

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No.240 of 2016**

Rahul Shukla, Aged about 40 years S/o Lalit Shukla, R/o Baijnathpara, Chhotapara, Raipur Tahsil and District Raipur Chhattisgarh.

---- **Petitioner**

Versus

1. Sonraj Golcha S/o Pukhraj Golcha,
2. Smt. Gunmala Golcha, W/o Sonraj Golcha,

Both R/o C- 105, Tagore Nagar, Raipur, Tahsil and District Raipur, Chhattisgarh, Presently R/o Ahmadji Colony, Behind Nalghar, Raipur, Tahsil And District Raipur, Chhattisgarh.

3. Lalit Shukla, S/o Late Shri Gangasagar Shukla, Aged About 69 Years R/o Chhotapara, Raipur, Tahsil and District Raipur, Chhattisgarh.

---- **Respondents**

For Petitioner	:	Shri Sourabh Sharma, Advocate.
For respondents No.1&2	:	Shri Amrito Das, Advocate.
For respondent No.3	:	None.

Hon'ble Shri Justice P. Sam Koshy

Order On Board

07.11.2016

1. The present petition under Article 227 of the Constitution of India has been filed assailing the order dated 30.03.2016 passed by the District Judge, Raipur, in Misc. Appeal No.11/2016 whereby the District Judge has rejected the appeal of the petitioner affirming the order dated 03.03.2016 passed in Civil Suit No.55-A/2011 rejecting petitioner's application under Order 21 Rule 97, 101 read with Sections 47 & 151 CPC.
2. The brief facts relevant for adjudication of the present petition is that, the petitioner in the instant petition is the son of the respondent No.3. The

dispute in the present case revolves around a House bearing No.7/118, situated at Chhotapara, opposite Maszid, Baijnathpara, Raipur, measuring 1400 sq.feet (herein after referred to as the suit property).

3. The facts of the case in brief is that, the suit property originally belonged to one Sushila Bai W/o Kashi Prasad Soni. It is said that the said Sushila Bai had entered into an agreement with the petitioner for sale of suit property for a sale consideration of Rs.4,00,000/- and an amount of Rs. 1,00,000/- was also paid as an advance/earnest money by the petitioner to said Sushila Bai. It is said that, subsequently, the agreement to sale could not be honoured with and as the agreement with the petitioner could not materialize, Sushila Bai sold the suit property to respondents No.1&2. The petitioner thereafter filed a suit for specific performance of contract which was registered as Civil Suit No.32-A/2006. The said suit was dismissed by the Civil Court vide its judgment and decree dated 30.07.2007 holding that the plaintiff i.e. petitioner herein has failed to prove his willingness to perform or showed his readiness and willingness to perform the terms of the contract which was to be performed on his part. The said decree in Civil Suit was put to challenge by way of an appeal preferred by the petitioner which was registered as First Appeal No.100/2007 before this High Court which is still pending consideration for final hearing. Division Bench of this High Court on 07.09.2007 while considering the application for interim relief passed the following interim orders:

“Having heard learned counsel for the appellant and having regard to the facts and circumstances of the case, it is directed that respondents No.2 & 3 should not alienate or create any third party interest in respect of the disputed

property until further orders.”

4. Since, in between, there was a valid transaction of sale between Sushila Bai and the subsequent purchaser i.e. respondent No.2, the respondent No.2 filed a suit for eviction against the respondent No.3 which was registered as Civil Suit No.55-A/2011 before the 4th Civil Judge, Class-II, Raipur. The said suit was decided in favour of the respondents No.1&2 with a decree of eviction against the respondent No.3 vide judgment and decree dated 16.12.2011. The said judgment and decree dated 16.12.2011 was put to challenge in First Appeal in Civil Appeal No.13-A/2011 before the Additional District Judge, Raipur. The lower appellate court also affirmed the judgment and decree dated 16.12.2011 dismissing the Civil Appeal vide its judgment and decree dated 27.09.2012. Both these judgments were questioned in Second Appeal No.381/2012. This High Court vide judgment dated 01.02.2016 dismissed the Second Appeal on the ground that there was no substantial questions of law involved. The said order of this High Court in Second Appeal No.381 of 2012 was put to challenge in SLP which too got dismissed on 02.05.2016. Thus, the decree dated on 16.12.2011 has attained its finality.
5. Subsequently, the respondents No.1&2 had initiated an execution proceeding against the respondent No.3 and where the present petitioner i.e. son of respondent No.3-judgment debtor filed an application under Order 21 Rule 97-101 CPC resisting the executing proceeding filed an objection in respect of grant of possession over the suit property sought to be executed by the decree holder i.e.

respondents No.1&2.

6. The contention of the petitioner in the said application was that the respondent No.3 was in possession of the suit property in the capacity of tenant but in between there was an agreement to sale executed by Sushila Bai in favour of the petitioner. By virtue of said agreement to sale he had come in possession of the suit property as a purchaser. The dispute between the petitioner, Sushila Bai and the subsequent purchaser i.e. respondents No.1&2 are still pending consideration before the High Court in First Appeal No.100 of 2007 in which the High Court, as an interim measure has ordered for non creation of any third party right.
7. According to petitioner, by virtue of the agreement entered into between the parties and in the light of the said contract he had come in possession over the suit property and he is in possession and residing in the said property since long. In case if he is now ordered for eviction from the said property, he would be put to irreparable loss. He further submits that he was a necessary party to the suit for eviction filed by the respondent No.2, but he has been deliberately not made a party, and therefore, insisted for allowing the application under Order 21 Rule 97, 101 IPC.
8. The trial court, after considering the entire facts and circumstances of the case particularly considering the fact that indisputably the respondent No.3 had taken possession of the suit property from Sushila Bai in the capacity of tenant, the sale of the property to the respondents No.1&2 by Sushila Bai also is a matter of fact and so far as the eviction suit and the

judgment and decree passed in the the said eviction suit is concerned, the same has attained finality as the respondent No.3 had availed all the remedies of appeal till the stage of Supreme Court and has been unsuccessful at all stages. The trial court also rejected the objection filed by the petitioner under Order 21 Rule 97 vide order dated 03.03.2016.

9. This order dated 03.03.2016 was further put to challenge by way of appeal before the District Judge, Raipur under Order 21 Rule 103 CPC. In the said appeal also, the petitioner took the same stand of his coming in possession of the suit property by virtue of an agreement to sale and the subsequent litigation which is still pending consideration in First Appeal No.100 of 2007. That, the right of the respondents No.1&2 over the suit property is hit by the doctrine of lis pendence as the alleged purchase by the respondents No.1&2 from Sushila Bai was made after the agreement to sale was already executed between Sushila Bai and the present petitioner.
10. According to the petitioner, the two courts below have not considered the aspect of the pendency of the First Appeal and the interim order granted by the High Court on 07.09.2007 in the said First Appeal. According to petitioner, as long as the First Appeal is pending consideration before the High Court, the executing court should not proceed further with the case and keep itself in abeyance till the right of the petitioner is thrashed out in the First Appeal pending before the High Court.
11. It was further contended by the counsel for the petitioner that even the procedure adopted by the two courts below firstly by the trial court while rejecting the application under Order 21 Rule 97 CPC summarily without

any investigation or inquiry and the affirmation of the same in First Appeal before the District Judge is bad in law. As per petitioner, the trial court upon the objection filed by the petitioner under Order 21 Rule 97 CPC ought to have taken cognizance of the said application and should have proceeded to adjudicate upon the right as claimed by the petitioner through the said application. In the absence of which, the entire proceedings drawn is per se illegal and deserves to be set aside/quashed.

12. Counsel for the petitioner relying upon the judgments of Supreme Court in cases of Ashan Devi & Another Vs. Phulwasi Devi & Others, reported in 2003(12)SCC 219, Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and Another, reported in 1997(3) SCC 694 and in case of Sameer Singh and Another Vs. Abdul Rab and Others, reported in 2015(1) SCC 379, prayed for the quashing of the two orders dated 03.03.2016 passed by the trial court as well as order dated 30.03.2016 passed by the District Judge, Raipur.
13. Per contra, learned counsel for the respondents No.1&2 opposing the petition made two fold argument. According to him, firstly the present petition was not maintainable and the impugned order is an appealable order as is evident from Order 21 Rule 103 CPC. The said fact is also evident from the fact that the petitioner himself had preferred an appeal before the District Judge which stands rejected on 30.03.2016 and against the said order of a subsequent appeal in the nature of Second Appeal before the High Court that would lie and not a writ petition, in this regard he relied upon the judgment of Supreme Court in case of

Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and Another, reported in 1998(3) SCC 723.

14. He further opposing the petition on merits of the case submitted that the application under Order 21 Rule 97 CPC as filed by the petitioner is not maintainable for the reason that he is not a stranger to the proceedings at all. According to respondents No.1&2, the present petitioner is in fact the son of the respondent No.3 who is judgment-debtor. Indisputably the present petitioner also resides with the respondent No.3 in the suit property which the respondent No.3 had taken from Sushila Bai as a tenant. The entire proceedings before the trial court in the suit filed by the respondent No.2 and the orders passed at different stages the petitioner was well aware of those developments and it is hard to presume that he was not aware of such development as he is the son of the respondent No.3 and who was residing in the same property along with respondent No.3. Thus, he being not a stranger to the proceedings was not entitled to prefer an application under Order 21 Rule 97 CPC against the judgment and decree which has been put to execution by the respondents No.1&2. Thus, prayed for rejection of the petition.
15. Having heard the rival contention put forth by counsel on either side we may first delve in to the issue of whether the present Writ Petition under Article 227 in the factual background of the case is maintainable or whether it ought to have been regular Second Appeal by the Petitioner. For ready reference it shall be relevant at this juncture to reproduce the rule 103 of Order 21 of the CPC

“103. Orders to be treated as decrees.- Where any application has been adjudicated upon under rule 98 or rule 100, the order

made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.”

16. A plain reading of the said provision very clearly envisages the fact that the order made on an application moved by the Resister to the decree under Rule 97 onwards it shall have the same force and shall also have the same condition to an appeal or otherwise as if it were a decree. In the instant case the Petitioner had moved the application under Order 21 Rules 97 - 101 CPC which got rejected initially by the Trial Court on 03.03.2016. In view of the Rule 103 under the normal rule of practice it ought to have been regular appeal under Section 96 which should have been filed before the District Judge but in the instant case the appeal has been preferred under Rule 103 and the same was registered as a Miscellaneous Appeal before District Judge, Raipur which has been entertained and decided also. Both the Courts i.e. the Trial Court as well as lower Appellate Court have rejected the objection moved by the Petitioner. Since the Miscellaneous Appeal under Rule 103 has already been entertained and decided, thus the present Petition under Article 227 of the Constitution of India under which the present Petition has been preferred, this Court has no hesitation in reaching to the conclusion that the present Petition under Article 227 is not otherwise maintainable against the order passed by the Court below on an application under Order 21 Rule 91 - 101 CPC. But in the peculiar facts of the case where the Miscellaneous Appeal preferred before the District Judge itself was registered under the wrong nomenclature of law this Court at this juncture does not intend to send the matter back to the

District Court for re-hearing the matter after registering the same as a regular appeal. Though procedurally it ought to have been first appeal which should have been registered before the District Judge and thereafter it ought to have been Second Appeal, however instead of deciding the Petition on its technicality and forcing the parties to re-agitate the whole issue once again under appropriate provision of law, this Court in exercise of its writ jurisdiction intends to decide the matter on its merits so as to an end to the application filed by the Petitioner and also for deciding the veracity of the two orders under challenge.

17. At this juncture it would also be relevant to take note of the fact that the judgment which has been cited by the Petitioner Counsel in support of his Petition being maintainable in the case of **Sameer Singh and Another v. Abdul Rab and Another** reported in **2015 (1) SCC 379** . the said judgment and the order passed on the application under Order 21 Rule 97 was not decided on merits but the Court below had refused to exercise its jurisdiction on the ground of the Court having become functus officio and therefore the Supreme Court entertained the Petition under Article 227 holding that though it ought to have been regular appeal in the said case since the application was not decided on merits the petition under Article 227 was maintainable. Such is not in the factual matrix of the present case in as much as both the Court below have decided the application on merits holding that the application moved by the Petitioner under Order 21 Rule 97-101 CPC is miss-conceived and without merits. It would be relevant at this juncture to reproduce the relevant portion of the said judgment dealing with the

said issue:-

“26 Order 21 Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were decree. Thus, it is a deemed decree. If a court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under Article 227 of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it.....

“ 27.....Had the executing court apart from expressing the view that it had become functus officio had adjudicated the issues on merits, the question would have been different, for in that event there would have been an adjudication.....

“28In view of the forgoing analysis, we conclude and hold that the High Court has fallen into error by opining that the decision rendered by the executing court is a decree and, therefore, an appeal should have been filed, and resultantly allow the appeal and set aside the impugned order.....

18. The ratio laid down by the Supreme Court in the aforesaid judgment clearly reflects that if on application under Order 21 Rule 97 the order is passed on its merits it would only be an appeal which would be tenable and not a petition under Article 227 of the Constitution. This position of law also finds place in one of the decision of the Madhya Pradesh High Court reported in **1999 (1) M.P. Weekly Note 155** in case of **Madhusudan v. Rajesh** wherein in somewhat similar factual background, against the order passed on an application under order 21 Rule 97 a Miscellaneous Appeal was preferred under Order 41 Rule 1

and the High Court held that it has to be an appeal under Rule 96 of the CPC. Thus this Court is of the opinion that as has been held by the Madhya Pradesh High Court this is only a procedural mistake which appears to have occurred on the part of the Petitioner while preferring Miscellaneous Appeal and thus the present Petition under Article 227 of the Constitution of India is not maintainable. However the Supreme Court time and again have laid emphasis to the aspect of procedure to subserve main object of doing justice without procedural technicalities when pitted against cause of justice it is later which should prevail. Law is meeting justice to its end. Therefore instead of again remitting the matter back to the lower Appellant Court for fresh adjudication and fresh registration of the case as an appeal under Rule 96 CPC particularly when the application has been decided on its merits ignoring the technicalities this Court exercising its supervisory writ jurisdiction under Article 227 wishes to decide the Petition itself on its merits. Else it will only amount to multiplicity of litigation.

19. For the said reasons the issue of maintainability part for the moment stands ignored in the peculiar facts of the present case. So far as the merits of the two orders dated 03.03.2016 and 30.03.2016 Annexure P/5 and P/1 Respectively are concerned what is pertinent to take note is the fact that so far as the Petitioner is concerned he had already exercised his right of claiming right over the suit property by filing a suit for specific performance of contract and which stands dismissed by the Trial Court and in the appeal also the Petitioner did not get any interim order of stay of the execution of the judgment and decree. Once when

the issue and right of the Petitioner already stood adjudicated upon in a duly constituted civil suit and which has gone against the Petitioner there is no occasion for executing Court now to entertain the application where practically he has raised the same grounds which the Petitioner had otherwise raised in the civil suit. It would literally amount to readjudication upon the claim of the Petitioner which the Trial Court has also decided in an earlier civil suit. Once when there is already an adjudication of his right over the suit property, coupled with the fact that the Petitioner resides in the same premises along with Respondent No.3, he cannot be said to be stranger to the litigation.

20. The Supreme Court in **1998 (3) SCC 723** in the case of **Silverline Forum Pvt. Ltd. v. Rajiv Trust and Another** in paragraph 14 has categorically held as under:-

“14..... The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. The court can make the adjudication on admitted facts or even on the averments made by the resister. Of course the court can direct the parties to adduce evidence for such determination if the court deems it necessary.”

21. The ratio laid down by the Supreme Court in the said case clearly enunciates the principle that it is not necessary that every application under Order 21 Rule 97 has to be decided after conducting an inquiry. In a given case if the facts in itself are very clear and where there is no scope or requirement of an inquiry the Court can decide the application on its merits within the undisputed facts which are on record. In the instant case also the undisputed fact is that the present Petitioner who had claimed his right over the suit property was unsuccessful in civil suit

against which he has preferred first appeal and where also the stay of execution of the judgment and decree of the Trial Court has not been passed. Thus, legally the judgment dismissing the civil suit holds good as on date.

22. Further, even as per the case of the Petitioner they are in suit premises in the capacity of the tenancy right where Respondent No.3 had taken the premises on rent and the Petitioner has been staying with the original tenant i.e. Respondent No.3 who is also father of the petitioner. The fight of the land owner against the tenancy also stands decided and has attained finality. Thus, it cannot be said that the Petitioner was a stranger to the proceeding or he was unaware of the development that have transpired in between. Moreover, there is dismissal of the suit preferred by the Petitioner himself which was also filed on the same grounds which he has raised in the present application under Order 21 Rule 97 CPC.
23. Thus, this Court does not find any merits on the submissions made by the Counsel for the Petitioner assailing the two orders. This Court does not find any infirmity or illegality on part of the District Judge while passing the order dated 03.03.2016 in Miscellaneous Appeal and the executing Court rejecting the application under Order 21 Rule 97 - 101 CPC vide its order dated 03.03.2016. The Writ Petition accordingly being devoid of merits the same deserves to be and is accordingly dismissed.

Sd/-

(P. Sam Koshy)
JUDGE