

SGPunde

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 3704 OF 2019
IN
CIVIL REVISION APPLICATION [ST] NO. 7158 OF 2019

Raghunath Bhumanna Sonar & Anr. ... Applicants
Versus
Anusayabai Khushalrao Patil & Anr. ... Respondents

...
Mr. U. B. Bilolikar – Advocate for applicants
Mr. Vivek V. Bhavthankar – Advocate for respondent no. 1
....

CORAM : GAURI GODSE, J.
DATE : 02nd FEBRUARY, 2023

PER COURT :

1. This civil application is filed for condonation of delay in filing the civil revision application. The order impugned in the civil revision application is dated 21st February, 2018 passed in MCA (RJE) No. 31 of 2016, by the learned Joint Civil Judge Junior Division, Biloli, District – Nanded. By the said order, an application filed by the respondents/plaintiffs, under Order XXXIX Rule 2A of Code of Civil Procedure, 1908 [“CPC”] was allowed and the property of the applicants/defendants was ordered to be attached by holding that the applicants were guilty of disobedience of an order of injunction passed in favour of the

respondents. The applicants had filed Miscellaneous Civil Appeal No. 12 of 2018 in the District Court at Biloli for challenging the said order. However, by order dated 01st February, 2019, the learned District Judge-1, Biloli, District-Nanded, held that in view of the law laid down by this Court in the case of Dry Chillies Brokers Association Vs. Dnyaneshwar Chamat and others¹, an appeal against an order passed under Rule 2A of Order XXXIX of CPC is not tenable. Hence, the applicants had withdrawn the appeal with liberty to file appropriate proceedings. In view of the same, the present Civil Revision Application is filed.

2. Since there was a delay in filing the civil revision application, Civil Application No. 3704 of 2019 was filed for condonation of delay. Learned advocate for respondent no. 1 raised a preliminary objection that the present civil revision application is not maintainable.
3. The learned advocate for the applicants relied upon the decision of this court in the case of *Shankar Jadhav Vs. Sainath Jadhav*²

¹ 1992(2) Mh.L.J. 1503

² 2016(4) Mh.L.J. 430

and submitted that, in a similar case this court has held that the provision of section 104(1)(h) of CPC is applicable to an order passed under Rule 2A of Order XXXIX of CPC. Thus, an appeal is maintainable. He further submitted that this court in the said case, had granted liberty to the applicant therein to file an appeal before the District Court. Thus, the learned advocate for the applicants by relying upon the said decision in the case of *Shankar Jadhav*, requested to grant leave to withdraw the present civil revision application with liberty to take out appropriate application before the District Court for recalling the order dated 01st February, 2019 passed below Exhibit - 1 in Miscellaneous Civil Appeal No. 12 of 2018 and for restoration of the said appeal.

4. I have considered the submissions made on behalf of both the parties. I have gone through both the said decisions of this Court. This Court in the case of *Dry Chillies Brokers Association* has held that an appeal against an order passed under Rule 2A of Order XXXIX of CPC is not tenable in view of the Bombay Amendment of 1st October, 1983. Paragraphs 4 and 5 of the decision in the case of *Dry Chillies Brokers Association* read as

under :

“ 4. No doubt, Civil Procedure Code, 1908, came to be amended by Central Act 104/1976 and clause (r) of Rule 1 of Order 43 came to be amended by inserting ‘Rule 2-A’ therein, whereby the order passed under Rule 2-A of Order 39 became appealable. Thereafter, in so far as the State of Maharashtra is concerned, however, clause (r) came to be substituted by Bombay High Court notification dated 5-9-1983 as under:

“An order under Rule 1, Rule 2, Rule 4, Rule 10 or Rule 11 of Order XXXIX.”

5. It is apparent that in this substituted clause (r), ‘Rule 2-A of Order 39’ is not mentioned, though it was so inserted in clause “r” by Amendment Act 104/76 making thereby the order passed under Rule 2-A of Order 39 appealable. The above referred provisions of clause (r) of Rule 1 of Order 43 which is applicable to the State of Maharashtra, do not thus provide appeal against the decision under Rule 2-A of Order 39 and the appeal preferred in the instant matter in the year 1986, being Misc. Civil Appeal No. 367 of 1986 was, therefore, apparently not tenable. The contrary conclusion arrived at by the learned Additional District Judge, is not correct. The impugned order is, therefore, set aside and the appeal filed by the non-applicant is held to be not maintainable.”

5. In the case of *Shankar Jadhav*, by the impugned order the petitioner therein was held guilty of breach of order of temporary injunction and the Trial Court had ordered to send the Petitioner to civil prison. Hence, in facts of the said case of *Shankar Jadhav* this Court has held as under:

“ 4. Learned counsel for the petitioner submitted that there is one more portion in section 104 of the Civil Procedure Code like 104(1)(i). that portion reads as under:

“(i) any order made under rules from which an appeal is expressly allowed by rules.”

Learned counsel submitted that in view of this provision and when in Maharashtra, provision of Order 43, Rule 1(r) of the Civil Procedure Code is not applicable the appeal cannot lie and only revision can lie. This proposition is not acceptable. In section 104 of the Civil Procedure Code categories of the cases in which appeal is available are given and section 104(1)(i) is one of those categories. Due to State amendment of some

portions of Order 43, Rule 1 of the Civil Procedure Code, the scope of other provision of section 104, the part like 1(h) cannot be reduced. In the present matter it can be said that provision of section 104(1)(h) is applicable. The provision of remaining portion like (i) of this section was also applicable in the past. By the State amendment care is taken to remove the relevant portion of section 104(1)(i) but due to that it cannot be said that appeal cannot be filed as specifically provided under section 104(1)(h) of the Civil Procedure Code.”

6. As held by this Court in the decision of *Shankar Jadhav* an appeal will be permissible under clause (h) of sub-section (1) of Section 104 of CPC, when an order is passed under Order XXXIX Rule 2A of CPC imposing a fine or directing the arrest or detention in the civil prison of any person, except where such an arrest or detention is in execution of a decree. In the facts of the present case the said decision is of no assistance to the applicants, as by the order impugned, the property of the applicants was ordered to be attached by holding that the applicants were guilty of disobedience of an order of injunction passed in favour of the respondents.

7. It is important to note that in exercise of the powers conferred under Section 122 of CPC and with prior approval of the Government of Maharashtra, Rule 1 (r) of Order XLIII of CPC is amended in supersession of the amendment made by Bombay

High Court on 1st October 1983. The said amendment is published in the Government Gazette notification dated 22nd June 2009, which reads as under:

“(r) An order under rule 1, rule 2, rule 2-A where disobedience or breach of injunction is held proved or attachment of property is ordered, rule 4, rule 10 or rule 11 of Order XXXIX.”

8. Thus, in view of the said amendment made by the Bombay High Court on 22nd June 2009, an appeal is provided under Rule 1 (r) of Order XLIII of CPC, against an order passed under Rule 2-A of Order XXXIX of CPC, where disobedience or breach of injunction is held proved or attachment of property is ordered. Thus, it is clear that the Miscellaneous Civil Appeal No. 12 of 2018 filed by the applicants was maintainable under Rule 1 (r) of Order XL III of CPC.

9. As the aforesaid Bombay High Court amendment of 2009 was not brought to the notice of the District Court, on a mistaken belief that the appeal was not maintainable, that the appeal was allowed to be withdrawn. The applicants cannot be deprived of their right to statutory remedy of appeal only because the

amendment was not noticed. If an application for restoration is made, I am sure that the District Court will consider the aforesaid aspects. Hence, leave as prayed on behalf of the applicants is granted. Applicants are permitted to withdraw the Civil Application as well as the Civil Revision Application, with liberty to make an appropriate application in the District Court, for restoration of the Miscellaneous Civil Appeal No. 12 of 2018.

10. Civil Application as well as the Civil Revision Application are disposed of in the above terms.
11. Interim relief granted by this Court by order dated 15th March, 2019 is continued for a period of eight weeks from today. Liberty to take out appropriate application before the District Court for continuation of the interim relief. Needless to mention that the applicants will be entitled to take benefit of the period that was consumed for the present civil revision application, for the purpose of condonation of delay, if any, for making an appropriate application in the District Court.

[GAURI GODSE]
JUDGE