

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (STAMP) NO.32988 OF 2014

Shri. Lavendra Baburao Savant

.. Petitioner

Versus

Smt. Surekha Sambhaji Patil and others

.. Respondents

Mr. Kuldeep U. Nikam, Advocate for the Petitioner.

CORAM : R.M. SAVANT, J.

DATE : 23rd JANUARY, 2015

PC.

1. The writ jurisdiction of this Court is invoked against the order dated 21.11.2014 passed by the Learned 6th Joint Civil Judge, Junior Division, Islampur, by which order the application Exh.14 came to be rejected. The said application was filed questioning the execution proceedings being Regular Darkhast No.155 of 2011 on the ground of its maintainability. In so far as the execution proceedings are concerned, they are in respect of the decree passed in Regular Civil Suit No.179 of 1988 which was filed for maintenance. The said suit came to be decreed by judgment and order dated 11.02.1998 in favour of the Plaintiff who is the non-Applicant No.1, in so far as the present application Exh.14 is concerned. The said decree was challenged by way of Appeal being Regular Civil Appeal No.133 of 2000. The Lower Appellate Court by judgment and order dated

26.06.2007 dismissed the Appeal and thereby confirmed the decree passed by the Trial Court. In so far as the decree is concerned, the maintenance which was awarded by the decree was kept as a charge on the property which the present Petitioner i.e. Defendant No.2 has purchased.

2. It seems that earlier the Decree Holder had filed Regular Darkhasht No.73 of 1998. However, the said Regular Darkhasht came to be dismissed for want of prosecution. It is thereafter that the instant Darkhasht being Regular Darkhasht No.155 of 2011 has been filed for executing the decree. The maintainability of the present Darkhasht is challenged on the ground that the same has been filed beyond limitation that since the earlier Darkhasht being Regular Darkhasht No.73 of 1998 has been dismissed, the present Darkhasht is hit by the principles of res-judicata. The Executing Court considered the said application, in so far as the first objection is concerned, the Executing Court referred to the judgment of the Apex Court reported in **AIR 1974 SC 1380** in the matter of **M/s. Gojer Brothers (P) Ltd. Vs. Ratan Lal Singh**, wherein the Apex Court has held that if the Appeal is disposed after a contested hearing, the decree to be executed is the decree of the Appellate Court and not of the Trial Court. The underlying principle being that the decree of the Trial Court merges in the decree of the Appellate Court. In view of the fact that the decree of the Appellate Court is dated 23.08.2007 the Executing Court held that the

Regular Darkhast No.155 of 2011 was not barred by limitation.

3. In so far as the issue which is sought to be raised on the basis of the rejection of the earlier Darkhast No.73 of 1998 is concerned, the Executing Court held that since the said Darkhast proceedings were dismissed on a technical ground and not on merits, the said fact would not come in the way of the decree holder from following and prosecuting the present Darkhast. It is required to be noted that the Petitioner is the original Defendant No.2 who has purchased the property on which there is a charge of the maintenance decree passed in favour of the decree holder. Hence, the objection of the Defendant No.2 is obviously with an intention to see to it that the decree is not executed as the charge in respect of the maintenance is on the land purchased by him. In my view, the reasons mentioned by the Executing Court rejecting the two fold contentions raised on behalf of the Defendant No.2 i.e. non-Applicant No.2 before the executing Court are unexceptional and do not warrant any interdiction in the writ jurisdiction of this Court. The Writ Petition is accordingly dismissed. Needless to say that in so far as the merits of the Darkhast proceedings are concerned, the contentions of the parties are kept open for being urged before the Executing Court.

[R.M. SAVANT, J]