



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.327 OF 2019
WITH
CIVIL APPLICATION NO.7033 OF 2019
WITH
CIVIL APPLICATION NO.12499 OF 2024
WITH
CIVIL APPLICATION NO.7992 OF 2023**

Smt. Bhagabai Daga @ Dagadu Chaudhari,
Age: 63 years, Occu: Agri,
R/o. Dhanora,
At present Dhule, Tq. & Dist. Dhule.

..Appellant
(Third Party)

Versus

1. Shri. Yashwant Dhaku Khatri
Through LRs
Sharad Yashwant Khatri (Danej) (died)
Through LRs.
- 1A. Ratnamala Sharad Danej (Khatri)
Age- 60 yrs, Occ- Household
- 1B. Abhishek Sharad Danej (Khatri)
Age- 38 yrs Occ- Service,
- 1C. Piyush Sharad Danej (Khatri)
Age- 31 yrs, Occ- Service,
All R/o: C-1/103, Lok Rachana
Complex, Amar Nagar, Mulund (West),
Mumbai – 400083.
4. Kessarbai Yashwant Khatri (died)
Through LRs
(Respondent Nos.1A to 1C, 5 and 6 are
already on record)
All R/o: Saket Nagar, Bhopal, 5
Public 4A (462023).
5. Sobha Narendra Petkar,
Age: Major, Occu: Household,
R/o. Swami Samarth Nagar.
6. Dr. Alaksha Sukshetra Petkar,
Age: Major, Occu: Household,
Res. Nos.5 and 6 R/o. Swami Samarth nagar,

At Post. Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar

..Respondents
(Orig. Plaintiffs)

...
Mr. A. B. Kale, Advocate for Appellant.

Mr. Mukul S. Kulkarni h/f Mr. P. V. Gujrathi, Advocate for
Respondents.

...
CORAM : S. G. CHAPALGAONKAR, J.
DATED : 01st APRIL, 2025.

ORDER:-

1. The appellant impugns judgment and decree dated 03.12.2018 passed by District Judge, Nandurbar in Regular Civil Appeal No.52/2014, thereby upholding judgment and decree dated 14.07.2024 passed by Civil Judge Junior Division, Nandurbar vide order below Exhibit-33 in Regular Darkhast No.12/2005.

2. The appellant filed objection to execution of decree passed in Regular Civil Suit No.85/1972 under Order XXI Rules 97, 98, 101 read with Sections 47 and 151 of the Code of Civil Procedure contending that she is widow of Daga Shankar Chaudhari. The suit land Survey No.261 admeasuring 13 acres 23 gunthas situated at village Dhanora was subject matter of Regular Civil Suit No.85/1972. It was instituted by Yashwant Dhaku Khatri against his brother Vasudeo and Sarubai seeking relief of possession in respect of suit property. It was contention of Yashwant that his brother Vasudeo was unconcerned with suit land. He executed agreement in favour of Sarubai without any authorization. Therefore, Vasudeo or Sarubai have no right over suit property.

During pendency of Suit, Sarubai expired. Her legal representatives i.e. defendant nos.1A to 1G were brought on record of suit. Daga @ Dagadu was shown as defendant no.1-E being legal representative of Sarubai alongwith others. Upon notice to legal representatives of Sarubai, notice of Daga @ Dagadu received back with endorsement that he is dead. The plaintiffs filed pursis at Exhibit-40 and deleted name of Daga @ Dagadu. The suit was contested by other legal representatives of Sarubai. One of the legal representative of Sarubai i.e. defendant no.1-F set up claim of tenancy. Hence, issue of tenancy of Khandu was referred. Ultimately he was unsuccessful. The Regular Civil Suit No.85/1972 was then decreed holding that Vasudeo had no right in suit property to execute any agreement in favour of Sarubai. Consequently, Sarubai had no right in suit property. Eventually, decree was passed upholding plaintiffs' claim with further directions to legal representatives of Sarubai to hand over possession of suit field to plaintiffs.

3. The aforesaid decree was unsuccessfully subjected to Appeal before District Court, then before this Court in Second Appeal and Special Leave Petition before Supreme Court of India. As such, attained finality. In execution proceeding of aforesaid decree, present appellant, who is widow of Daga @ Dagadu set up objection contending that Daga @ Dagadu was one of the legal representative

of Sarubai. Although he was shown as legal representative, his name was deleted after receipt of Bailiff report regarding his death. Therefore, decree passed in suit would not bind right of legal representatives of Daga @ Dagadu.

4. The Executing Court rejected objections holding that appellant could not set up her independent right to continue in possession of suit property. Once legal representatives of Sarubai have suffered decree being unauthorized possessors of suit field and directed to hand over possession to plaintiffs, she cannot resist decree. The order passed by Executing Court was challenged before District Judge in Regular Civil Appeal No.52/2014, who dismissed Appeal upholding judgment and order passed by Executing Court. Hence, this Second Appeal.

5. Mr. Kale, learned Advocate appearing for appellant vehemently submits that appellant had raised objection to execution of decree, since she is in possession of suit property. Although Daga @ Dagadu was added as one of legal representative of original defendant Sarubai, his name was deleted from array of respondents. No attempts were made to bring his legal representatives on record. Therefore, decree as passed in Regular Civil Suit No.85/1975 would not bind her and she cannot be asked to hand over possession of suit property on the strength of said decree. Mr. Kale further submits that objection to the decree filed

under Order XXI Rule 97 ought to have been tried as suit and after recording evidence, findings ought to have been given. However, such procedure is not followed by Executing Court. He would further submit that Sarubai had entered into an agreement with Vasudeo i.e. brother of plaintiffs. She parted amount out of joint family income. Sarubai was put into possession on behalf of joint family and all legal representatives of Sarubai were holding undivided share. They had interest in suit land under Sections 8 and 15 of the Hindu Succession Act. Therefore, to the extent of share of Daga @ Dagadu in suit property, decree cannot be executed.

6. Per contra, Mr. Kulkarni, learned Advocate appearing for respondents submits that suit was filed by plaintiffs seeking decree of possession against his brother Vasudeo and Sarubai, who was put into possession on the basis of unauthorized agreement executed by Vasudeo. During pendency of suit, Sarubai expired. Her legal representatives 1A to 1G were brought on record. The name of Daga @ Dagadu was deleted as he was reported to be dead and suit was contested by other legal representatives of Sarubai. Daga @ Dagadu could not have asserted independent right in suit property and could not have independent stand than as taken by Sarubai. Further, one of the legal representative of Sarubai namely Khandu (defendant no.1-F) took up stand of tenancy, which

is already negated by Competent Court of jurisdiction in reference of such issue. Mr. Kulkarni submits that it is not a case of joint family property possessed by plaintiffs. Sarubai herself was found in unauthorized possession. The agreement dated 14.04.1965 by Vasudeo in favour of Sarubai is held to be without authority. Hence, Sarubai or her legal representatives would not have independent right in suit property.

7. Having considered submissions advanced, only issue that requires consideration is whether appellant can set up independent claim to continue in possession of suit property and her entitlement to resist execution of decree. Perusal of objection of appellant filed before Executing Court shows that she seeks to set up her claim on the basis of agreement entered between Vasudeo and Sarubai. According to appellant, plaintiffs deleted name of Daga @ Dagadu from array of defendants in Regular Civil Suit No.85/1972. Therefore, decree would not be binding upon her being legal representative of Daga @ Dagadu. Admittedly, Daga @ Dagadu was brought on record as one of legal representative of Sarubai and Sarubai's claim on the basis of agreement with Vasudeo. After death of Sarubai, her legal representatives were brought on record. Except Daga @ Dagadu, all other legal representatives contested suit.

8. In suit proceeding Trial Court had framed an issues as to authority of Vasudeo to enter into agreement with Sarubai, whereupon finding is recorded that he had no authority to put Sarubai in possession of suit field. Even plea of Sarubai or her legal representatives to be tenant over suit property has been dealt and negated by Court in Regular Civil Suit No.85/1972. The said decree is confirmed upto Supreme Court without any modification.

9. In this background, claim of Sarubai to continue in possession of suit property on the basis of agreement dated 14.04.1965 executed by Vasudeo is finally adjudicated after giving opportunity to her legal representatives to defend her interest. The absence of legal representatives of Daga @ Dagadu, who was reported to be dead or deletion of his name from array of defendants would be of no consequence. His interest was duly represented by his contesting brother, who defended claim of Sarubai upto Supreme Court. Therefore, in absence of independent right irrespective of claim of Sarubai, objection to execution of decree by appellant being legal representatives of Daga @ Dagadu would not be sustainable.

10. The scheme of Section 47 or Order XXI Rule 97 of the Code of Civil Procedure does not give right in favour of person, who is claiming through judgment debtor to resist decree, unless he has independent right to protect his possession. The Executing Court

as well as Appellate Court observed that appellant claimed her right to continue possession through Sarubai alleging right of joint family. The appellant cannot claim herself to be third party. Her possession held to be unauthorized. The Appellate Court has also confirmed aforesaid finding.

11. Pertinently, effect of deletion of name of Daga @ Dagadu was raised in Civil Appeal No.229/1990 filed by Khandu Shankar Choudhari against decree in Regular Civil Suit No.85/1972, wherein Appellate Court has observed that there was nothing on record to show that Daga @ Dagadu has any legal representative and his brother had carried forward litigation on behalf of legal representatives of Sarubai hence effect of non-bringing of legal representative of deceased Daga @ Dagadu was nullified. The said decree passed by Appellate Court was confirmed by this Court and then by Supreme Court. Therefore, it is not open for appellant to again raise same issues, which has been already adjudicated in original proceeding of suit.

12. Mr. Kulkarni has further pointed out that appellant had filed Regular Civil Suit No.26/2011 seeking declaration that all judgments in Regular Civil Suit No.85/1972 are not binding upon her and said suit is dismissed in default. Thereafter, objections are filed in execution proceeding. Even assuming that, dismissal of suit would not take up jurisdiction of Executing Court to deal with

objection to the execution of decree, this Court holds that in absence of independent right, appellant cannot resist execution of decree that has attained finality. All questions sought to be raised by appellant are already adjudicated in original proceeding. The Executing Court as well as Appellate Court have rightly concluded that appellant cannot resist execution of decree. In result, no substantial question of law arises for consideration in this Appeal. Consequently, Appeal stands dismissed.

13. In view of dismissal of Appeal, pending Civil Applications also stand disposed of.

(S. G. CHAPALGAONKAR)
JUDGE