

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

WRIT PETITION NO.2401 OF 2016

Ahmed s/o Mukin Chaware
And ors.

... Appellants

-vs-

Abdul Aziz s/o Abdul Hafiz
And ors.

... Respondents.

Shri A. N. Ansari,

CORAM : A.S.CHANDURKAR, J.
DATE : July 16, 2019

P.C.

The respondents have been served but have not chosen to contest the prayers made in the writ petition. Accordingly, the learned counsel for the petitioner is heard by issuing Rule and making the same returnable forthwith.

The petitioners are the Objectors who had raised an objection to the execution of a decree passed in R.C.S. No.358/1987. By that decree a declaration was granted that the plaintiffs were the owners of house bearing No.123/01 and that the defendants should deliver possession thereof to the plaintiffs. In the execution proceedings the petitioners raised an objection under Section 47 of the Code of Civil Procedure, 1908 (for short, the Code) on the ground that the decree in question was not liable to be executed. The executing Court rejected that objection on 11/01/2011. Being aggrieved the petitioners filed an appeal by invoking provisions of Order XLI Rule 8 of the Code. The appellate Court by the impugned order has held that the appeal in question was not maintainable. For

recording that conclusion the appellate Court relied upon the decision in ***Ghasiram and ors. vs. Chaitram Saini and ors. AIR 1998 SC 2476.*** Being aggrieved the said order has been challenged in the present writ petition.

2. Shri A. N. Ansari, learned counsel for the petitioners submitted that by virtue of provisions of Order XXI Rule 103 of the Code as amended by Act No.104 of 1976 an order passed by the executing Court has the same force and is subject to same conditions as if it is a decree and hence the appeal as filed was maintainable. He submitted that prior to the amendment by the aforesaid Act, the remedy of filing separate suit was available. The appellate Court erred in relying upon the decision in ***Ghasiram and ors.*** (supra) in the light of the fact that the suit therein had been filed in the year 1950. Since the proceedings were covered by amended provisions the appeal was maintainable.

3. As stated above the respondents have not chosen to contest the writ petition. Accordingly I have heard the learned counsel for the petitioner and I have given due consideration to the submissions as urged. It is not in dispute that the objections raised by the petitioners were rejected by the executing Court on 11/01/2011. The decree sought to be executed is one passed in R.C.S. No.358/1987 which is filed after the provisions of the Code were amended by the Act of 104 of 1976.

4. In that view of the matter, the provisions of Order XXI Rule 103 enabled the petitioner to file an appeal for challenging the order passed by the executing

Court on 11/01/2011. The facts in the decision of the Honourable Supreme Court indicate that the suit therein was filed in the year 1950 and hence the proceedings were covered by the provisions prior to the amendment Act coming into force. The appellate Court was therefore not justified in relying upon the aforesaid decision.

5. As the appeal preferred by the petitioners is found to be maintainable in the light of provisions of Order XXI Rule 103 of the Code, the impugned order is not sustainable. The order passed below Exhibit-1 in M.J.C. No.23/2011 is accordingly set aside. The appeal preferred by the petitioners is restored for being adjudicated on merits in accordance with law.

Rule is made absolute with no order as to costs.

JUDGE