 97 read with Rule 99 then by virtue of Rule 103, as it then was, he was to file a suit to establish his right. But now after the amendment one need not file suit even in such cases as all disputes are to be settled by the executing court itself finally under Rule 101.

We find that both either under the old law or the present law, the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under Order 21 Rule 97 has to be decided by the executing court itself”.

13. Applying the above ratio to the facts of the present case, the application for amendment filed by the petitioners deserves to be allowed.

14. The learned advocate for the respondents strongly relied on the decision of the Apex Court in **Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors., Civil Appeal Nos.1659-1660 of 2021 @ Special Leave to Appeal Nos.7965-7966/2020**, wherein, guidelines are framed for the Courts dealing with the suits and execution proceedings. Guideline No. 14 reads thus:

“14. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay”.

15. Since the guidelines framed are mandatory for the Executing Court, the Executing Court will have to decide the execution proceedings as expeditiously as possible.

16. In the result, the following order is passed:

ORDER

(i) Writ Petition is allowed in terms of prayer clause “B”.

(ii) The impugned order dated 05th March, 2018, passed by the learned 2nd Joint Civil Judge, Junior Division, Shrirampur, is hereby quashed and set aside.

(iii) Application (Exhibit-225) filed by the petitioners is allowed.

(iv) The petitioners shall amend their say as per the proposed amendment and shall submit say in a prescribed proforma within a period two weeks from the date of receipt of this order.

(v) The respondents/decreed holders shall be entitled to counter the same.

(vi) The Executing Court shall dispose of the execution proceedings within a period of six months from today.

17. Rule is made absolute in the above terms. No costs.

[NITIN B. SURYAWANSHI, J.]

Sameer