



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

WRIT PETITION NO.2443 OF 2025

Ramchandra S/o Trimbakrao Katruwar,
Age: 87 years, Occ: Business,
R/o. Main Road, Manwat,
Taluka Manwat, District Parbhani.

..Petitioner

Versus

1. Shaikh Kausarbee @ Kesharbi
W/o Shaikh Ratan,
Age: 67 years, Occ: Household,
R/o. Vishnunagar, Basmat Road,
Parbhani.
2. Shiakh Farook S/o. Shaikh Ratan,
Age: 47 years, Occ: Private Service,
R/o. As above.
3. Shaikh Latif Shaikh Ratan,
Age: 45 years, Occ: Private Service,
R/o. As above.
4. Shaikh Maheboob Shaikh Ratan,
Age: 43 years, Occ: Private Service,
R/o. As above.

..Respondents

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Mr. S. S. Rathi, Advocate for Petitioner.

Mr. P. N. Kalani, Advocate for Respondent nos.1 to 4.

...

**CORAM : S. G. CHAPALGAONKAR, J.
DATED : 07th JULY, 2025.**

ORDER:-

1. The petitioner impugns order dated 08.01.2025 passed by learned Civil Judge Senior Division, Parbhani below Exhibit 61 in Special Darkhast No.16/2023 and seeks further direction to allow application for issuance of possession warrant with specific

direction to remove all type of obstructions on suit property by appointing special bailiff for execution of decree dated 29.11.2017.

2. Mr. Rathi, learned Advocate appearing for petitioner submits that petitioner instituted Special Civil Suit No.41/2012 against defendants seeking decree of recovery of possession and mandatory injunction in respect of suit property bearing Plot No.63, Survey Nos.315 and 316 as specified in plaint. On 29.11.2017, learned Civil Judge, Senior Division, Parbhani decreed suit. The decree as passed by Trial Court is confirmed by learned District Judge at Parbhani in Regular Civil Appeal No.155/2017 as well as by this court in Second Appeal No.27/2024 vide order dated 02.04.2024. In pursuance to aforesaid decree Special Darkhast No.16/2023 was filed in which application below Exhibit-10 was filed for issuance of possession warrant in terms of Order XXI Rule 35 of Code of Civil Procedure. The learned Executing Court allowed application directing issuance of possession warrant as prayed with liberty in favour of Decree Holder to avail Special Bailiff for execution.

3. Later on, petitioner filed application below Exhibit-33 for issuance of possession warrant and to provide police aid for its execution. The learned Executing Court allowed said application vide order dated 31.07.2024 and directed issuance of possession warrant of suit property as per description mentioned in decree, so also issued direction to concerned Police Station to provide police

assistance of two male constables and two lady constables on payment of appropriate Bhatta. In deference to order of Executing Court, petitioner made application to Police Inspector, District Special Branch, Parbhani for providing police protection and deposited requisite amount of Rs.85,911/- including GST for services of police.

4. At this stage, Judgment Debtor filed mercy application dated 11.11.2024 to Executing Court, contending that his family consists of 18 members who reside in the suit property requested for six months' time to deliver vacant possession to the Decree Holder. The application itself contains an undertaking to deliver vacant possession. The Executing Court partly allowed said application and granted a month's time and asked to vacate suit property by 12.12.2024. Despite of aforesaid undertaking, Judgment Debtor failed to vacate premises. Eventually, Decree Holder pressed application Exhibit-61 for issuance of possession warrant. However, learned Executing Court rejected such application on the ground that petitioner has availed police force of 14 police personnel and also failed to disclose existence of permanent structure, water plant and families of Judgment Debtors at the suit property. Further petitioner employed Tractors, Tempos and labours without sanction of Court. As such, petitioner has indulged

in choosing process of law contrary to provision contemplated under Order XXI of Code of Civil Procedure.

5. Mr. Rathi submits that impugned order is perverse. The police aid was granted by same Court under its order dated 31.07.2024. He would point out that decree itself indicate that removal of encroachment was directed. Consequently, services of Special Bailiff were also permitted. According to Mr. Rathi, Executing Court instead of passing orders facilitating to execute decree as passed, rejected prayer for issuance of possession warrant on erroneous count.

6. Per contra, Mr. Kalani, learned Advocate appearing for respondents submits that petitioner filed application below Exhibit-33 with blanket prayer and suppressed material fact from the Court. Accordingly, obtained order for police protection. The police aid was limited for availing services of two male constables and two lady constables. However, petitioner misused order and availed services of 14 police personnel including PSI, so also took aid of JCB machines and other equipments for removal of construction at the site. He would, therefore, supports the impugned order.

7. Having considered submissions advanced, it cannot be disputed that in Special Civil Suit No.41/2012 decree has been passed against defendants in following terms:

*“Defendant Nos.2 to 5 shall deliver the vacant possession **by removing the existing temporary structure of the suit plot No.63**, Survey No.315(Part) and 316(Part), situated at Parbhani adm.50 X 50 ft. which is bounded as under:
East: Lay out Road; West: Plot No.48;
South: Plot No.62; and North: Plot No.64,
to plaintiff, **within two month** from the date of this order.”*

8. The decree has attained finality after dismissal of Second Appeal filed by defendants by this Court. When decree was put to execution in Special Darkhast No.16/2023, initial order of possession warrant in terms of Order XXI Rule 35 of Code of Civil Procedure was passed and Decree Holder was given liberty to avail Special Bailiff for execution. Unfortunately, because of obstructions at the hands of Judgment Debtor, decree could not be executed and petitioner was compelled to file application below Exhibit-33 for providing police assistance. The learned Executing Court vide order dated 31.07.2024 issued following directions:

- “1. The present application is hereby allowed;*
- 2. Issue the warrant of possession of the suit property according to the description, as mentioned in the certified copy of decree in Special Civil Suit No.41/2012 filed at Exh.37;*
- 3. The concerned Police Station is hereby directed to provide the police assistance claimed in terms of two male constables and two lady constables according to law and on the payment of the appropriate Bhatta therefor”*

9. At this stage, Judgment Debtor filed an application Exhibit-73 seeking six months' time for vacating suit property. The contents of paragraph no.3 of application states that Decree Holder has family of 18 members and he needs six months' time to find out

suitable premises. It further stipulates that Decree Holder undertakes to hand over vacant possession to Judgment Debtor. The learned Executing Court sympathetically considered the request of Judgment Debtor and even petitioner consented for grant of one month's time. Consequently, following order was passed:

- “1. The present application is partly allowed;*
- 2. Judgment Debtor Nos.1 to 4 to vacate the suit property within one month from today i.e. till 12.12.2024;*
- 3. The applications below Exh.61, 63 and 66 of the Decree Holder are hereby expedited and to be heard and decided till 17.12.2024. Call the reply of the concerned Bailiff and the Superintendent of Police meanwhile. The concerned Clerk to secure this reply within due date.”*

10. It appears that, although Judgment Debtor availed benefit of aforesaid order, no steps were taken to vacate premises and hand over possession.

11. Later on, learned Executing Court passed impugned order.

12. At this stage, reference can be given to Rule 35(3) of Order XXI which reads as under :-

“35 (3). Where Possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.”

13. Supreme Court of India adopted broader interpretation of Rule in case of ***B. Gangadhar Vs. B. G. Rajalingam***¹, wherein in paragraph nos.6 and 7 following observations are made:-

“6. Rule 35(3) of Order 21 itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or superstructure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any construction of the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes in-executable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings.”

Further in paragraph no.7, in last 8 lines following observations are made:

“7. What is relevant is only a warning by the bailiff to deliver peaceful possession and if they cause obstruction, the bailiff is entitled to remove the obstruction; cause the construction demolished and deliver vacant possession to the decree holder in terms of the decree. Thus considered, we hold that the High Court and the executing Court have not committed any error of law in directing demolition of shops and delivery of the possession to the decree-holder.”

¹ AIR 1996 SC 780.

14. It is apparent that when decree for possession of immovable property is put to execution, Executing Court can exercise all inherent powers to give effect to decree and in given cases provide necessary assistance to Decree Holder by way of police aid or appointing Commission for securing execution. In present case, as per order dated 31.07.2024 already directions are given to provide police aid on payment of appropriate Bhatta. The Police Authorities asked Decree Holder to deposit necessary charges and accordingly, police force was provided. Since there was obstruction and existing construction was not removed by Judgment Debtor, necessary equipments were arranged. However, learned Executing Court ignoring his own previous orders and provisions contained in Order XXI Rule 35(3) of Code of Civil Procedure, refused to issue possession warrant.

15. Apparently, Executing Court erroneously interpreted provisions of law and also acted contrary to its own orders. It is apparent that Judgment Debtor himself has sought time for removal of structures and hand over possession free from all encumbrances in favour of Decree Holder. Even as per indulgence of Executing Court, one month's time was availed by Judgment Debtor, however, undertaking given to Court has been flouted by Decree Holder. In above circumstances, impugned order cannot be sustained in law. In result, Writ Petition is

allowed in terms of prayer Clauses (B) and (C) with liberty in favour of petitioner to pursue his remedy for prayers incorporated in Clause (D) of petition.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/July-2025