

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.48 OF 2025

Devdas Anant Foka ...Petitioner

vs.

Kesari Janardhan Foka and Others ...Respondents

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Mr. Rupesh Lanjekar, for the Petitioner.

Mrs. Shivani K. for Respondent Nos. 1 and 2.

CORAM : N. J. JAMADAR, J.

DATE : JANUARY 09, 2025

P.C:

1. Heard the learned counsel for the parties.
2. The petitioner/ obstructionist takes exception to an order passed by the learned Judge, City Civil Court in Execution Application No. 100 of 2018 directing issue of possession warrant under Order XXI Rule 35 of the Code of Civil Procedure, 1908.
3. The respondent Nos. 1 and 2 decree holders have filed Execution Application No. 100 of 2018 to execute final decree in Suit No. 8565 of 2002 dated 12th December, 2017 of partition, and separate possession of 1/6 share of the decree holders in the premises bearing CTS No. 559 and 560/1 situated at Varsova, Tal. Andheri (the suit premises). In execution of the said decree the Court had appointed an Architect as a Court Commissioner to carry

out inspection of the suit premises and suggest partition. Based on the report of the Court Commissioner, which was accepted by the decree holder, the learned Judge, City Civil Court issued order of possession warrant.

4. Mr. Lanjekar, the learned counsel for the petitioner/obstructionist, submitted that, in fact, the respondent Nos. 1 and 2/decree holders, had taken out an application under Order XXI Rule 97 of the Code for removal of the obstruction and subsequently did not press the said application. Therefore, since the decree holder had withdrawn the proceeding for removal of obstruction, filed under Order XXI Rule 97 of the Code, the impugned order issuing possession warrant under Rule 35 of Order 21 is legally infirm. Reliance was sought to be placed on the judgment of the Supreme Court in the case of **Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and Anr.**¹.

5. The learned counsel for the respondent Nos. 1 and 2 decree holder countered the submissions on behalf of the petitioner. It was submitted that the petitioner is the son of the judgment debtor Anant Foka. The petitioner is bound by the decree. In fact, the petitioner had already preferred an obstruction proceedings under Order XXI Rule 97, which came to be dismissed and the said order has attained finality.

1 (1997) 3 Supreme Court Cases 694.

6. From the perusal of the impugned order, it becomes abundantly clear that the learned Judge, City Civil Court, referred to the said Notice of Motion No. 3416 of 2018 preferred by the petitioner/ obstructionist and the fact that the said Notice of Motion was dismissed and no appeal had been preferred against the said order. A perusal of the order dated 9th February, 2024 passed in Notice of Motion No. 3416 of 2018 shows that the obstruction proceedings filed by the petitioner under Order XXI Rule 97 came to be rejected by a reasoned order repelling the objections of the petitioner to the execution.

7. In any event, the petitioner, being the son of the judgment debtor No. 1, appears to be bound by the decree. The executing Court had also noted that the petitioner had filed an independent suit seeking a declaration that the decree in question is not binding upon him.

8. In this view of the matter, when the obstruction proceedings taken out by the petitioner under Order XXI Rule 97 of the Code has already been rejected by the executing Court, the fact that the decree holder had filed and withdrawn the proceedings to remove the obstruction, does not render the order of issue of possession warrant under Order XXI Rule 35 infirm. There is no substance in the petition.

Hence, the following order.

ORDER

The petition stands dismissed.

(N. J. JAMADAR, J.)