

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1220 of 1997

Mr.Laxman Dhondiba Tambe and Ors.	...Petitioners
Versus	
Mr.Ramdas Daji Ramane.	...Respondent

None for the Petitioners.
None for the Respondent.

CORAM: A.S.Oka,J
DATED: 16th May 2017

ORAL JUDGMENT (Per A.S.Oka, J):-

1. Called out for final hearing. Perused the Petition. The Petitioners are the legal representatives of the original Defendant in Regular Civil Suit No.1120 of 1987 filed by the Respondent. The said suit was filed under Section 6 of the Specific Relief Act, 1963. The suit was decreed by the Trial Court against the Petitioners. The Petitioners preferred Writ Petition being Writ Petition No.3503 of 1987 before this Court for challenging the decree passed in the suit. The Writ Petition was allowed to be withdrawn with liberty to the Petitioners to

challenge the execution of the decree on the ground that the same was nullity.

2. Accordingly, in Regular Darkhast No.51 of 1987, the Petitioners raised issue of nullity by an order dated 11th March 1993, the learned Civil Judge Junior Division, Thane, upheld the said issue and dismissed the execution application. An Appeal was preferred against the said order by the Respondent before the District Court. By the impugned judgement and order dated 29th January 1997, the said appeal was allowed and Regular Darkhast No.51 of 1987 was restored. The learned 5th Additional District Judge directed that the execution shall proceed in accordance with law.

3. The main contention raised in this Writ Petition under Article 227 of the Constitution of India is that after the amendment of the Code of Civil Procedure, 1908 (for short "the said Code") made by the Code of Civil Procedure (amendment) Act 1976 an Appeal against an order dismissing the execution application was not maintainable.

4. None appears for the Respondent.

5. By the said amendment of 1976, Sub Section (2) of Section 47 of the said Code was deleted. Therefore, an appeal against order of dismissing execution application was not maintainable. An appeal against an order passed dismissing an Execution Application is not maintainable under Sections 96 and 104 or under Order XLIII of the said Code. Unfortunately, the learned Additional District Judge has not adverted to the issue of maintainability of the Appeal. It is well settled that an appeal is a creation of Statute. As the Appeal itself was not maintainable, the learned Additional District Judge had no jurisdiction to entertain the Appeal and to set aside the order of the executing Court. Only on this ground, the petition must succeed.

6. Accordingly, I pass the following order:-

(i) The impugned order dated 29th January 1997 passed by the learned 5th Additional District Judge, in Civil Appeal No.252 of 1993 is hereby set aside only on the ground that the Appeal was not maintainable. Accordingly, Civil Appeal No. 252 of 1993 is hereby dismissed as not maintainable;

- (ii) I make it clear that this order will not prevent the Respondent from challenging the order dated 11th March 1993 passed by the Learned Civil Judge Junior Division, Thane in Regular Darkhast No. 51 of 1987 in accordance of law by adopting appropriate proceedings;
- (iii) All contentions on merits are kept open;
- (iv) Rule is partly made absolute on above terms with no order as to costs.

(A.S.Oka,J)