

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Civil Revision Application No.139/2017

...

1. Mohan s/o Bhagwan Solanke,
Aged about 29 years,
Occupation: Labourer,
2. Kusam d/o Bhagwan Solanke,
Aged about 25 years,
Occupation: Household,
3. Meerabai w/o Bhagwan Solanke,
Aged about 53 years,
Occupation: Household,

All R/o Ward No.31, Buldana. ..

APPLICANTS

.. **Versus** ..

1. Kai. Vasantrao Naik Magasvargiya
Gruh Nirman Sahakari Sanstha,
[Regd. No. BUD/BUD/HAG/(TO)311/87,
Dated 28th April, 1987] Ltd. Buldana,
through President and Secretary
Ramchandra Bhikaji Pawar,
Aged about 52 years, R/o Buldana.
2. ~~Bhagwan s/o Sampat Solanke (Deleted)~~
3. Tukaram Yashwanta Kusalkar (Dead),
through L.Rs.

(a) Smt. Janabai wd/o Tukaram Kusalkar,
Aged Major, Occu. Household.

(b) Smt. Seetabai wd/o Yashwanta
Kusalkar, Aged Major,
Occu: Household.

(c) Anil s/o Tukaram Kusalkar,
Aged Major, Occu. Labourur,

Nos. 5-a to 5-c All R/o Sawargaon
Dukare, Tq. Chikhli, Dist. Buldana.

4. Sakharam Amruta Narote,
Aged about 52 years, Occu: Advocate,
R/o Suwarna Nagar, Buldana.
5. Waman Ramrao Narote,
Aged 39 years, Occu: Agriculturist,
R/o Januna , Tq. & Dist. Buldana.
6. Eknath Narayan Ingle,
Aged about 62 years,
Occu: Not known, R/o Buldana.
7. Shobha w/o Eknath Ingle,
Aged about 57 years,
Occu: Not known,
R/o Buldana.
8. Ramesh Jagannath Rajgure (Dead)
through L.Rs. :
 - (a) Chhaya wd/o Ramesh @ Ramnath
Rajgure, Aged 71 years,
Occu: Household, R/o Madh,
Tq. & Dist. Buldana.
 - (b) Sau. Jyoti w/o Kaduba Jadhao,
Aged 49 years,
Occu: Household, R/o Madh,
Tq. & Dist. Buldana.
 - (c) Sau. Swati w/o Pravin Ingle,
Aged 45 years,
Occu: Household, R/o Buldana,
Tq. & Dist. Buldana.

(d) Sau. Preeti w/o Dnyaneshwar Ingle,
Aged 42 years, Occu. Household,
R/o Janefal, Tq. Mehkar,
Dist. Buldana.

(e) Pawan s/o Ramesh @ Ramnath
Rajgure, Aged 39 years,
Occu. Labourer, R/o Madh,
Tq. And Distt. Buldana.

9. District Deputy Registrar,
Co-operative Societies, Buldana.

10. Registrar,
Co-operative Societies, Pune,
2nd Floor, New Central Building,
Ambedkar Wellesly Rd., Pune,
Maharashtra 411001.

.. **NON-APPLICANTS/
RESPONDENTS.**

Mr. R.L. Khapre, Advocate for Applicants.

Mr. Tushar Darda, , Advocate for Respondent No.1.

Mrs. Geeta Tiwari, AGP for Respondent Nos. 9 and 10.

....

CORAM : MANISH PITALE, J.
DATE OF RESERVING ORDER : MARCH 07, 2018.
DATE OF PRONOUNCING ORDER : APRIL 04 , 2018.

ORDER

1. This civil revision application arises out of a common order dated 14.09.2017 passed by the Court of Joint Civil Judge, Senior Division, Buldana, whereby two applications filed under Order VII Rule 11 of the Civil Procedure Code, 1908 (CPC) for rejection of plaint, stood dismissed. It was the case of the applicants herein that the suit filed by the respondent no.1 was

not maintainable, considering the factual position of this case and that only a proceeding under Section 47 of the CPC was maintainable before the executing Court.

2. The facts leading up to filing of this revision application are that on 15.01.1986, a sale deed was executed by Bhagwan s/o Sampat Solanke, husband of the applicant No.3 herein and father of applicant Nos. 1 and 2 in favour of the deceased respondent no.3 Tukaram Kusalkar in respect of the suit property, being land at Survey No. 34/4 admeasuring 1 H 1 R in district Buldana. In the sale deed, the said deceased respondent no.3 was shown as Chief Promoter of the respondent no.1 Society, which at that stage was a proposed society and it was yet to be registered. It is the case of the respondent No.1 society that the deceased respondent No.3 had purchased the suit property for and on behalf of the society and that contributions towards the consideration amount had been made by the members of the said society.

3. On 28.04.1987, the respondent no.1 society was registered as a Co-operative Society. In 1987, the applicants herein filed Regular Civil Suit No. 53 of 1987 for declaration, setting aside alienation and for possession against Bhagwan

Solanke, husband of applicant No.3, and deceased respondent No.3. It was claimed in the said suit that the aforesaid sale deed dated 15.01.1986 was liable to be set aside, as it was a transaction undertaken without any legal necessity even though it was concerning ancestral property. The deceased respondent No.3 remained absent, although served with summons in the said suit and, therefore, the Court proceeded *ex parte* against him. The vendor in the said transaction i.e. husband of applicant No.3 Bhagwan Solanke was defendant No.2. He filed his written statement in the said suit and admitted the claim of the plaintiffs (applicants herein). On this basis, on 28.09.1988, the Court decreed the suit in favour of the applicants. This decree was put into execution by the applicants. The respondent No.1 society was not aware about the pendency of the aforesaid suit and the decree passed by the Court, although it believed that it had a claim in the said property as the consideration amount had been paid through contributions made by members of the society and deceased respondent No.3 had entered into the transaction as the Chief Promoter of the society.

4. In July, 1989, the aforesaid *ex parte* decree was executed and applicants took possession of the suit property.

When respondent No.1 society became aware about this fact, it filed a police complaint. Later, on 29.08.1989, the respondent No.1 society filed application under Order XXI Rule 99 of the CPC, claiming that possession was wrongly taken by the applicants and that the society deserved to be put back into possession. In this application filed by respondent no.1 society, the applicants herein along with the vendor i.e. Bhagwan Solanke and the respondent no.3 were made parties. The applicants appeared before the executing Court in the said application and resisted the claim of the respondent No.1 Society, contending that the application was not maintainable and that therefore, it deserved to be rejected, without going further into merits of the contentions raised on behalf of respondent No.1 society. There were 13 witnesses examined by the parties and seven issues were framed by the executing Court in the said application.

5. It is relevant that during the pendency of the said application, the respondent no.1 society filed a Special Civil Suit No. 125 of 1990, before the Court of Civil Judge, Senior Division, Buldana, for declaration that the aforesaid judgment and decree obtained by the applicants in Regular Civil Suit No. 53 of 1987 was not binding on the society as it had been

obtained by the applicants herein and the vendor i.e. husband of applicant No.3, by fraud and misrepresentation. The respondent No.1 society prayed for being put into possession in consequence of such declaration. The said suit remained pending while the executing Court proceeded with recording of evidence and consideration of contentions of the parties in the application filed by the respondent No.1 society under Order XXI Rule 99 of the CPC.

6. On 28.01.2011, the executing Court passed its judgment and order dismissing the aforesaid application filed by the respondent No.1 society. The executing court did not enter into the merits of the contentions of the respondent No.1 society, because it arrived at the conclusion that Order XXI Rule 99 of the CPC was not applicable to the facts of the case and since the dispute raised by respondent No.1 Society involved allegations of fraud by applicants, the vendor and deceased respondent No.3, it could be established only by way of separate suit, which was already filed by the respondent No.1 society and it was pending. The executing Court concluded that for applicability of Order XXI Rule 99 of the CPC, it was mandatory that the person who complained of dispossession must be someone other than the judgment

debtor. It found that since the respondent No.1 society was claiming through deceased respondent No.3, being its Chief Promoter, it could not be said that the respondent No.5 society could maintain the application under Order XXI Rule 99 of the CPC. On this basis, the executing Court held that the application was not maintainable and without entering into the merits of the contentions raised on behalf of the respondent No.5, it dismissed the application.

7. The respondent No.1 society filed appeal against the said order of the executing Court but later the same was withdrawn. The respondent no.1 society amended its pending Regular Civil Suit No. 125 of 1990 and pursued the same. The Court framed issues in the said suit and additional issues were also framed. At this stage, the applicants herein approached the Court below, filing an application under Order VII Rule 11 of the CPC, contending that the suit filed by the respondent No.1 society was not maintainable, as the pleadings made therein demonstrated that it could either file proceeding before the executing Court under Section 47 of the CPC, in view of the findings rendered by the executing Court in its judgment and order dated 28.01.2011 or that the respondent no.1 society ought to have pursued its appeal challenging the said

judgment and order of the executing Court. It was contended that in the face of the findings rendered by the executing Court pertaining to the status of the respondent No.1 society, as being an entity claiming through the judgment debtor or as having entered the shoes of the judgment debtor, a separate suit was not maintainable and that therefore, the application under Order VII Rule 11 of the CPC deserved to be allowed and the plaint deserved to be rejected. As another defendant in the said suit also filed a similar application, the Court below has decided both the applications by a common order. The Court below has rejected the applications and aggrieved by the same, the applicants have filed this revision application.

8. Mr. R.L. Khapre, learned counsel appearing on behalf of the applicants submitted that the Court below has lost sight of the legal position and it has committed an error in rejecting the application for rejection of plaint. The learned counsel contended that once the executing Court had held in the aforesaid order dated 28.01.2011 that the application filed by respondent No.1 society under Order XXI Rule 99 of the CPC was not maintainable, because the respondent No.1 society was claiming through the judgment debtor, a separate suit could not have been maintained by the society. It was

contended that either the respondent no.1 society should have pursued its appeal challenging the said judgment and order dated 28.01.2011 or it ought to have approached the executing Court under Section 47 of the CPC, because it was nothing more than a representative of the deceased respondent No.5 who was a judgment debtor and all questions raised by the respondent No.1 society relating to the discharge or satisfaction of the decree could be determined only by the executing Court and not by a separate suit. It was claimed that the position of law as regards scope of Section 47 of the CPC, and bar on filing of separate suit was well settled and that the Court in the present case had completely failed to appreciate the contentions raised on behalf of the applicants while rejecting their application under Order VII Rule 11 of the CPC.

9. On the other hand, Mr. Tushar Darda, learned counsel appearing on behalf of the respondent No.1 society, submitted that there was no error committed by the Court below while rejecting the application filed under Order VII Rule 11 of the CPC. It was contended that the applicants could not be permitted to blow hot and cold at the same time. It was pointed out that on the one hand before the executing Court in the application filed by the respondent no.1 society under

Order XXI Rule 99 of the CPC, the applicants had claimed that such an application at the behest of the respondent no.1 society was not maintainable since it was claiming through the judgment debtor i.e. deceased respondent no.5, while in its application under Order VII Rule 11 of the CPC before the Court below and in the revision application filed before this Court, the applicants contended that the reliefs claimed by the respondent no.1 society squarely fell under Order XXI Rule 99 of the CPC. It was contended that the applicants could not be permitted to take such stand and that if the contention of the applicants was accepted and plaint was rejected, the respondent no.1 Society would be left remediless. The learned counsel contended that the applicants could not be permitted to approbate and reprobate at the same time and they could not be permitted to contend that the suit filed by the applicants was not maintainable.

10. Having heard the counsel for the parties and upon perusal of the material on record, the point that arises for determination in this revision application is, as to whether the Court below was justified in rejecting the application for rejection of plaint under Order VII Rule 11 of the CPC and as to whether the suit filed by the respondent no.1- society was

barred under Section 47 of the CPC.

11. Section 47 of the CPC provides that all questions arising between parties to the suit in which a decree was passed or their representatives and relating to execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. It is significant that questions that may arise between the parties or their representatives to a suit, relating to execution, discharge or satisfaction of a decree are to be determined by the Court executing the decree. In the present case, a perusal of the prayer in the suit filed by respondent no.1 society shows that a declaration is sought against the defendant Nos. 1 to 4 and 6 to the said suit to the effect that the decree obtained by them was by fraud and misrepresentation. In the amended plaint, the respondent no.1- society (plaintiff) has stated in detail how the judgment and decree has been obtained by the said defendants on the basis of fraud and misrepresentation. In fact, the record shows that the defendant no.4 therein (Bhagwan Sampat Solanke) who had executed sale deed in favour of defendant no.5 (respondent No.3 herein) filed written statement and admitted claim of the plaintiffs in the aforesaid decree, which is subject matter of the suit filed by the

respondent no.1 society. The defendant no.5 in the said suit (respondent no.3 herein) who was the Chief Promoter of the respondent no.1 society, which was at that point in time yet to be registered, was served with summons and yet he remained absent and the Court proceeded *ex parte* against him, leading to the judgment and decree regarding which the respondent no.1 society has filed the suit seeking a declaration that such a decree was obtained by fraud and misrepresentation. Thus, the prayers made in the suit primarily concern the fraud and misrepresentation perpetrated against the respondent no.1 society and its members who had contributed towards payment of consideration and that, therefore, it was a suit requiring consideration by the Court.

12. In the context of scope of Section 47 of the CPC and the maintainability of a separate suit, this Court in the case of **Lalitabai w/o Ishwarprasad Chopra .vs. Pundlik Dayaram Rangari - 2007(1) Mh.L.J.782**, has held as follows:-

“17. After considering entire relevant material this Court finds that the spirit underlined to section 244 of Civil Procedure Code, 1882, has been translated with clarity in section 47 of Civil Procedure Code and in order to eliminate further room of doubt, sub-section (2) of section 47 has been deleted and explanations have been substituted. The scheme is to prevent multiplicity of litigation, nevertheless, in-built limitations of the executing Court

which have to be judicially recognized, have been left untouched even by amendments to section 47 of Civil Procedure Code. The exceptions to maintainability of suit as were recognized and carved out while interpreting section 244 of old Civil Procedure Code of 1882, as well as section 47 of Civil Procedure Code in vogue as it stands after amendment, have not been done away.

A claim in a suit a claim that “the decree has been obtained by fraud or that the decree is nullity and is in-executable is still open for adjudication in a separate suit” emerges to be the ratio flowing from the judgments relied upon by learned Advocate Mr. Charde. This being the settled position of law, this Court finds that it shall be of no gain to discuss the precedents relied upon by learned Advocate Mr. Charde.

18. This Court finds that the judgment relied upon by the learned Advocate Mr. Palshikar is besides the issue raised i.e. section 47 of Civil Procedure Code.

19. In the result, the maintainability of a suit where the decree is sought to be declared as obtained by fraud, is still open for adjudication in an independent suit. In the light of this discussion, this Court finds that there is no merit in the Civil Revision Application. The order impugned cannot be held to be illegal or erroneous or unjust.”

Applying the said position of law to the facts of the present case, it would be evident that the contention raised on behalf of the applicants that the plaint deserved to be rejected, cannot be accepted.

13. The executing Court in its order dated 28.01.2011 has also observed that the dispute is mainly between the respondent no.1 society and the respondent no.3 who was then Chief Promoter of the said society, when it was in the process of being registered. The tenor of the pleadings in the suit and the prayer made therein concerns the allegations of fraud and misrepresentation made by the respondent no.1 society against the defendants therein, on the basis of which the respondent no.1 society is claiming a declaration in the suit. A perusal of the nature of prayers made in the said suit demonstrates that the impugned order passed by the Court below cannot be said to be erroneous. The allegations made in the suit filed by the respondent no.1 and the prayers made therein require a full fledged trial and upon recording of evidence, it can be concluded as to whether serious allegations of fraud and misrepresentation made by the respondent no.1 society are acceptable or not.

14. The contentions raised on behalf of the applicants, if accepted, would have the effect of rendering the respondent no.1 society remediless and such a situation cannot be accepted. The respondent no.1 society is certainly entitled to demonstrate before the Civil Court that it has suffered at the

hands of the defendants due to the fraud and misrepresentation perpetrated by them and it would certainly be a matter of evidence and trial. Such a suit cannot be nipped in the bud, particularly when the application/objections filed by the respondent no.1 society under Order XXI Rule 99 of the CPC before the executing Court stood dismissed as not maintainable. The executing Court refused to go into any other question, as a result of which the respondent no.1 society has pursued the aforesaid suit wherein issues have also been framed. In this situation, it would be a travesty to hold that the suit filed by the respondent no.1 could be torpedoed by rejection of plaint under Order VII Rule 11 of the CPC.

15. In the light of the above, the instant revision application is dismissed with no order as to costs.

(Manish Pitale, J.)

...