



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 5931 OF 2024

1. Smt. Sita w/o Dilip Ingole
Aged about : 45 Years, Occu : Service;
2. Dilip s/o Jadavan Ingole
Aged about : 50 Years, Occu : Labour; R/o
Plot No. 31, Senapatinagar, Behind
Crematorium, Dighori, Nagpur.

... PETITIONERS

VERSUS

1. Jugalkishor Mishrilal Darak (dead) through
L.Rs.
 - (i) Smt. Leelabai wd/o Jugalkishor Darak
Aged about 86 Years, Occu : Nil;
 - (ii) Omprakash s/o Jugalkishor Darak
Aged about 69 Years, Occu : Business;
 - (iii) Ajay s/o Jugalkishor Darak
Aged about 64 Years, Occu : Business;All R/o Nehru Bazar, Main Road, Katol,
Tahsil Katol, District Nagpur.
2. Maharshi Sudarshan Maharaj Co-operative
Housing Society, Nagpur, through its
Secretary Shri Rajesh Dudhalkar, R/o 45,
Ratan Colony, Sonbajichi Wadi, Mahal,
Nagpur.

[Amendment carried out as per Court's
order dated 15.01.2025]

Maharshi Sudarshan Maharaj Co-operative
Housing Society, Nagpur, through its
Secretary Shri Goldi s/o Rajesh Dudhalkar,
R/o 45, Ratan Colony, Ramaji ki Wadi,
Chitanavispura Road, Nagpur.

... RESPONDENTS

Mr. P. R. Chakole, Advocate for Petitioners.

Mr. S. A. Kalbande, Advocate for Respondent No.1-(ii)/Caveator.

CORAM : R. M. JOSHI, J.
DATE : JUNE 30, 2025.

ORAL JUDGMENT

. Heard Mr. P. R. Chakole, learned Counsel for the Petitioners and
Mr. S. A. Kalbande, learned Counsel for the Respondent No.1(ii)/Caveator.

2. By consent of both sides, Petition is heard finally at the stage of
admission.

3. This Petition take exception to the order dated 10/1/2024 passed
below application (Exhibit-68) and order dated 4/3/2024 passed below
application (Exhibit-72) by the Execution Court in MJC No. 309/2012,
whereby the applications were allowed. The Execution Court has directed
possession to be taken of the suit property from the Petitioner and has also
provided for police protection.

4. The facts which led to the filing of this Petition, according to the Petitioners, can be narrated in brief as under :

5. The Petitioner No.2 claims himself to be a bona fide purchaser of plot in the sanctioned layout bearing Plot No.31/A in Kh. No. 25/1, 37/1, P. H. No.39, admeasuring 750 sq.ft. situated at mouza Dighori Dahanghat, Senapati Nagar, Nagpur under registered sale deed dated 2/5/1992 executed in her favour by the Respondent No.2/Maharshi Sudarshan Maharaj Co-operative Housing Society, Nagpur, a Society registered under the Maharashtra Co-operative Societies Act, 1960. He further claims that she had constructed the house on the said plot since last 32 years and is occupying the same along with Petitioner No.1 and his family. Petitioner No.1 is wife of Petitioner No.2 and claims to have been joint occupant of subject plot.

6. The Respondent No.1, in the year 2005 filed a suit for declaration and permanent injunction against the Respondent No.2/Society being Regular Civil Suit No. 564/2005. On 25/11/2010 the suit came to be decreed, wherein it is held that the Respondent No.2/Society has no right or authority in respect of the subject property and perpetual injunction was granted, restraining the Society, its members, servants and assignee from disturbing possession of the

Plaintiff over the suit property and carrying out construction thereon and further creating any third party interest.

7. The Respondent No.1/Original Plaintiff filed proceedings under Order 21 Rule 32 read with Order 39 Rule 2-A of the Code of Civil Procedure, on the basis of the Judgment and decree passed in Regular Civil Suit No. 564/2005 against the Original Defendants and Petitioners herein. On 11/2/2013 Petitioners appeared before the Execution Court raising objection to the maintainability of the proceeding under Section 47 of the Code. Insofar as the decree passed by the trial court in Regular Civil Suit No. 564/2005 is concerned, the Respondent No.2/Society challenged the said decree in Regular Civil Appeal No. 102/2011 which came to be dismissed and that the decree passed by the trial court has attained finality.

8. The Petitioners claim that in or around year 2016-17 notices were issued by the Nagpur Improvement Trust calling upon the Petitioner No.1 to remove construction made on the subject plot. She filed suit against the Nagpur Improvement Trust being Regular Civil Suit No. 207/2017, wherein temporary injunction has been granted restraining the Nagpur Improvement Trust from taking action on the basis the notices impugned. It is their further case that on 24/9/2024 Petitioners got call from the concerned Police Station

informing about orders passed below Exhibits-68 and 72 in MJC No. 309/2012. Hence, this Petition.

9. The learned Counsel for Petitioners submits that the Petitioners were not Defendants in Regular Civil Suit No. 564/2005 and as such the decree passed therein does not bind them. It is his contention that though Petitioner No.2 is Member of the Respondent No.2/Society, Petitioner No.1 not being Member of the said Society, is not bound by such decree in any case. It is submitted that the objection raised by the Petitioners before the Execution Court with regard to the maintainability of the proceedings against them has not been decided by the Execution Court and the court proceeded to pass order on the application for possession of the subject plot. It is his submission that having regard to the nature of decree passed by the trial court in Regular Civil Suit No. 564/2005, question of there being any handing over of possession of the subject plot to the Decree Holder/Original Plaintiff does not arise. It is his submission that the Petitioners are in occupation and possession of the subject plot since the year 1992 and that the orders passed below Exhibits-68 and 72 deserves interference.

10. The learned Counsel for Respondent No.1/Original Plaintiff opposed the Petition firstly on the ground that the Petitioner No.2 being

Member of the Society is seeking the right through the Society as the alleged sale deed has been executed in his favour by the Society. It is his submission that undisputedly a decree came to be passed against the Society, which had represented all its Member before the trial court and since the said decree has attained finality, the order of injunction passed against the members of the Society would bind the Petitioner No.2. It is argued that Petitioner No.1 does not claim any independent right in the suit property and as such there is no question of hearing her objection to the execution proceedings.

11. As far as the objection raised by the Petitioners before the Execution Court is concerned, it is pointed out that after the objection was filed in the year 2013, till year 2024 they have failed to pursue and substantiate their objection before the Execution Court and as such now it cannot be permitted to be argued that the right of raising objection has been denied to them. It is his submission that once there is an injunction restraining the members of the Society from carrying out any construction on the suit property, it cannot be expected from the Plaintiff/Decree Holder to file separate suit for removal of a person who has carried out construction and occupied the plot in contravention of the injunction. It is his submission that

the powers of Execution Court are rightly exercised under Order 21 Rule 32 of the Code.

12. There is no dispute made by the Petitioners of the fact that the subject plot has been purchased by the Petitioner No.2 from the Respondent No.2/Society. The Respondent No.2/Society was party Defendant to the Regular Civil Suit No. 564/2005. It is not the case of the Petitioners that the said suit was a collusive suit between Plaintiff and Society. The Society not only resisted the said suit, but also filed appeal against the Judgment and decree passed by the trial court. The decree passed by the trial court has attained finality and as such the findings recorded therein would bind all concerned.

13. The trial court in the said suit in paragraph 32 of the Judgment has held that the purchasers of the suit property (i.e. Society) were not handed over with the possession thereof. It is also recorded therein that admittedly the suit property is not demarcated and that the purchasers were not put in possession of any particular portion out of the suit property. The contention of the Defendant that its members are in lawful possession of the suit property was held to be not sustainable. It was further held by the trial court that the Defendant/Society and its members are claiming their right without entering

into a lawful contract with the Plaintiff in respect of the suit property. The Court has also taken into consideration the contentions sought to be raised before it that the members of the Society are trying to erect huts and trying to show symbolic possession over the suit property. It was categorically held by the trial court that the Plaintiff has established his possession of the suit property and also proved that Defendant/Society has no right over the same. In the light of these observations and findings of the trial court, it proceeded further to issue following perpetual injunction :

“(ii) It is declared that the defendant society, its office bearers, assignee, members have no right, authority, power and status to make an encroachment over the suit property and to construct house or building.

(iii) The defendant society, its office bearers, assignee, members and any other person are permanently restrained by perpetual injunction from disturbing peaceful possession of the plaintiff over the suit property and they are restrained from constructing or erection of any building or house on the suit property.

(iv) The defendant society, its office bearers, assignee are permanently restrained from creating any third party interest and alienating the suit property.”

14. Though now it is argued on behalf of the Petitioners that the Petitioners were not aware of the filing of the said suit, however, admittedly at least from the year 2013 after causing appearance in the execution proceedings, the Petitioners are aware of the decree passed in Regular Civil

Suit No. 564/2005 and the perpetual injunction granted against the members and assignee etc. of the Defendant/Society. In spite of this knowledge, no steps are taken by the Petitioners in order to challenge the said order or at least to seek a declaration that the same does not bind the Petitioners.

15. Now a grievance made by the learned Counsel for Petitioner that the objection to the maintainability of the execution proceedings against the Petitioners has not been decided by the Execution Court. In this regard perusal of record more than sufficiently demonstrates that since year 2013, the Petitioners have not bothered to press the said objection before the Execution Court. Needless to emphasis that party must be vigilant towards his rights and it is not obligation on the Court to run behind the litigant and to call upon them to pursue case. Now, therefore, it cannot be permitted to be said that they were denied any opportunity of hearing by the court below.

16. The case of the Petitioner No.2 is that he has purchased the subject property from Respondent No.2/Society. It is already held by the competent court that Respondent No.2/Society had no right over the suit property. This finding is intact even as on today. Thus, the claim made by the Petitioner No.2 through the Society is not entertainable. He does not claim any independent right in the suit property, but the said right is derived from the

Defendant/Society only. As far as Petitioner No.1 is concerned, except for the fact that she is wife of Petitioner No.2 and member of family, she does not claim any independent right in the suit property. Thus, there is no merit in the objection raised by the Petitioners to the execution proceedings.

17. Reference made by the Petitioners on the order passed by the Civil Court in Regular Civil Suit No. 207/2017 is wholly misplaced for the reason that it is a *prima facie* observation of the trial court and such observation has been made in total ignorance of the Judgment and decree passed in Regular Civil Suit No.564/2005, since not pointed out to it. Moreover, the Respondent No.1, who is the owner of the property, has not been joined as Defendant in the said suit.

18. Once it is admitted fact that there is a perpetual injunction granted by the competent court restraining the Society, its members, assignee etc.. from carrying out any construction or obstructing the possession of the Plaintiff over the suit property, it cannot be expected that the Plaintiff is required to file separate suit for removal of such encroachment caused by the member, who has been prevented by order of injunction. Order 21 Rule 32 of the Code sufficiently covered the said situation and in the facts of the case, order passed by the trial court vide Exhibit-68 of removal of encroachment and

directing possession of the subject property to the Plaintiff/Decree Holder cannot be termed as without jurisdiction or in excess of jurisdiction of the Execution Court.

19. The execution proceeding is pending since the year 2012. The Petitioners caused appearance therein in the year 2013. Admittedly, no steps were taken in order to press the application filed before the Execution Court. In the circumstances, Execution Court has committed no error in entertaining the application of the Plaintiff/Decree Holder. Thus, this case is not the one, wherein opportunity of hearing has been denied to the Petitioners. It is often seen that the unscrupulous litigants adopt different tactics in order to ensure that the decree passed by the competent Court is not executed. When the Court has exercised jurisdiction correctly, and that too, when the order has been passed after a lapse of around 11 years, it cannot be said that any haste was shown by the Execution Court in passing order impugned. The Petition, therefore, sans merit and hence is dismissed.

20. The learned Counsel for Petitioners seeks stay to this order for a period of six weeks in order to approach the Hon'ble Supreme Court. The learned Counsel for Respondent opposes the said prayer. In order to enable the Petitioners to test the order passed by this Court to the Hon'ble Supreme Court,

the interim relief granted in this Petition stands continued for a period of six weeks from today.

(R. M. JOSHI, J.)

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