

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

CIVIL REVISION APPLICATION NO. 41 OF 2017

1. Manohar Stephan Waghmare
Age 57 years, occu: Agril. & Service
2. Amruta Stephan Waghmare,
Age : Major, Occu : Service
3. Ramesh Stephan Waghmare
Age : 54 years, Occu: Agril. & Service,

No.1 to 3 R/o : Newasa Khurd,
Tal. Newasa, Dist. Ahmednagar
4. Smt. Fulwanti Shamwel Chaudhari
Age : 66 yrs. Occu: Agril & Household,
R/o Near Amba Mata Mandir, A/p :
Vasai, District - Dang, Gujarat
5. Mrs. Sushilabai Rambhau Gaikwad,
Age : 58 yrs, Occu: Agril & Household,
R/o Ganganagar, Newasa Khurd,
Tal. Newasa Dist. Ahmednagar,
6. Shalinibai Surlin Chaudhari,
Age : 54 years, Occu: Agril. & Household, .. Applicants/
R/o Near Amba Mata Mandir, Orig. Resps.
A/p Vasai, District - Dang, Gujarat No.1 & 3 to 7

versus

1. Shri Sampat Ganpat Darunte,
Age : 48 years, Occu: Agriculturist,
2. Shri Rama Kesu Darunte (since
deceased, through LRs.)
- 2-A. Smt. Malanbai Ganpat Darunte
Age : 68 years, occu: Agriculturist
& Household

2-B Shri Janardan Ganpat Darunte
Age : 48 years, occup. Agriculturist
& Labour

2-C Shri Arun Bhanudas Shinde
Age : 48 years, Occu: Agriculturist
& Labour,

No. 1, 2-A to 2-C, R/o Newasa Kd.
Tal. Newasa, Dist. Ahmednagar

3.	Ahmednagar Land Mortgage Co-operative .. Respondents/ Bank Ltd. Ahmednagar, through its No.1 Orig. Manager, Branch Newasa, Tal. Newasa, Appellant Dist. Ahmednagar No.2 & 3 Orig. Resp.No.2 & 8
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[civil revision application is rejected
against respondent no. 3 in view of
conditional order passed by the court
on 07-06-2018]

Mr Zafar M. Pathan, Advocate for applicant

Mr Sanket S. Kulkarni, Advocate for respondent no.1 and 2-A to 2-C

CORAM : SUNIL P. DESHMUKH, J.

DATE : 1st October, 2018

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard learned counsel for appearing parties finally by consent.

2. In regular darkhast proceedings bearing no. 104 of 1986 arising from decree in regular civil suit no. 251 of 1981, present respondent no. 1 had under applications - Exhibits 86 and 102 objected to execution of said decree. Said applications were

rejected by trial court under order dated 17-09-2010. Said order is purported to have been appealed from at the instance of respondent no. 1 under miscellaneous civil appeal at Exhibit - 38 which pursuant to order thereon dated 03-10-2013 came to be converted into regular civil appeal bearing no. 254 of 2014.

3. Petitioners-decree holders applicants herein had objected to maintainability of the regular civil appeal, through application Exhibit - 42. As the same had been pending and required immediate attention, an application Exhibit - 55 had been moved to hear Exhibit - 42. The Court, on Exhibit - 42, according to learned counsel for applicants herein, has passed a very terse order on 23-01-2017, referring to that objection to maintainability of appeal would be considered and decided at final hearing of regular civil appeal.

4. Learned counsel for applicants submits that respondents-objectors in execution proceedings bearing regular darkhast no.104 of 1986 have no concern with the suit. As a matter of fact, they have no legs to stand on. Despite this, said respondents had filed regular civil suit bearing no. 526 of 1995 challenging decree in regular civil suit bearing no. 251 of 1981 (supra), however, the same was dismissed. In such a case, in the absence of any provisions of law providing for objection at

their instance, the appeal and its registration as regular civil appeal is not proper. Besides aforesaid, earlier attempts by present petitioners in darkhast proceedings have met with failure.

5. He further goes on to submit that in facts and circumstances, proceedings pursuant to rules 97, 100 and 101 of Order XXI of the Code are not maintainable and even the proceedings are not referable to Order XLI, section 96 of the Code of Civil Procedure, 1908, and as such an appeal would not lie. Thus, he submits that a serious question about maintainability of appeal would arise and the same would have to be decided first before going into merits of the appeal.

6. On the other hand, learned counsel Mr Sanket Kulkarni appearing on behalf of respondents no.1 and respondents no. 2A to 2C submits that civil revision application is not to be entertained for the simple reason that while there had been conversion of miscellaneous civil appeal bearing no. 34 of 2010 into regular civil appeal bearing no. 254 of 2014 pursuant to order on Exhibit-38, no objection had been taken and said conversion order had been passed way back on 03-10-2013 and for about four years thereafter, the same had not been objected to.

7. Mr Kulkarni purports to submit that Order XLI of the Code of Civil Procedure does not provide for issue on preliminary point as may be in the cases of suits pursuant to Order XIV and relevant rules thereunder.

8. However said submissions may not carry any efficacy in the given background since it is for appellant to first justify that appeal is maintainable in accordance with provision of law. Needless to refer that appeals are creation of statutes and cannot be made available by interpretative process.

9. Having regard to aforesaid background that the decree in regular civil suit no. 251 of 1981 is being posed objection to by third persons who have lost in their efforts hitherto to have said decree set aside in a substantive suit therefor. There are some attempts by third party which had met with failure. It appears that while the appeal presumably is being considered pursuant to Order XXI, rules 100 and 101 of the Code of Civil Procedure, its maintainability appears to assume significance and such a question will have to be addressed first as to whether the orders passed by the executing court would be appealable under the provisions of law or not. In the circumstances, it would be appropriate that appellate court proceeds with application

Exhibit - 42 and decide the same before it deals with proceedings in appeal.

10 In view of aforesaid, order dated 23-01-2017 on Exhibit - 55 which was moved for decision on application Exhibit - 42 is set aside. The appellate court to proceed with application Exhibit - 42 in right earnest.

11. With aforesaid, civil revision application is disposed of.

SUNIL P. DESHMUKH
JUDGE

pnd/-