



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

Second Appeal No.185 of 2018

Shri Kamlakar Ganpatrao Jawake

vs.

Shri Chandrashekhar Naryansing Shauhan (Dead), through L.Rs. & others

*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

Court's or Judge's Orders

*Mr. S.S. Patil, Advocate for the Appellant.
None for the Respondents.*

CORAM : M.W. CHANDWANI, J.
DATE : 13th FEBRUARY, 2025.

This is an appeal filed against the impugned judgment and order passed by the learned District Judge, Amravati in R.C.A. No.51/2011, whereby the appeal came to be dismissed on the ground that the appeal is not maintainable against the order passed by the executing Court under Section 47(1) of the Code of Civil Procedure (C.P.C.).

02. While issuing notices to the respondents, the following substantial question of law came to be framed :

I) Whether the appellate Court was legally correct in concluding that the appeal preferred for challenging the orders passed below Exhibits 26 and 32 was not maintainable?

03. This Court by order dated 26/11/2024 directed to list the appeal for final hearing at the stage of admission. Before proceeding to determine the substantial question of law framed in this appeal, it will be appropriate to go through the grounds raised in the case.

04. The respondents had filed a suit against the appellant for removal of encroachment and possession. The appellant raised the defence of becoming the owner on the basis of adverse possession. The said suit bearing R.C.S. No.663/1997 came to be decreed by the Joint Civil Judge Junior Division, Amravati. An unsuccessful attempt was made by filing an appeal before the learned District Judge, Amravati. Since the judgment of the Civil Judge Junior Division, Amravati came to be confirmed by the learned District Judge, Amravati, the respondents filed execution proceedings before the executing Court for possession of the suit property. In the execution proceedings, the appellant filed an objection under Section 47 of the C.P.C. claiming that the judgment debtor is the trustee of the said Sanstha and the decree holder was never the owner of the suit field. The appellant had also moved an application before the executing Court for permission to lead evidence in support of the applications [Exh.26 and Exh.32]. The executing Court rejected both the applications by speaking order dated 05/09/2007. The appellant preferred an appeal under Section 96 of the C.P.C. before the learned District Judge, Amravati. The learned District Judge, Amravati dismissed the appeal on the ground that the appeal is not maintainable. Hence, this second appeal.

05. Mr. S.S. Patil, learned Counsel appearing for the appellant submitted that an appeal lies against the order of Civil Judge Junior Division before the District Judge under Section 96 of the C.P.C. and therefore, the appeal came to be filed against the order of rejection of the applications [Exh.26 and Exh.32] by the learned Civil Judge Junior Division, Amravati. According to him, the appeal under Section 47 of the C.P.C. against the order lies before the learned District Judge. Therefore, the learned District Judge was not right in holding that the appeal is not maintainable.

06. Though, respondent No. 3 was served, nobody appeared on his behalf. The appeal against respondent No.1, 2, 4, 5, 6 and 7 came to be dismissed for want of service.

07. Having heard the learned Counsel for the appellant, I have gone through the impugned judgment. It is necessary to mention here that the definition of decree prior to amendment of 01/02/1977 runs as under :

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

08. Thereafter, by the Act of 104 of 1976, the words and figures "section 47 or" were omitted with effect from 01/02/1997. Therefore, it is abundantly clear that an order passed by the Court under Section 47 is not a decree within the meaning of Section 2(2) of the C.P.C. Needless to mention that an appeal under Section 96 of the C.P.C. lies against a decree and therefore, since the applications [Exh.26 and Exh.32] are not filed by a third party complaining of dispossession by the decree holder as contemplated under Order 21 Rule 100 of the C.P.C. and are filed by the decree holder complaining obstruction by third party under Order 21 Rule 98 of the C.P.C., the order passed by the learned Civil Judge Junior Division does not come under the

exception culled out in Order 21 Rule 103 of the C.P.C., which prescribes that an order made by the adjudication of any application filed under Order 21 Rule 98 or Rule 100 of the C.P.C. shall be deemed to be a decree. The learned first appellate Court was justified in holding that the appeal against rejection of applications [Exh.26 and Exh.32] are not maintainable. Hence, the question framed in this appeal is answered accordingly. Consequently, the appeal fails and is dismissed.

09. The appellant is at liberty to take appropriate legal action as permissible under the law subject to law of limitation.

JUDGE

**sandesh*