



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 263 OF 2024

- 1) Kailas Kashiram Raut,
Aged about 49 years, Occu.-Labour,
R/o. Vaidya Nagar, Tukum,
Tadoba Road, Chandrapur,
Tal. and Dist. Chandrapur.
- 2) Padmini Nivrutti Bhalerao,
Aged about 52 years, Occu.-Labour,
R/o. Vaidya Nagar, Tukum,
Tadoba Road, Chandrapur,
Tal. and Dist. Chandrapur.
- 3) Shri Subhash Bapurao Kove,
Aged about 50 years, Occu.-Labour,
R/o. Vaidya Nagar, Tukum,
Tadoba Road, Chandrapur,
Tal. and Dist. Chandrapur.

.... **APPELLANTS**

// VERSUS //

- 1) Pradip Dnyaneshwar Aasutkar,
Aged about 32 years, Occu.-Education,
- 2) Pritam Dnyaneshwar Aasutkar,
Aged about 31 years, Occu.- Education,
- 3) Smt. Pramila Dnyaneshwar Aasutkar,
Aged about 53 years, Occu.-Household,

All R/o. D.G. Tukum, Near S.T. Work Shop,
Chandrapur, Tq. and Dist. Chandrapur.
- 4) Sau. Pravina Ravi Katkar,
Aged about 36 years, Occu.-Service,
R/o. Sidhharth Nagar, D.G. Tukum,
Chandrapur, Tq. and Dist. Chandrapur.

- 5) Smt. Bisnabi Sitaram Chandrawansi,
Aged about 63 years, Occu.-Household,
- 6) Smt. Chamelibai Anandrao Koram,
Aged about 73 years, Occu.-Household,

Both No.5 and 6 R/o. Vaidya Nagar,
Urjanagar, Chandrapur,
Tq. and Dist. Chandrapur.,
- 7) Shri Nilkanth Sahare,
Aged about 45 years, Occu.-Business,
R/o. Vaidya Nagar, Near Durgapur
Road, Near Major Gate, Durgapur,
(Neri), Chandrapur,
Tq. and Dist. Chandrapur.

.... **RESPONDENTS**

Mr. A. M. Chandekar, Advocate for Appellants.
Ms. R. S. Sirpurkar, Advocate for Respondent Nos.1 to 4.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 25.10.2024.

DATE OF PRONOUNCING THE JUDGMENT : 11.12.2024.

JUDGMENT.

1. Heard. **Admit.** Heard finally with the consent of the learned Advocates for the parties.

2. This appeal is preferred against the Judgment and decree passed by the District Judge-1, Chandrapur in Regular Civil Appeal No.125/2023, dated 26.07.2024, which was preferred against the Order dated 07.10.2023 passed in Regular Darkhast No.58/2017 below Exhibit-72 by the 4th Joint Civil Judge, Junior Division, Chandrapur.

FACTUAL MATRIX :

3. The Regular Civil Suit No.233/2008 was filed by the father of respondent Nos. 1 to 3 for removal of encroachment in Plot No.11, admeasuring 287.50 sq.mtr. out of Survey No.14, 15, 16/320-A, situated at Vaidya Nagar, Tukum, Chandrapur City, Tahsil and District Chandrapur. The suit was decreed on 24.06.2017.

4. The execution proceedings Regular Darkhast No.58/2017, were preferred by the respondent/decreed holder for removal of encroachment. In that proceeding, the appellants filed an Application/objection under Order 21 Rule 97 and 101 of the Code of Civil Procedure, 1908 (for short the "CPC") at Exhibit-72 and resisted the execution proceeding.

5. The objectors/appellants contended that, objector No.1 is the owner of property bearing Property No.1999, which was renumbered as Property No.2007, the objector No.2 is the owner of property No.3/2719, which was renumbered as W3000913. The objector No.3 is the owner of property No.2021. The objectors further contended that they have been residing in the suit property for the past 23 to 24 years. They stated that when the Police came to their houses on 14.06.2022, their children were at home. The suit property

was measured. When the objectors returned to their houses, they became aware of some judicial proceedings. They came to know that the decree holder, Dnyaneshwer had filed a civil suit and his legal representatives are trying to dispossess them illegally. The said judgment and decree was not passed against them. It is not binding upon them. The suit property does not belong to the decree holder. They have been in possession of the suit property for a long time and cannot be dispossessed. Therefore, the objectors prayed for a declaration that the decree is ineffective and it is nullity against them, and they shall not be dispossessed from the suit property.

6. The learned executing Court, while deciding the objectors application, held that there is no any documentary evidence to show the objectors title to the suit property. Their possession is not held legal, and merely because the decree holder has admitted that there are some constructions over the suit property in para 13 of their reply, this is not legal ground to protect the possession of the applicants/objectors. The application was rejected.

7. The objectors preferred appeal against the said order. The learned First Appellate Court held that the impugned order passed by the learned executing Court is legal and correct, and it is not

necessary to conduct the detailed inquiry into the matter as well as to permit the objectors to adduce evidence for deciding their application on merit. The learned First Appellate Court held that there is no substance in the grounds of objections raised in that appeal. The appeal was dismissed.

8. This appeal is heard at the admission stage with the consent of the learned Advocates for the parties.

9. Learned Advocate Mr. A. M. Chandekar, representing the appellants, argued that the possession of the appellants is admitted by the respondents in their reply. He submitted that an order passed by the executing Court below Exhibit-72 and the judgment passed by the learned First Appellate Court are not sustainable in the eyes of law. He further argued that a substantial question of law need to be formed as to “Whether the executing Court and First Appellant Court is justified in holding that the appellants have no right to obstruct to the execution proceedings?” He pointed out a dispute regarding the identification of the suit property, which was not considered. He contended that an opportunity was not given to the appellants to lead the evidence. He relied upon the following precedential laws:

(i) ***Brahmdeo Choudhary Vs. Rishikesh Prasad Jaiswal & Anr.***, reported in ***1997 AIR (SC) 856***, wherein law is laid down that the Court can decide all the questions, including question of right and title to the property.

(ii) ***Shreenath Vs. Rajesh***, reported in ***1998(3) ALL M.R. 213***, wherein law is laid down that expression “person” as contemplated by Order 21 Rule 99 and 97 of the CPC includes all persons resisting delivery of possession and claiming right in the property including tenants or strangers.

(iii) ***Pradeep Mehra Vs. Harijivan J. Jethwa (Dead) through LRs. & Ors.***, reported in ***2023 (14) Scale 887***, in which law is laid down that the executing Court, while deciding the rights of the parties, applies principles of *res judicata*.

10. The learned Advocate for the appellants lastly submitted that an opportunity was not given to the appellants to lead the evidence. Therefore, the matter should be remanded to the executing Court for a fresh decision on merits, permitting the appellants to lead their evidence. It was lastly prayed to allow the appeal by setting aside the impugned judgment.

11. Learned Advocate for the respondent Nos.1 to 4 Ms. R. S. Sirpurkar, submitted that the hearing of the Application (Exhibit 72) is concluded on merits and then order was passed. It is not necessary to allow the appellants/ objectors to lead the evidence in each case. The executing Court and the First Appellate Court have already held that the appellants have no legal right, title or interest in the disputed property. The *prima facie* burden of proof lies on the person asserting the right to prove title to the disputed property and the weakness of the opposing side cannot be a ground to allow the objectors' claim. She further submitted that merely because their possession over the disputed property was admitted by the respondents, they cannot claim title to it. She also submitted that appellants are third party and have no right to challenge the said judgment as contemplated by Order 21 Rule 97 and 98 of the CPC. She relied upon the following precedential law of ***Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal & Anr.***, reported in ***(1997) 3 SCC 694***, wherein law is laid down that,

“In view of the aforesaid settled legal position, therefore, and in the light of the statutory scheme discussed by us earlier it must be held that respondent no.1 decree-holder's application dated 6th May 1991 praying for issuance of warrant for delivery of possession with the aid of armed force, was in substance for removal of obstruction offered by the appellant and others under Order XXI Rule 97, CPC and had to be adjudicated upon as enjoined by Order XXI Rule 97 sub-rule (2) read with

Order XXI Rule 101 and Order XXI Rule 98. In this connection the Court had also to follow the procedure laid down by Order XXI Rule 105 which enjoins the Executing Court to which an application is made under any of the foregoing Rules of the Order to fix a date of hearing of the application.”

12. The learned Advocate for the respondents lastly submitted that the order passed by the learned executing Court and judgment of the First Appellate Court are legal and correct, and no interference is warranted in it and prayed to dismiss the appeal.

13. On perusal the order below Exhibit-72, passed by the learned Executing Court and the judgment passed by the learned First Appellate Court and the documents filed in support of the contentions of both sides, both the Courts rightly concluded that the appellants have not pleaded under what capacity they are in possession of the suit property and they have also not adduced any evidence to show that they have title to the suit property. Merely because respondent admitted their possession in the reply to their application, the appellants cannot be protected solely on the ground that they were not parties in the said suit. They have not even *prima facie* established through their pleadings and documentary evidence that they possess the suit property with the consent and knowledge of the respondents, who are owners of the suit properties. They have

not shown that how they acquired at least possessory title to the disputed property under any of the provision of law. The appellants have only filed the receipt of taxes paid by them. But these do not prove their title. These receipts issued for a fiscal purpose only, and they cannot take place of title of the objectors to the disputed property. Unless the legal right over the suit property is established by the plaintiff, they cannot claim any right over the suit property.

14. As far as admission of possession by the respondents is concerned, law is very clear that “admission is not conclusive proof” as per Section 31 of the Indian Evidence Act, 1872. As per Section 58 of the Indian Evidence Act, 1872 “admitted fact need not be proved”. However, Proviso of Section 58 of the Indian Evidence Act, 1872, provides that the Court may, in its discretion require further proof. Therefore, merely because there is admission of possession, such admission of possession it cannot create substantive right in favour of the appellants. They have not pleaded and proved their legal capacity to possess the disputed property. They must stand on their own feet and establish their legal title or possessory title over the suit property independently. Mere possession without title to the suit property, cannot be protected. There is no need to allow the appellants/objectors to lead evidence, as they have no any kind of

title to the disputed property. They have not *prima facie* show that, since earlier to filing of suit, they were in possession of the disputed properties. They have not filed appropriate suit for their rights. The respondents are following due course of law. If these aspects are considered together with the reasons stated by both the Courts and their findings, this Court is of the view that there is no substance in the grounds of objection of this appeal. Therefore, no substantial question of law, as formed, does not arises for decision of this appeal, as submitted by the learned Advocate Mr. Chandekar for the appellants.

15. For the reasons stated above, the argument of learned Advocate Mr. A. M. Chandekar is not acceptable. The precedential laws cited by him are also not useful to the objectors in view of different facts of the case and reasons stated above. No interference is warranted in the order passed Below Exhibit 72 by the Executing Court and in the judgment passed by the learned First Appellate Court.

16. The appeal, being devoid of merits, deserves to be dismissed with costs of Rs.5,000/- to be paid to the respondents Nos.1 to 4 by the appellants. This is because the respondents Nos.1 to

4 must have incurred some expenses to face this appeal and there is no legal justification for the appellants to claim their right in the disputed property. Hence, the following order :

- (i) The Second Appeal is **dismissed**.
- (ii) The appellants is directed to pay costs of **Rs.5,000/-** (Rs. Five Thousand only) to the respondent Nos.1 to 4, within a period of three months. If the said amount is not deposited within three months, the appellants have to pay 9% interest on the said amount.

(SANJAY A. DESHMUKH, J.)