

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.550 OF 2016
WITH
CIVIL APPLICATION NO.11328 OF 2016
IN SA/550/2016**

SHANTABAI W/O MAROTRAO INGALE
VERSUS
MUKTIRAM S/O MANIKRAO RASAL AND ANOTHER

.....
Advocate for Appellate : Mr. M. M. Patil (Beedkar)
Advocate for Respondent No.1 : Mr. V. P. Kadam

...

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
03-08-2021**

**Date of Pronouncing The Order :
24-08-2021**

ORDER :

1) Present appeal has been filed by the original objection petitioner challenging the Judgment and order passed by learned Ad-hoc District Judge-1, Parbhani on 03-05-2016 in Regular Civil Appeal No.126 of 2015 arising out of Judgment and order dated 09-09-2015 below Exhibit 12 in Regular Darkhast No.209 of 2012 by 6th Joint Civil Judge Junior Division, Parbhani whereby the application filed by the present appellant under Order XXI Rule 97 of the Civil Procedure Code came to be rejected.

2) Heard learned Advocate Mr. M. M. Patil for appellant and learned Advocate Mr. V. P. Kadam for respondent No.1.

3) The facts giving rise to the second appeal are that the appellant is the third party who had objected to the execution of the decree. The original decree-holder who is respondent No.1 herein the second appeal filed execution petition for a decree in respect of recovery of possession of the suit land Survey No.26 i.e. present Gut No.87 admeasuring 3 H 92 R which was passed in Regular Civil Suit No.61 of 1985. That suit was decreed and the defendants therein (judgment debtor in Regular Darkhast) preferred first appeal bearing Regular Civil Appeal No.123 of 1997 which came to be dismissed on 21-08-2001. Thereafter, the Judgment Debtor had filed a second appeal bearing Stamp No.24700 of 2001, it dismissed-in-default on 26-11-2001. Thereafter, the execution petition was filed on 16-10-2012, a warrant for handing over the possession was issued on 25-04-2013 and then the objection petitioner i.e. present appellant appeared and filed an application under Order XXI Rule 97 of the Code of Civil Procedure. She prayed for stay to the execution of the petition and then contended that she had filed Regular Civil Suit No.65 of 2003, it was dismissed, however, she has challenged the

said dismissal in appeal bearing Regular Civil Appeal No.134 of 2013 and till the decision of the said appeal, the execution proceeding should be stayed.

4) Learned 6th Joint Civil Judge Junior Division, Parbhani had rejected the application on 09-09-2015. The present appellant then preferred Regular Civil Appeal No.126 of 2015, it has been decided by learned Ad-hoc District Judge-1, Parbhani and dismissed on 03-05-2016.

5) The appellant contends that she was not made a party to the original suit. In fact, the suit property was purchased by one Kishanrao Dhage who was the father of the appellant. Kishanrao had five sons and two daughters. Kishanrao expired on 20-06-2002. After the death of her father, the appellant claimed that she has a share in the suit property and thereby she was resisting the execution of the decree. The original decree-holder objected to the said application and submitted that he is the purchaser of the property. One Tukaram s/o Kishanrao who was the original defendant No.2 was the absolute owner and possessor of 2 Acres of land from land Survey No.26 who had sold his share to one Syed Nazir in 1978. Then the decree-holder had purchased the same

from Syed Nazir in 1982. It was then stated that the original defendant No.2 had illegally dispossessed him and, therefore, he had filed the suit for recovery of possession and mesne profits i.e. Regular Civil Suit No.61 of 1985.

6) At the outset, it is to be noted that both the Courts below are concurring with the findings that the application under Order XXI Rule 97 of the Code of Civil Procedure filed by the applicant is not maintainable.

7) It will not be out of place to mention here that the second appeal itself with the civil application was placed before the Division Bench of this Court to answer the following issues : -

"i. Whether a person not a party to 'lis' or not claiming through parties to the 'lis' (third party), not in possession and/or not claiming to be in possession can maintain an action pursuant to Order XXI, Rule 97 of the Civil Procedure Code ?

ii. When there is already a substantive 'lis' initiated by the person as aforesaid (third party) and pending for adjudication of rights in respect of immovable property, whether a purported objection invoking Order XXI, Rule 97 of the Code of Civil Procedure, 1908 in execution of decree by the same

person can be entertained for vindication of rights to such immovable property giving treatment to it according to Rules 97 to 103 ?”

By order pronounced on 29-03-2019, the Division Bench has held thus : -

"32. In view of the above it will have to be held that, if a person is in possession of a property, then even if, he has filed a suit and the same is pending for adjudication of the rights still he would be entitled to maintain an application under Order XXI Rule 97 for vindication of rights to such immovable property giving treatment to it according to Rules 97 to 103. However, the person not in possession of the property may not be entitled to maintain an application under Order XXI Rule 97, irrespective of the fact whether he has filed a substantive lis and is pending for adjudication."

This decision by the Division Bench is coming in this appeal itself and, therefore, it is now required to be seen as to whether the appellant can take any advantage of the same and whether she would show that substantial questions of law are arising in this case. It is to be noted that in her application under Order XXI Rule 97 of the Code of Civil Procedure she has not stated that she is in

possession of the property. Further, she had filed Regular Civil Suit No.65 of 2003 before Civil Judge Junior Division, Parbhani for partition and separate possession as it appears. Her suit has been dismissed but she has stated that her appeal is pending before District Court, Parbhani. The Division Bench has come to the conclusion (at the cost of repetition) that : -

"However, the person not in possession of the property may not be entitled to maintain an application under Order XXI Rule 97 of the Code of Civil Procedure, irrespective of the fact whether he has filed a substantive lis and is pending for adjudication."

Therefore, when the present appellant is not in possession of the suit property then her application under Order XXI Rule 97 of the Code of Civil Procedure is not maintainable. No substantial question of law is arising in this case requiring admission of the second appeal.

8) Learned Advocate for respondent No.1 original decree-holder submits that now the possession has been taken by the decree-holder through Court. Under such circumstances also, the objections raised by the appellant cannot be decided as the

execution petition itself would have been disposed of as the decree has been complied with. Hence, the second appeal stands dismissed as no substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising. Pending Civil Application also stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-