

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 636 OF 2023

Indubai D. Kothawale and Ors.

...Applicants

V/s.

Laxman Balwant Chougule and Ors.

...Respondents

Dr. Abhinav Chandrachud i/by. Mr. Namitkumar Pansare, for the Applicants.

Dr. S.S. Patwardhan a/w. Mr. Chetan G. Patil, for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 14 December 2023.

Pron. On : 21 December 2023.

JUDGMENT:

1. This Revision Application is filed by the applicants challenging the Order dated 16 October 2023, passed by the Civil Judge Junior Division Panhala rejecting application filed by the applicants under the provisions of Order 21, Rule 97 of the Code of Civil Procedure (**Code**) obstructing to the execution of the decree passed in favor of Respondent No.1.

2. Briefly stated, facts of the case are that a residential house and open premises admeasuring Gram Panchayat Property No. 410 out of CTS No.43 situated at Village-Vadi Ratnagiri, Taluka-Panhala, District Kolhapur was originally owned by Ganpati Kothavale, who died leaving behind his son Dhondiram and daughter Akkatai. It appears that Dhondiram had two wives, Chitrabai and Indubai. On 29 April 1985, Dhondiram and his sons (through Chitrabai) executed Sale Deed in respect of the house property in favour of Respondent No.1-Laxman Balwant Chougule. It is the case of the Revision Applicants, who are Indubai and her daughters that the Sale Deed executed by Dhondiram was without their consent and since the Revision Applicants had a share in the house property, Respondent No.2 did not acquire any title in the house property. Revision Applicants claim to be in possession of the Suit Property.

3. It appears that the suit property was handed over by Respondent No. 1 to Respondent No.2-Maruti Shankar Yadav as a gratuitous licensee and Respondent No.1 desired possession of the suit property from Respondent No.2, who was unauthorisedly occupying the same. Respondent No.1/Plaintiff filed Regular Civil Suit No. 90 of 1998 seeking possession of the suit property against Respondent No. 2. The suit was contested by Respondent No.2. By Judgment and Decree dated 21 January 2006, the suit was decreed. The Appeal filed before the District Court came to be dismissed on 15 June 2020. Respondent No.2 thereafter filed Second Appeal before this Court, which also came to be disposed of by this Court by Order

dated 13 March 2023 with clarification that the decree of the Trial Court was only in respect of Gram Panchayat Milkat No.43-1 and that the Plaintiff was not seeking any rights in respect of Gram Panchayat Milkat No.43-2. Respondent No.2 filed Special Leave Petition before the Supreme Court which came to be rejected. This is how the decree of the Trial Court attained finality.

3. The decree was put in execution by Respondent No.1 by filing Regular Darkhast No. 19 of 2020. In that Darkhast, Revision Applicants filed application at Exhibit-39 obstructing to the execution of the decree contending that the Revision Applicants always jointly owned and possessed the suit property and that since they were not impleaded to the Suit, the decree would not be binding on the Revision Applicants. By Order dated 16 October 2023, the executing court has proceeded to reject the obstruction application of the Revision Applicants. Aggrieved by the Order dated 16 October 2023, the Revision Applicants have filed the present Revision.

4. Dr. Chandrachud, the learned counsel appearing for the Petitioner would submit that once the Revision Applicants pleaded before the executing Court that they are in possession of the suit property and obstruction was presented to the execution of the decree, it was incumbent for the Executing Court to institute a full-fledged enquiry under the provisions of Order 21 Rule 101 of the Code. He would submit that even a person other than the judgment debtor apprehending dispossession from immovable property is entitled to

file application under Order 21 Rule 97 of the Code and that he/she need not wait till the actual dispossession for filing application under Order 21 Rule 99. In support of his contention, he would rely upon the judgments of the Apex Court in the case ***Brahmdeo Chaudhary V/s Rishikesh Prasad Jaiswal and Anr*** (1997) 3 SCC 694 and ***Silverline Forum Pvt. Ltd V/s Rajiv Trust and Another*** (1998) 3 scc 723. He would also place reliance on the judgment of Single Judge of this Court in ***Mr. Saiyad Masroor Ghorl (decd.) through his Legal Heirs and Ors V/s. Purushottam Tahilram Rohira (decd.) through his Legal Heirs and Ors.*** Second Appeal No.578 of 2022 decided on 2 December 2022.

5. In support of his contention, that the Revision Applicants are in possession of the suit property, Dr. Chandrachud would rely upon additional Affidavit dated 12 December 2023 and draw my attention to the Mutation Entry recording the names of the Revision Applicants to the revenue records in respect of the suit property. He would submit that the revenue entry so made would clearly indicate possession of the suit property by Revisions Applicants. That though revenue entries may not determine title of a person, they are presumed to be true statement of their contents, unless proved to be contrary. In support of his contention, he would reply upon judgment of the Apex Court in ***Narasamma and Others. V/s. State of Karnataka and Others*** (2009) 5 SCC 591 and of this Court in ***Pramod Moreshwar Tattu V/s. Sub-Divisional Officer*** 2019(6) Mh.L.J. 785. Dr. Chandrachud would further submit that the decree secured by Respondent No.1 against Respondent No.2 is a

declaration of right in *personam* and not a declaration of right in *rem* and that therefore, the same would not bind non-parties to a suit. In support of his contention, he would rely upon the judgment of the Apex Court in ***Booz Allen and Hamilton Inc. V/s SBI Home Finance Limited and Ors.*** (2011) 5 SCC 532.

6. Inviting my attention to the impugned order passed by the Executing Court, Mr. Chandrachud would complain that the court has not conducted any enquiry despite *prima-facie* material being put before it to demonstrate possession of the suit property by the obstructionists. That while deciding the obstructionist application, the executing court was not supposed to enter into the issue of title and ought to have restricted the consideration of the issue of possession. Once it is asserted by the Obstructionist that they are in possession of the suit property, the executing court ought to have conducted the enquiry into that assertion, rather than summarily rejecting the application by unnecessarily entering into the issue of their entitlement in the share of the property under the provisions of the Hindu Succession Act, 1956.

7. *Per-contra*, Mr. Patwardhan, learned counsel appearing for Respondent No.1 would oppose the Revision Application and support the order passed by the executing Court. He would submit that the Revision applicants have no semblance of right in the suit property and that they are conveniently set up with a view to prevent the Respondent No.1 from enjoying the fruits of the decree. That the

suit was filed by the Owner (Respondent No. 1) against a mere gratuitous licensee (Respondent No.2). That the suit property was sold by Dhondiram and his three sons in favour of Respondent No.1 in the year 1985 and that the Revision Applicants did not raise any objection to such a sale for the last 35 long years. That perusal of the obstructionist application would show that no right, title or interest in the suit property is either claimed or demonstrated in the application. That Dhondiram himself was alive till 2001 and his second wife, Indubai or her daughters never raised any objection to the sale of the suit property by Dhondiram and his three sons way back in 1985. That Indubai had no right in the property of Dhondiram during his lifetime except to claim maintenance. That the sale transaction took place well before introduction of the Maharashtra Amendment to the Hindu Succession Act, 1996. That under amended Section 6 of the Hindu Succession Act w.e.f. 27 September 2006, alienation effected before 20 December 2004 remained unaffected.

8. Inviting my attention to the application filed by the Revision Applicants, Mr. Patwardhan would contend that in the application itself, the Revision Applicants contended that they were in joint possession of the suit property and not in exclusive possession. On the contrary, in para-2(b) of the petition, the Revision Applicants have contended that the suit property was always in possession of Respondent No.2. That thus there is a clear contradiction between the averments made by the Revision Applicants in the Application filed before the Executing Court and in the present petition. Inviting my attention to the two additional Affidavits filed by the Revision

Applicants in pursuance of the Order passed by this Court on 30 October 2023, Mr. Patwardhan would submit that the first Affidavit filed on 8 November 2023 does not contain even a whisper about possession of the suit property by Revision Applicants. That the second additional Affidavit has been filed and affirmed on 12 December 2023 and a Mutation Entry certified on 23 November 2023 (after filing of the present petition and after passing of Order dated 30 October 2023 by this Court) was produced to demonstrate mutation of names of Revision Applicants as legal heirs of Dhondiram (Dagadu). That a document to show possession is created after passing Order dated 30 October 2023 since no other document exists to prove such possession.

9. Mr. Patwardhan, would rely upon the Judgment of the Apex Court in the case of *Silverline Forum* in support of his contention that a third party presenting obstruction must produce some material for the executing Court to conduct an enquiry. That in absence of any material produced before the executing Court to prove possession, the executing Court has rightly not instituted a full-fledged enquiry. He would pray for dismissal of the petition.

10. Rival contentions of the parties now fall for my consideration.

11. In the present case, resistance or obstruction to the possession of the suit property is not noticed or encountered by the decree holder while executing the decree. Rather it is the case of the

decree holder that Revision Applicants are not in possession of the suit property and that the possession is sought to be recovered from the judgment-debtor (Respondent No.2). Therefore, there was occasion for the decree holder to invoke the provisions of Order 21 Rule 97 of the Code. Dispossession is apprehended by the Revision Applicants, who filed application at Exhibit-39 asserting that they are in possession of the suit property. The right of a third person likely to be dispossessed from immovable property to apply to the executing court to complain about dispossession is recognized under Order 21 Rule 99. However going by the language employed in Order 21 Rule 99, such application can be filed by a third party upon actual dispossession. In the present case, the Revision Applicants are not yet actually dispossessed as the execution application is still pending. However, issue of right of a third party apprehending dispossession to file obstructionist application before actual dispossession is no more *res-integra* and by now it is settled position of law that such third party need not wait till actual dispossession and can always present an obstruction to execution of the decree before his actual dispossession. The law in this regard is well settled by judgments of the Apex Court in ***Brahmdeo Chaudhary*** (supra) and ***Silverline Forum Pvt. Ltd.*** (supra). This Judgment need not be burdened by making detailed discussion in that regard as the executing court has not refused to take cognizance of Revision Applicant's application on the ground that they are yet to be dispossessed. Thus, the Revision Applicants had right to present obstruction to execution of the decree even before their actual dispossession.

12. The only issue is whether the Revision Applicants are/were in actual physical possession of the suit property at the time of filing of obstructionist application. According to Dr. Chandrachud, the possession need not be actual or physical and even constructive possession is sufficient for the purpose of presenting obstruction under Order 21 Rule 97 of the Code. It is for this reason that this Court by Order dated 30 October 2023, directed the Revision Applicants to produce material to demonstrate possession of the suit property. In pursuance of the Order passed by this Court, the Revision Applicants have filed two additional Affidavits. In the additional Affidavit dated 8 November 2023, the Revision Applicants have not produced any material to show actual or constructive possession of the suit property. It is for this reason that second additional Affidavit dated 12 December 2023 appears to have been filed. By that Affidavit, the Revision Applicants have brought on record copy of Mutation Entry No.490 by which names of legal heirs of Dagadu (Dhondiram) Ganpati Kothavale are brought on record, which include names of Revision Applicants. Basis of the Mutation Entry certified on 25 November 2023, it is claimed that the Revision Applicants are in possession of the suit property. However, the Mutation Entry is certified on 23 November 2023 i.e. after this Court passed Order on 30 October 2023. The Mutation Entry did not exist at the time of filing of obstructionist application by the Revision Applicants. Thus, evidence is now sought to be created by certification of mutation entry to show possession by the Revision Applicants over the suit property before 23 November 2023. There

is no iota of evidence to suggest that Revision Applicants ever possessed the suit property. Also of relevance is the fact that Dagadu (Dhondiram) expired on 30 April 2001 and his legal heirs are brought on record after 22 long years i.e. on 23 November 2023. It appears that the factum of death of Dagadu Ganpati Kothavale (Dhondiram) was already noted and his legal heirs were already brought on record by earlier Mutation Entry No.386 certified on 5 October 2019, which did not include the names of the Revision Applicants. To fill up this lacuna, fresh application appears to have been made to add names of Revision Applicants as heirs of Dhondiram. This would leave no matter of doubt that evidence of possession of the suit property by the Revision Applicants is sought to be created during pendency of the present petition. This conduct on the part of the Revision Applicants is deprecated.

13. Apart from the fact that no material was produced by the Revision Applicants before the executing court about possession of the suit property by them, there is direct contradiction between the averments made by them in the obstructionist application and in the present petition. In para- 7 of the Obstructionist Application, the Revision Applicants pleaded that they are in joint possession of the suit property. On the contrary, in para-2(b) of the petition, it is pleaded by them that Respondent No.2 (Judgment Debtor) is in vacant and peaceful possession of the suit property since 1972. Thus, there is a direct admission in the petition that the Judgment Debtor has always been in possession of the suit property since 1972.

14. I am therefore of the view that no material is produced by the Revision Applicants to demonstrate actual or constructive possession of the suit property. Mutation Entry certified on 23 November 2023 during pendency of the present petition cannot prove possession of the suit property by the Revision Applicants at the time of filing the Revision Application. Therefore, reliance by the Revision Applicants on the Judgment of the Apex Court in **Narasamma** (supra) and of this Court on **Pramod Moreshwar Tattu** (supra) are of little assistance to their case. There can be no dispute to the proposition that the decree in favour of Respondent No.2 is declaration of right in *personam* and not a right in *rem*. The proposition is expanded by the Apex Court in its judgment in **Booz Allen Hamilton**. It is nobody's case that the decree would bind a third party in actual possession of the suit property. The problem for Revision Applicants is that they are unable to show even prima facie that they possess the suit property.

15. Mr. Patwardhan has relied on paras-12 and 14 of the Judgment of the Apex Court in **Silverline Forum** in which it has held as under :

12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because the resistor raised it. The questions which executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions

should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, execution court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

14. It is clear that executing court can decide whether the resistor or obstructor is a person bound by the decree and he refused to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21 Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary.

16. Thus every baseless application made by a third party to present obstruction need not be taken to a detailed enquiry by the executing Court. The executing Court is competent to make a summary enquiry as to whether the question raised by the Obstructor legally arises between the parties or not. If the executing Court arrives at a conclusion that an Obstructor has no semblance of right to

present obstruction, it can summarily reject the application. In the present case, there is specific admission on the part of the Revision Applicants that the Judgment Debtor (Respondent No.2) is in possession of the suit property. Additionally, no material was presented before the executing court to demonstrate actual or constructive possession of the suit property by them. Therefore, no error can be traced in the order passed by the executing court in rejecting the application filed by the Revision Applicants.

17. I therefore find the Order passed by the Executing Court to be unexceptionable. The Revision Application, being devoid of merits, is dismissed without any order as to costs.

SANDEEP V. MARNE, J.

18. After the Judgment is pronounced, the learned counsel appearing for Applicants request for continuation of ad-interim order. The request is opposed by learned counsel appearing for the Respondents. Considering the findings recorded in the Judgment, the request for continuation of ad-interim order is rejected.

SANDEEP V. MARNE, J.