



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

**WRIT PETITION NO. 6721 OF 2023
WITH
CA/1931/2024 IN WP/6721/2023
WITH
CA/11990/2023 IN WP/6721/2023**

1. Adarsh Education Society Hingoli,
Through it President,
Kamal Kishor s/o Motilalji Kabra,
Age 79 years, Occu. Business,
R/o Kasarwada, Hingoli,
Tq. And Dist. Hingoli.
2. Adarsh Education Society Hingoli,
Through its Secretary,
Ramchandra s/o Bhalbhadra Kayal,
Age 78 years, Occu. Business,
R/o Bhat Colony, Hingoli,
Tq. And Dist. Hingoli.

...Petitioner
(Original Defendants)

~ versus ~

1. Dr. Shakuntaladevi Venuprasad Bagadiya,
Age Major, Occu. Medical Practitioner,
R/o Kalmanuri, Dist. Hingoli.
2. Aparna Anil Ruiya,
Age Major, Occu. Household,
R/o Nagpur, Tq. And Dist. Nagpur.
3. Nitinkumar Venuprasad Bagadiya,
Age Major, Occu. Engineer,
R/o Kalamnuri, Dist. Hingoli.
4. Komal Venuprasad Bagadiya,
Age Major, Occu. Education,
R/o Kalamnuri, Dist,. Hingoli.

All No.1 to 4 At present Residing At
Labh Chamber, Station Road,
Aurangabad.

5. Dr. Banvarilal Madhavlal Bagadia,
Age Major, Occu. Medical Practitioner,
Shivaji Nagar, Hingoli, Tq. Hingoli.
Dist. Hingoli.
6. Suresh Madhavlal Bagadia,

Age Major, Occu. Agri.,
R/o Hingoli Tq. Dist. Hingoli. (Original Plaintiff)

7. Purshottamdas Madhavlal Bagadiya,
Age Major, Occu. Business,
R/o Hingoli, Tq. And Dist. Hingoli. (Original Defendant)

...Respondents

APPEARANCE :

Advocate for the Petitioners : Mr. H. V. Patil
Advocate for Respondents No.1 to 7 : Mr. P. R. Katneshwarkar

CORAM : ARUN R. PEDNEKER, J.

Dated : 08/05/2024

JUDGMENT :

1. Rule. Rule made returnable. With consent of the parties, heard finally.

2. By the present petition, the petitioners are challenging the order dated 23/09/2019, passed by 2nd Joint Civil Judge, Junior Division, Hingoli, below Exhibit 66, in Regular Darkhast No.98/2012, whereby the application filed by the Judgment Debtor to adduce evidence by calling Taluka Inspector of Land Records to demonstrate that portion of suit land in the decree and part of the adjacent land of the Judgment Debtor are overlapping as some new facts have come to the knowledge of the Judgment Debtor during the measurement of the land of the Judgment Debtor, and there is overlapping of Survey No.19, 20 and Survey No.8, 9

and 12 at Ganeshwadi over each other.

3. Facts giving rise to the present petition can be briefly summarized as under : -

That the respondents No.1 to 6 are the Decree Holders in Regular Civil Suit No.224/1983 whereas the petitioners are the Judgment Debtors. The suit is filed for removal of encroachment and mesne profit. The said suit was decreed by order dated 17/08/2000 by the Trial Court by holding that the defendants / petitioners herein have encroached upon 93 R land of the plaintiffs/ respondents herein. The said Judgment is confirmed up till the High Court in the second appeal.

4. The petitioners have also filed Regular civil Suit No.291 of 2000 for declaration of ownership and for perpetual injunction wherein the respondents Decree Holders are also defendants and the said suit is also decreed which has attained finality.

5. It is the case of the petitioners that the land in Survey No.9 of village Ganeshwadi and land in Survey No.19, 20 and 22 of village Hingoli are adjacent to each other. The said two lands are on village boundaries.

6. After the decree was confirmed in Regular Civil Suit No.224/1983, Regular Darkhast No.98/2012 is filed for execution and prayed to deliver the possession of 93 R land from the petitioners. The petitioners filed an

application at Exhibit 21 seeking directions against the Decree Holder i.e. respondents to deposit the amount for joint measurement. The said application was allowed. However, it is the case of the petitioner that the measurement so carried out was incorrect. Accordingly, possession warrant was issued by the Trial Court.

7. The petitioners, thereafter, filed application at Exhibit 53 before the Executing Court under Section 47 as well as Order 21 Rule 97 to 101 of the Code of Civil Procedure, in which it is specifically contended that there is overlapping of properties and that there is no measurement of the property by the Judgment Debtor and Decree Holder and without joint measurement, the petitioners are shown as encroachers. It is contended that unless there is proper measurement and actual measurement ascertained, the decree for possession cannot be executed. The said application was rejected by order dated 15/11/2019. It is observed by the Trial Court that the Executing Court has no power to go beyond decree.

8. The petitioners again moved another application below Exhibit 64 to call for original file of measurement carried out in which there is clear finding of overlapping between the lands. The said application was also rejected by order dated 14/08/2019. The petitioners, thereafter, moved another application below Exhibit 66 requesting to permit the petitioners to lead evidence. The petitioner contended that the petitioners have already

recorded their objection to the measurement, specifically there is overlapping of Survey No.19, 20 and Survey No.8, 9, 12 of Ganeshwadi. The petitioners have reported their objection under Order 21 Rule 97 to 101 of the Code of Civil Procedure. The said application is opposed by the Decree Holder on the ground that the Executing Court cannot go behind the decree between the parties or their representatives, it must take the decree according to its tenure, and cannot entertain any objection that the decree was incorrect in law or on facts, therefore, requested for rejection of the application.

9. The Executing Court by order dated 23/09/2019 was pleased to reject the application filed below Exhibit 66. It is observed by the Trial Court that the objection is not maintainable as already in the matter Regular Civil Suit No.224/1983, the Court Commissioner was appointed and he has prepared map (Exhibit 58) and he has been duly cross-examined by the Judgment Debtor, and thereafter, the decree is passed. The report of the Court Commissioner is duly proved therefore, there is no question of leading evidence, and so, the application is rejected. Against the said impugned order dated 23/09/2019, the present writ petition is filed.

10. While issuing notice, this Court by order dated 21/06/2023 observed as under : -

"4. Learned Advocate for the petitioner fairly submits that during the pendency of this petition, the authorities have measured the land and handed over the possession to the respondents. In that view of the matter, the respondents are directed not to create any third party interest in the property in question."

11. The learned Advocate for the petitioners submits that the petitioner has challenged the impugned order on the ground that there is gross illegality in rejecting the application of the petitioner and that the Court failed to notice that there is overlapping of the land between the petitioners and respondents. Unless there is proper report of encroachment, the decree for recovery of encroachment cannot be executed.

12. It is further contended that the measurement map Exhibit 58 along with report at Exhibit 59 in Regular Civil Suit No.224/1983 was prepared long back and subsequent changes are not considered on the basis of objection filed under Order 21 Rule 97 to 101, and in such circumstances, the Executing Court should permit the petitioners to lead evidence.

13. Per contra, the learned Advocate appearing for the respondent submits that the successive applications are filed to defeat the right of the Decree Holders.

14. Having heard the learned Advocate for the parties. It is required to

be noted that the Judgment Debtors have suffered a decree wherein the Civil Court in Regular civil Suit No.224/1983 has held that the defendants/petitioners herein are encrochers and shall hand over the possession of 93 R portion of land in Survey No.9 as shown by letters "E. F. J. I." in the measurement map Exhibit 58 within two months from the date of Judgment by removing the construction at their own costs. The defendants in Regular Civil Suit No.224/1983 are held to be encroachers of the land of the plaintiffs. The said finding is arrived at after the report of the Court Commissioner at Exhibit 58 is taken on record and the Court Commissioner was examined. The Judgment Debtors/petitioners has contested the suit, as such, there is no question of reopening the same issues as was decided by the Civil Court. As regards the suit filed by the petitioners are concerned bearing Regular Civil Suit No.291/2000, the same pertains to different property i.e. Survey No.19 at Hingoli admeasuring 5 H 17 R. The Executing Court while rejecting Exhibit 53 has observed at paragraph no.11 as under : -

"11. From the record, it reveals that, the D.H. has filed the instant executing proceeding regarding the decree passed in R.C.S.No.224/1983. In the original suit map vide Exhibit 58 was the part and parcel of the suit. The said map was prepared by T.I.L.R. Hingoli and it was duly proved by the D.H. in the trial of original suit. In the original suit the Court Commissioner has been duly appointed and after visiting the spot he has submitted it's report accordingly. From the

record, it also reveals that Court Commissioner has been duly cross-examined by the J.D. in original suit. As per the judgment in R.C.S.No.224/1983 this Court already held that the map and report filed by Court Commissioner is duly proved and the map vide Exhibit 58 is part and parcel of the suit. It means already all the issues regarding encroachment were duly decided and determined finally by this Court."

15. The learned Advocate for the petitioners relied upon the Judgment of Hon'ble Supreme Court in ***Jini Dhanrajgir and Anr. vs. Shibu Mathew and Anr. Etc., (Civil Appeal Nos.3758 – 3796 2023) [Arising out of SLP (C) Nos.28258-282962018]***, paragraph 17 reads as under : -

"17. Section 47 of the CPC, being one of the most important provisions relating to execution of decrees, mandates that the court executing the decree shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit. What is intended by conferring exclusive jurisdiction on the executing court is to prevent needless and unnecessary litigation and to achieve speedy disposal of the questions arising for discussion in relation to the execution, discharge or satisfaction of the decree. Should there be any resistance offered or obstruction raised impeding due execution of a decree made by a court of competent jurisdiction, the provisions of Rules 97, 101 and 98 of Order XXI enable the executing court to adjudicate the inter se claims of the decree-holder and the third parties in the

*execution proceedings themselves to avoid prolongation of litigation by driving the parties to institute independent suits. No wonder, the provisions contained in Rules 97 to 106 of Order XXI of the CPC under the sub-heading "Resistance to delivery of possession to decree-holder or purchaser" have been held by this Court to be a complete code in itself in *Brahmdeo Chaudhary (supra)* as well as in a decision of recent origin in *Asgar vs. Mohan Verma*. In the latter decision, it has been noted that Rules 97 to 103 of Order XXI provide the sole remedy both to parties to a suit as well as to a stranger to the decree put to execution."*

16. In the instant case the objections are raised by the Judgment Debtor who has suffered the decree, and not by a third party who has independent right over the suit property and resist the execution. The objection thus raised has to be summarily rejected.

17. The learned Advocate for the petitioner also relied on the Judgment of Hon'ble Supreme Court in ***Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and Another, reported in (1997) 3 Supreme Court Cases 694***. However, it is to be noticed that the obstruction therein also by a third party and the executing court was held bound to decide the objection in the execution proceedings. Paragraph No.9 of the Judgment reads as under : -

"9. In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining

to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the 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 21, Rule 97, sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21, Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order 21, Rule 99 CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order 21, Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order

21, Rule 99. Order 21 Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order 21 Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order 21 and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order 21 Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order 21 Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is

actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order 21 Rule 97, CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21 Rules 97 and 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves."

The facts of the instant case are different, therefore the above Judgment is also not applicable here.

18. The Judgments cited as above are not applicable to the facts of the

instant case, the same does not come to the aid of the petitioners as petitioner is not the third party claiming independent right. The Judgment Debtor is not a third party and he cannot be permitted to lead fresh evidence on the aspect of encroachment, having suffered a decree.

19. Thus, the Trial Court has rightly rejected the application at Exhibit 66, and the present proceeding are only tactics to delay the execution of the decree. Accordingly the writ petition is dismissed with cost of Rs.25,000/- to be paid to the respondents No.1 to 7.

20. Rule is discharged. Pending applications stand disposed of.

(ARUN R. PEDNEKER, J.)

After Pronouncement of Judgment : -

21. At this stage the learned Advocate for the petitioners submits that there was interim order operating in favour of the petitioner during the pendency of this writ petition and prays for continuation of the interim order. However, since I have held that the present proceeding are only to delay the execution, the request for continuation of interim relief is rejected.

(ARUN R. PEDNEKER, J.)

vj gawade/-.