

SGPunde

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 198 OF 2016

Balasaheb s/o Namdeo Daule ... Applicant

Versus

Balasaheb s/o Uttam Shinde & Anr. ... Respondents

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Mr. Rahul R. Karpe – Advocate for applicant

Mr. Ravindra V. Gore h/f Mr. Yogesh S. Thorat – Advocate for
respondent no. 1

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CORAM : GAURI GODSE, J.

DATE : 08th FEBRUARY, 2023

PER COURT :

1. This Civil Revision Application is filed for challenging the order dated 26th September, 2016 passed by the learned Civil Judge, Senior Division, Newasa, below Exhibit - 30 in Regular Darkhast No. 3 of 2015. The application at Exhibit-30 was preferred by the present applicant under Order XXI Rule 97 of the Code of Civil Procedure [‘CPC’] with an objection that the said decree under execution was not maintainable and, therefore, may not be executed. The contention of the Applicant is that in a partition suit

the judgment debtor and the applicant are granted $1/5^{\text{th}}$ share each. Therefore, the applicant's case is that the judgment debtor has only $1/5^{\text{th}}$ share in the Gut No. 173, which is subject matter of the decree in execution. The application is decided by the executing court on merits and the objections raised by the applicant have been rejected. In view of Rule 103 of Order XXI of CPC, where any application has been adjudicated under Rule 98 or Rule 100 of Order XXI of CPC, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree. The application which is filed by the applicant is under Order XXI Rule 97 of CPC. The application thus as filed under Order XXI Rule 97 CPC is required to be adjudicated as per Rule 98 or Rule 101 of Order XXI of CPC. Hence, the order impugned is to be treated as a decree as per Rule 103 of Order XXI of CPC. Therefore, the impugned order is appealable. Hence, Civil Revision Application is not maintainable.

2. The learned advocate for the applicant submitted that in view of law laid down by the Hon'ble Supreme Court in the case of *Sameer Singh and another vs Abdul Rab and others*¹, the impugned order is revisable. The order impugned before the Hon'ble Supreme Court was passed by the High Court refusing to entertain the writ petition under Article 227 of the Constitution of India, on the ground that the order impugned in the Writ Petition was appealable in view of Rule 103 of Order XXI of CPC. The order impugned in the writ petition was passed by executing Court, holding that it had no Jurisdiction to decide the objection as the decree under execution was marked satisfied and the Court had become functus officio. Hence, the Hon'ble Supreme Court in the said decision has held that if a subordinate court exercises jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order is revisable under section 115 of CPC. The Hon'ble Supreme Court has further held that

1 (2014 (0) BCI 259)

after amendment of section 115 of CPC w.e.f. 1st July 2002, the said power is exercised under Article 227 of the Constitution of India, as per the principle laid down in Surya Dev Rai Vs Ram Chander Rai². Hence the matter was remanded back to the High Court for decision as necessary under Article 227 of the Constitution.

3. In the present case, the executing court has decided the objection of the Applicant on merits. Hence, the law laid down by the Hon'ble Supreme Court is of no assistance to the applicant.
4. The learned counsel for the applicant on instructions, state that he may be allowed to withdraw the civil revision application with liberty to file regular first appeal.
5. Leave is granted as prayed.
6. Learned counsel for the applicant prays that the interim protection granted by this court on 23rd November, 2016, may be extended for a certain limited period to enable the applicant to file an appeal.

2 ((2003) 6 SCC 675)

7. In the facts and circumstances of the case, the interim relief granted by this court on 23rd November, 2016, is extended for a period of eight weeks from today.
8. The applicant will be at liberty to make an appropriate application for grant of interim protection in the first appeal, if filed.
9. Civil Revision Application is disposed off as withdrawn with liberty to adopt appropriate proceedings.
10. Needless to record that the applicant will be entitled to claim the benefit of time that is consumed in prosecuting the present civil revision application.

[GAURI GODSE]
JUDGE