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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12209 OF 2022**

1] Azijullah Abdullah Choudhary
alias Azizullah Abdulrehman Chaudhari
(Since deceased through legal heirs)
1a. Safiullah Azizullah Coudhary and Ors.Petitioners.
V/s
Kedarnath Mahadev Tiwari and Anr. Respondents.

Mr. Dhananjay D. Rananaware for the Petitioners.
Mr. Bansraj Singh i/b R.B. Singh & Associates for the Respondents.

CORAM: NITIN W. SAMBRE, J.

DATE: OCTOBER 11, 2022

P.C.:-

1] Heard.

2] Writ Petition is against the order of the Small Causes Court, Bandra, Mumbai dated 19/09/2022 passed on the Applications Exhibits-16 and 18 in Obstructionist Notice No.11 of 2017 in Execution Application No.68 of 2017. Petitioners have also questioned the order of the said Court dated 19/09/2022 passed below Exhibits 21, 23 and 26 in Execution Application Nos. 68 of 2017.

3] Application below Exhibit-16 is by the Petitioners in Obstructionist Notice No.11 of 2017 for restoration of possession, Application below Exhibit-18 is by the stranger for restraining the decree holder from removing belongings and creating third party interest in the suit property, Application below Exhibit-21 is by Defendant No.2, one of the Obstructionists seeking restoration of possession, Application below Exhibit-23 is by judgment-debtor, thereby seeking injunction against the decree holder from creating third party interest and Application below Exhibit-26 is by decree holder for directions to the judgment-debtor No.2 to remove belongings.

4] Respondent No.1 filed RAE & R Suit No.268/701 of 1995 on the grounds of arrears of rent, subletting which was decreed on 17/2/2003. It is claimed that said decree was ex parte. Misc. Appeal No.6 of 2011 was preferred by Defendant No.2 which was dismissed on 2/11/2012. Defendant No.2 thereafter preferred Revision before this Court being Civil Revision Application No.1115 of 2012 which

was dismissed by a speaking order dated 25/2/2013. Subsequent thereto Review Application No.3 of 2013 was taken out in Appeal No.6 of 2011 at the behest of Defendant No.2. which was rejected on 6/10/2015 and the said order was confirmed by this Court in Civil Revision Application No.242 of 2016.

4] As a consequence of above decree, Respondent/decreed holder got possession of the suit property in execution proceedings. Petitioner Nos. 1 and 2 are real brothers. It is claimed that they have preferred Obstructionist Proceedings bearing Nos. 10 and 11 of 2017 pursuant to the provisions of Order 21 Rules 97 to 103 which are still pending adjudication. Petitioner No.1 is claimed to have title over the suit property. It is claimed that Petitioner No.1 is intentionally not impleaded as party to the suit proceedings so as to have decree against the person who has not title, so that decree can be obtained and executed expeditiously.

5] Based on the aforesaid title, Petitioners have preferred aforesaid obstructionist proceedings. As far as orders passed below Exhibit-16

and Exhibit-21 are concerned, fact remains that since the orders are passed in exercise of powers under Order 21 Rule 99, Petitioners have remedy of appeal and as such claim to that effect stands rejected with liberty to the Petitioners to take out appropriate proceedings.

6] As far as challenge to the order below Exhibit-18, thereby restraining the present Respondents/-decree holder from removing belongings of the Petitioners so also order below Exhibits-23 and 26 are concerned, facts remains that at the behest of the decree holder, directions are issued to Petitioner No.2/judgment debtor to remove his belongings from the suit property.

7] The said order is passed pursuant to the fact that the Petitioners have lost possession in execution of the decree, though it is claimed by the Counsel for the Petitioners that in view of the judgment of the Apex Court in the matter of *Brahmdeo Choudhary vs. Rishikesh Prasad Jaiswal and Another* reported in **1997 DGLS (SC) 102**, obstructionist cannot be put to hardship of removal of his belongings and then pursue obstructionist proceedings. Fact remains that in the

case in hand brother of Petitioner No.1 obstructionist is one of the judgment-debtors. The judgment-debtor has chosen not to appear before the Court and has suffered decree. Both the judgment-debtor and obstructionist who are agitating their claims under Obstructionist Notice No.10 and 11 of 2017 have jointly come before this Court, seeking protection of their belongings which are lying in the suit premises.

8] As such, if we appreciate the aforesaid conduct of the Petitioners, relief of protection claimed by them cannot be granted for two reasons viz. (a) Petitioners' Appeal questioning the order of refusal to restore the possession is yet to be considered and (b) Obstructionist Notice Nos. 10 and 11 of 2017 at the behest of the Petitioners are pending consideration before the Executing Court. Apart from above, claim put-forth by Petitioner No.1 that he is a stranger to the decree, cannot be accepted, particularly when Petitioners are jointly prosecuting the present proceedings before this Court. As such, law laid down by the Apex Court in the case of *Brahmdeo Choudhary* (supra) will be of hardly any assistance in the

aforesaid backdrop.

9] That being so, there is no error of jurisdiction noticed in the orders impugned. Writ Petition as such fails and same stands dismissed.

(NITIN W. SAMBRE, J.)