

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

Second Appeal No.3 of 2015
(Prashant Vinayak Dhavne v. Sau. Bhavana Sharadchandra Muley and
others)

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's order	Court's or Judge's orders
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Shri N.R. Saboo, Advocate for Appellant.
Shri A.A. Naik, Advocate for Respondent No.4.

Coram : R.K. Deshpande, J.
Date : 4th January, 2017

The operative order of the decree passed by the Trial Court in Regular Civil Suit No.156 of 1997 on 31-3-2000 is reproduced below :

“(i) The suit is decreed with costs against the defendant no.3.

(ii) The defendant no.3 is restrained from making any construction or alterations to the suit house without any express permission of the landlord or that of the Authority under the C.P. and Berar of Letting of Houses Rent Control Order 1949.

(iii) By a decree of mandatory injunction, the defendant no.3 is directed to demolish every construction to the North of the (ऋ, ॐ) wall of the suit house within a period of one month from the date of this judgment.

(iv) A copy of the Commissioner's map would form the part of the decree.

(v) The suit against the defendants 1 and 2 stands dismissed.

(vi) Decree be drawn up accordingly.”

The appellant is the son of the judgment-debtor, who was the defendant No.3 in the suit. The appeal filed by the defendant No.3 challenging the decree has been dismissed and the decree passed by the Trial Court has attained the finality.

The appellant filed an objection under Order XXI, Rule 97 of the Code of Civil Procedure to the executability of the decree. The Trial Court rejected the said objection with the findings in paragraphs 11 and 12 as under :

“11. While considering objection raised by the objector Prashant, the difference between decree for recovery of possession and decree for mandatory injunction is to be considered. When the Court passes decree for recovery of possession, it is presumed that the defendant is illegal and unauthorise possession of the suit property. But in decree for mandatory injunction possession of the suit property is always presumed to be with the plaintiff.”

“12. While deciding RCS No.156/97, it was held that the property upon which construction sought

to be removed is standing was in possession of the plaintiff and the J.D. Leelabai had erected illegal construction thereupon. Therefore, the present decree cannot to be said to be the decree for possession. The provisions under rule 97 to 101 of Order 21 of the C.P.C. Relates to the decree for the possession of immovable property. Therefore, it is not open for the objector to take recourse of those provisions.”

The contention of Shri Saboo, the learned counsel for the appellant, is that the lower Appellate Court has dismissed the appeal on the ground that the rejection of objection cannot be termed as a 'decree' under Order XXI, Rule 103 of the Code of Civil Procedure and, therefore, an appeal is not maintainable. He has relied upon the following decisions for this propositions :

- (1) *N.S.S. Narayana Sarma and others v. M/s. Goldstone Exports (P) Ltd. and others* – reported in **AIR 2002 SC 251**.
- (2) *Nallasivam v. Dakshinamurthy and another* – reported in **AIR 2004 Madras 387**.
- (3) *Balraj Singh and another v. Ajit Singh* – reported in **AIR 2005 Rajasthan 120**.

(4) *Rishabh Chand Jain and another v. Ginesh Chandra Jain* – reported in ***AIR 2016 SC 2143***.

The law laid down in the aforesaid decisions cannot be disputed. The question involved in the present case is whether the lower Appellate Court has dismissed the appeal solely on the ground that the order passed by the Trial Court rejecting the objection under Order XXI, Rule 97 of the Code of Civil Procedure cannot be termed as a 'decree' under Order XXI, Rule 103 of the Code. Perusal of the judgment delivered by the lower Appellate Court shows that the lower Appellate Court has misconstrued the findings recorded by the Trial Court. However, that by itself is not enough, but what is apparent from the judgment of the lower Appellate Court is that it, in substance, confirms the findings on merits recorded by the Executing Court. In view of this, I do not find that any substantial question of law arises for consideration in this second appeal.

The second appeal is dismissed.

Judge.