(1973) 03 BOM CK 0033

Bombay High Court

Case No: Civil Revision Application No. 280 of 1971

Ganpati Ram Bhande and Others		APPELLANT
	Vs	
Baliram Raghunath Jadhav and Others		RESPONDENT

Date of Decision: March 8, 1973

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 51, Order 21 Rule 52, Order 21 Rule 53, Order 21 Rule 54, Order 21 Rule 55
- Transfer of Property Act, 1882 - Section 55(6)

Citation: AIR 1974 Bom 155 : (1974) 76 BOMLR 58 : (1974) MhLj 512

Hon'ble Judges: Mukhi, J

Bench: Single Bench

Advocate: S.J. Deshpande, for the Appellant; S.P Kurdukar and A.V. Savant, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. By this civil revision application the petitioner, who were the original objection petitioners, seek to challenge the order of the Civil Judge Senior Division, Bhir, dated the 24th of December 1970 , rejecting the objection petition with costs.

2. In order to consider the said challenge to the order of the learned Civil Judge, Senior Division, Bhir, it is necessary to refer to some of the salient facts.

3. It is to be noticed that the dispute relates to agricultural land bearing Survey No. 10 with an area of 19 acres and 9 gunthas situate at Daithan, Thaluka Ambajogai, District Bhir, It is important to notice that the agricultural land was subject to the restrictions and prohibitions contained in the relevant tenancy enactments as to the transfer of the land and the protection given by statue to tenants on the land.

4. The opponents to this petition are Baliram Jadhav and Jaiwant Jadhav, Who are said to have entered into an agreement for purchase of the suit land along with another piece of land bearing Survey No. 2 belonging to Gopalrao Vithoji Deshmukh, who is opponent No. 3 in this petition and who was one of the original non-applications, The said Gopalrao also figures as a judgment-debtor as will appear from the facts set out hereafter.

5. Now, it has been stated that on the 23rd of June 1962, there was an oral agreement of sale between Gopalrao as the owner of the land and Baliram and Jaiwant, who agreed to purchase it for a sum of Rs 23, 000/- out of which Rs. 11,000/- are said to have been paid as advance, It is significant that this agreement was an oral agreement, but it is stated in the plaint of the suit ultimately filed by Baliram and Jalwani against Gopalrao, being Special Civil Suit No. 58 of 1967, that the terms of the agreement were that Rs. 9,000/- were to be paid as advance to enable Gopallrao, the seller, to obtain permission from the concerned authorities to alienate the suit lands by way of sale as required u/s 47 of the Hyderabad Tenancy and Agricultural Lands Act. It is further stated in the plaint that the remaining amount was to be paid at the time of the registration of the sale deed, and the one of the most essential features of the agreement of sale was that the defendant Gopallrao agreed to obtain surrender from the tenants, who were admittedly on the suit lands, who were admittedly on the suit lands, and put the purchasers, that is to say, Baliram and Jaiwant, in physical possession. In fact, the names of the tenants are also set out in the plaint. It would appear that Gopalrao, not with standing the agreement of sale and the terms said to have been incorporated therein, failed to obtain the surrender of possession from the tenants on the suit lands and, having so failed, did not take any steps or commence any proceedings for obtaining the requisite permission to transfer the suit lands in favour of Baliram and Jaiwant, It is the contention of Baliram and Jaiwant, in the plaint that Gopalrao was in strained financial position and he demanded a further advance of Rs. 2,000/-, so that ultimately the amount advanced to him came to Rs. 11,000/-

6. On the 18th December, 1964, a Kararnama was executed by Gopalrao in favour of Baliram and Jaiwant and in this written agreement of sale, the earlier oral agreement of sale, the earlier oral agreement dated the 23rd of June 1962 is said to have been confirmed and there is also an acknowledgment of the receipt of Rs, 11,000/- by way of advance, In the said plaint, Baliram and Jaiwant also stated that in the said Kararnama and incorrect statement was made that the possession of the lands had been handed over to Baliram and Jaiwant, although possession as there were tenants on the lands.

7. In paragraph 11 of the plaint, there is a significant statement, namely, that till the date of the suit, which is the 18th December 1967, Gopalrao was not successful in obtaining surrender of possession from the tenants "who are on the suit lands". There is also a statement which shows that Baliram and Jaiwant were aware that

Gopalrao had sold some portion of the suit land to other persons. On these averments, it was further contended that it was, therefore, clear that Gopalrao was not in a position to fulfil his part of the contract and that in law also he is not competent to perform his part of the contract. This has obviously a reference to the fact that by reason of the tenants being on the lands, Gopallrao, who had failed in his efforts to obtain surrender, was not in a position to deliver possession of the lands to Baliram and Jaiwant pursuant to the contract of sale. Lastly, it is to be noticed from the plaint itself that Gopalrao is said to have refused to accept a notice dated the 22nd of November 1967, calling upon him to obtain surrender of possession from the tenants and execute a sale deed in favour of Baliram and Jaiwant pursuant to the agreement of sale.

8. It is in these circumstances that Special Civil Suit No. 58 of 1967 was filed and it has been stated at the Bar by Mr. Deshpande, the learned Advocate for the petitioners, that Gopallrao defended the suit for some time, but ultimately on the 11th of October 1968 a compromise was entered into and a consent decree was obtained for Rs. 15,000/- in favour of Baliram and Jaiwant from the Civil Court.

9. A certified copy of the compromise, as stated at the Bar, has been produced before me and it is significant to note that there is a statement to which obviously both the parties to the suit subscribed, viz., that "due to tenancy litigation the defendant could not fulfil his part of the contract and execute a sale deed in favour of the plaintiffs". Now, paragraph 3 of the compromise is important and requires to be set out in extensor:

"3, It is now settled and agreed between the parties that the defendant do pay Rs. 11,000/- to the plaintiff, an amount of consideration which he has received from the plaintiffs as part consideration of contract of sale and purchase of the above lads and Rs. 4,000/- as interest claimed by the plaintiffs in the suit, In all the defendant undertakes to pay Rs, 15,000/- to the plaintiffs and there will be a statutory charge on the above lands agreed to be sold i.e. S. No. 2 and S. No. 10 situated at Daithan, Taluka Ambajgai, Dist. Bhir".

On the 4th January 1969, Baliram and Jaiwant, who thus became decree-holders, filed a Darkhast and in the said Darkhast, which is No. 1 of 1969, Column 10 shows the following endorsement:-

"By attachment and sale of agricultural land Survey No. 2-31 acres, 37 gunthas, and Survey No. 10-19 acres, 8 gunthas, assessed at Rs. 22.31 P. Situate at Mouza - Taluka. The lands are in the actual possession of the defendant and there is a statuary charge of this decretal amount over those lands. The lands may kindly be attached and sold."

10. Pursuant to this Darkhast, an attachment was issued on the 12th of February 1969, It is now to be noted that Survey No. 10 belonging to Gopalrao was purchased by the petitioners herein from Gopalrao by three sale deeds dated the 10th of June

1967, 18th of June 1967 and 5th of July 1967. These sale deeds were duly registered and it is not disputed that the agricultural and comprised in Survey No. 10 was so purchased by the petitioners, who are therefore purchasers and have an interest in the land which has been subjected to attachment. On the 15th of March 1969, the petitioners before me, filed an objection petition, being Miscellaneous Application No. 20 of 1969 in the executing Court, that is to say, the Court of the Civil Judge, Senior Division, Bhir are this objection petition was filed against Baliram and Jaiwant as the decree-holders and Gopalrao, who was the judgment -debtor.

11. As has been stated above, the learned Civil Judge, Senior Division, Bhir, rejected the objection petition on the 24th of December 1970.

12. Mr. Deshpande, the learned Advocated for the petitioners, has contended that the order passed by the learned Civil Judge is without jurisdiction., that the learned Civil Judge failed to exercise jurisdiction vested in him under Order XXI, Rules 58 and 59 of the CPC and that, in any event, the Court below has acted with material irregularity, Mr. Deshpande made the following propositions:-

(1) On the 18th of December 1967, viz., the dated on which the suit was filed, as well as on the 11th October 1968, viz., the date on which the consent decree was passed, the third opponent Gopalrao had no subsisting right or interest in the land comprised in Survey No. 10.

(2) The learned Civil Judge had misunderstood and misapplied the judgment of this High Court in Dnyanu Baby v. Gulab Eknath, (1960) 62 Bom LR 940 and, therefore, acted illegality.

(3) Manifest facts regarding the existence of tenants on the land have been overlooked by the learned Civil Judge causing a basic error affecting his decision of merits.

(4) The learned Civil Judge made use of admissions between Baliram and Jaiwant on the one hand and Gopalrao on the other against the petitioners.

(5) The Court below acted illegally in exercising its jurisdiction on an erroneous view of Section 55(6)(b) of the Transfer of Property Act.

(6) The charge said to have been created by the consent decree is illegal and inoperative and, at any rate, is inadmissible for want of registration of the decree u/s 17 of the Registration Act.

(7) The lower Court has committed an error of jurisdiction in not trying the issue which arises under Order XXI, Rule 58 of the Code of Civil Producer, that is, who is in possession of the property liable to attachment on the property liable to attachment on the date of attachment, i.e. 12th of February 1969, and whether the petitioners had some interest in the property on the date of the attachment.

13. Mr. Kurdukar, the learned Advocate for opponents Nos. 1 and 2, that is to say, the decree-holders, has taken up a preliminary objection that this civil revision petition is incompetent as the petitioners have an alternative remedy by way of a substantive suit under Order XXI, Rule 63 of the Civil Procedure Code, particularly as the procedure under Order XXI, Rule 58 is summary procedure fact cannot be investigated under Order XXI, Rule 58, Mr. Kurdukar thus contends that the High Court should not investigate facts which have been dealt with under the summary procedure by the lower Court, Mr. Kurdukar also contended that the lower Court has in exercise of its jurisdiction under Order XXI, Rule 58, arrived to do and this could not be interfered with under the revisions jurisdiction of the High Court.

14. On merits, Mr. Kurdukar based his arguments on the statutory charge claimed by the decree-holder, which according to him, was set out in the consent decree and his further contention was that as against the petitioner, who were purchasers under registered sale deed, the claim of the decree-holders, Baliram and Jaiwant, was superior. Mr. Kurdukar thus contended that the learned Civil Judge was right in framing an issue as to whether there was a statutory charge on the land bearing Survey No. 10 in respect of the decree passed in Special Civil Suit No. 58 of 1967 and, having decided that issue in favour of the decree-holders properly dismissed the objection petition.

15. On the basis of the facts which have been set out and the rival contentions which have been raised by the Advocates for the parties, two questions arise for consideration : (1) Has the lower Court properly exercised its jurisdiction under Order XXI, Rule 58 and investigated the claim or objection according to law? and (2) whether the civil revision application is maintainable against such an order?

16. It is appropriate to first appreciate the scope and content of the inquiry under Order XXI, Rule 58, which is admittedly of a summary nature. It is therefore necessary to set out in extensor the provisions of Order XXI, Rules 58 to 61 as to notice that Rule 63 enables the aggrieved party to file a substantive suit after an order under Order XXI, Rule 58 has been made. Rules 58 to 61 of Order XXI are as follows:-

"58. (1) Where any claim is preferred to or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection".

59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached".

"60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment".

"61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim".

17. Now while considering the scope of O. 21, R. 58, C.P. Code the Supreme Court in Sawai Singhai Nirmal Chand Vs. Union of India, had occasion to observe as follows:-

"In this connection, we ought to bear in mind that the scope of the enquiry under Order 21, Rule 58, is very limited and is confined to question of possession as therein indicated while suit brought under Order 21, Rule 63 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the investigation under Order 21, Rule 58. In fact, it is the order made in the said investigation that is the cause of action of the suit under order 21, Rule 63 ....."

18. Apart from the observations of the Supreme Court in the aforementioned case, where the question at issue was as to whether a notice u/s 80 of the CPC was necessary before a suit under Order XXI, Rule 63 could be filed, there is considerable authority to show that in an investigation under Order XXI, Rule 58, the most important fact to be noticed is with regard to possession.

19. The words in Rule 58 are: "the Court shall proceed to investigate the claim or objection". It is, therefore, the duty of the Court to investigate a claim preferred to it under this Rule, unless it sees reason to reject it on the ground of delay. It is not in dispute that question of delay does no arise in the case before me.

20. As to the extent of the investigation, it was pointed out by Lord Hob house in Sardhari Lal v. Ambika Prasad, (1888) 15 I. A. 123-

"The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question,

in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him".

It is of course possible to define the extent of the enquiry which would constitute such an investigation as that would depend on the facts of each case. But the next aspect which requires to be noticed is as to what is to be investigated. This is indicated by the Rules 58, 59, 60 and 61, reproduced above. As Rule 58 says, first of all the investigation is of the claim or objection and Rule 59 enjoins the claimant or objector to adduce evidence to show that he had either some interest in, or was possessed of, the property attached on the date of the attachment. Rule 60 provides for release of the property from attachment, if the Court by reason of having made the investigation is satisfied (a) that the property, when attached, was not in the possession of the judgment-debtor or some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, that is to say, the judgment-debtor or (b) that if it is found that the judgment-debtor was at the time of the attachment in possession of the property, then such possession was not on his own account or as his own property but on account of someone else, and if these conditions are satisfied, then it would be the duty of the Court to make an order releasing the property. Conversely R. 61 provides as to when the claim to the property attachment shall be disallowed. This happens when the Court is satisfied that the property at the time of the attachment was in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person who was holding the property in trust for the judgment-debtor, or that the property was in physical possession of a tenant or other person who was paying rent to other person who was paying rent to him, that is to say, the judgment-debtor. In that event, the Court is enjoined to disallow the claim.

21. In my view, these Rules clearly set out the matters requiring investigation and it is the duty of the Court to apply its mind to these points or factors in order to come to a determination whether the objection petition should be allowed or disallowed.

22. It is substantially clear that on a proper construction of these Rules the question to be decided is whether on the date of the attachment it was the judgment-debtor who was in possession or it was the objector who was in possession and further when the Court comes to a finding that the property was in the possession of the objector, then the Court must proceed further to find whether that possession of the objector was on his own account for himself or as trustee or on account of the judgment-debtor. It requires to be emphasised that the direction of the investigation, which the Court has to carry out, points to possession being the criteria. It is, of course, possible that in the course of such an investigation as to who is in possession of the property subjected to attachment, the question of some legal right or interest or title may also arise and if such legal right affects the

determination of the question as to who is the real person in possession in fact or in law, then such a legal right or interest will naturally have to be taken into account. But it is also settled law that complicated questions as to titled are not to be gone into under the summary procedure of the investigation under Order XXI, Rule 58.

23. It is to be noticed that in the case before me, the learned Civil Judge seems to have been oblivious of what in fact the provisions of Order XXI, Rules 58 to 61 required form him with regard to the investigation of the claim or objection. It is obvious that the learned Civil Judge instead of directing his enquiry into finding out as to who was in possession has concerned himself with a some what collateral question as to who had a superior claim. Now, it is, of course, possible that in a substantive suit under order XXI, Rule 63 that may be a material question, because that would revolve on the question of title. But whether the petitioners or the decree-holders had superior claim over the property was a question which really did not fall for consideration in the proceedings under Order 21, Rule 58, C.P. Code.

24. The record before the learned Civil Judge, including the averments of the decree-holders in the plaint in Special Civil Suit No. 58 of 1967, clearly showed that there were tenants who were in possession on the land. We are not concerned in this civil revision petition with Survey No. 2 but only with Survey No. 10. But it cannot be disputed that Survey No. 10 was also in the possession of tenants who had certain statutory rights under the various tenancy enactments and it is also on record that is was because Gopalrao, the judgment-debtor, was unable to obtain a surrender from these very tenants that the transaction between him and the decree-holders Baliram and Jaiwant fell through, resulting in the suit being filed and thereafter the consent decree being obtained.

25. If, therefore, it was obvious or should have been obvious to the learned Civil Judge that there was tenants on the land, then taking into accounts the fact that the objection petitioners had in their claim or objection clearly set out their interest in the land by reasons of the three registered sale deeds executed in their favour by Gopalrao, the previous owner of the land, the learned Civil Judge should have proceeded to direct his inquiry into finding out as to on whose behalf these tenants were in possession and to whom these tenants were paying rent. In other words, if due regard had been paid to the provisions of Rule 59, 60 and 61 the learned Civil Judge had to investigate the claim on the footing that the petitioners were bona fide purchasers for value under registered sale deed. It is not clear as to whether the decree-holders Baliram and Jaiwant ever challenged the validity of these sale deeds, but assuming that they had, then that would have still been a question of title, But it could not be gainsaid that on the basis of the registered sale deed, the petitioners "had some interest in the property attached" within the meaning of Rule 59. The question which was required to be investigated was if the possession of the tenants who were admittedly on the land was on account of Gopalrao, the judgment-debtor or on account of the petitioners as the purchasers of the property from Gopalrao.

26. Instead of directing himself to such a kind of enquiry, which is clearly contemplated and enjoined by Rules 58, 59, 60 and 61, the learned Civil Judge misdirected himself by proceeding to determine a collateral question as to whose claim was superior.

27. And during the course of that inquiry the only issue that he raised was whether there was a statutory charge on the land bearing Survey No. 10 in respect of the decree passed in Special Civil Suit No. 58 of 1967. In fact this was the only issue that he raised, although his attention was invited specifically to the fact that tenants were in possession of the property and that it was because the judgment-holder had taken the responsibility to get a surrender form these land to Baliram and Jaiwant that the transaction between them fell through.

28. The learned Civil Judge relied on the statutory charged said to have been created on the property by the consent decree as being the basis of his conclusion that the decree-holders Baliram and Jaiwant had a superior claim and that, therefore, the claim of the petitioners should be disallowed. In his order, the learned Civil Judge first of all erroneously states that "on the other hand the compromise decree reveals that a charge is created on the property agreed to be sold". As I have stated above, a certified copy of the compromise has been produced before me and in paragraph 3, which has also been reproduced above, the following words are used:-

"There will be a statutory charge on the above lands agreed to be sold i.e. S.No. 2 and S.No. 10 situated at Daithan Thaluka Ambajogai Dist. Bhir".

The learned Civil Judge was clearly in error in coming to the conclusion that the charge was created by the compromise decree. First of all, the words merely say that there will be a statutory charge. That means that the charge is created by statute if the requisite conditions are found to exist. Secondly, as pointed out by Mr. Deshpande, the learned Advocate for the petitioners, if a charge had been created by the compromise decree, then such a charge could not be enforced until and unless the decree was registered u/s 17 of the Registration Act. In my view, therefore, assuming that there is a charge on the property, then that would be a statutory charge u/s 55(6)(b) of the Transfer of Property Act. But that is not to say that merely because such a section exists in the Transfer of Property Act, the is an automatic charge without the conditions stated therein having been found to have been established. Section 55(6)(b) of the Transfer of Property Act reads as follows:-

"55 (6) buyer is entailed -

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller''s interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and fro interest on such amount; and when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel

specific performance of the contract or to obtain a decree for its rescission".

It will at once be noted that this section predicates who facts: (1) that the acceptance of delivery must not have been improperly declined and the purchase-money must have been properly paid and (2) that if delivery is properly declined then a claim for earnest and costs should also arise.

29. It follows that the decree-holders would have been entitled to a statute charge under the section, only and only if they had not declined to accept delivery of the property improperly. The learned Civil Judge then goes on to find: "But they declined to accept the delivery of the property properly as is laid down in Section 55(6)(b) of the T.P. Act". it does not appear to be clear as to on what basis the learned Civil Judge arrived at this finding. There is nothing on record which would warrant such a finding. On the other hand, the record goes to show that there were obstacles in the way of the seller giving possession to the decree-holders pursuant to the agreement of sale and these obstacles were known to the decree-holders at the time of the agreement of sale and were in fact taken into consideration when arriving at the agreement of sale. This is clearly set out in the decree-holder''s paint in Special Civil Suit No.58 of 1967.

30. The attention of the learned Civil Judge was invited to the judgment of this High Court in Dnyanu Baba Chobe Vs. Gulab Eknath Bhais, . In that case, it was held that Section 55(6)(b) of the Transfer of Property. Act comes into operation only when it is possible for the vendor to give possession of the property to the purchaser and yet he fails to deliver it. In such a case the purchaser would have a statutory lien u/s 55(6)(b) would not be created in favour of the purchaser in respect of the money that he might have paid under the contract of sale.

31. In the case before me it is clearly set out that even in 1962 when the oral agreement for sale was entered into, the decree-holders Baliram and Jaiwant and the judgment-debtor Gopalrao were fully conscious that the only manner in which the sale could ever be completed would be if Gopalrao succeeded in obtaining surrender from the tenants, so that he would be in a position to hand over possession to the purchasers from him, viz., Baliram and Jaiwant. In other words, Gopalrao was never in a position to deliver possession, and if he was never in a position to deliver possession, I fail to understand how it can be said that the statutory lien u/s 55(6)(b) of the Transfer of Property Act would be crated in favour of the purchasers.

32. And yet the learned Civil Judge has sought to distinguish this authority on the footing that in that case it was the question of a tenant becoming a purchaser and in this case the purchasers were strangers.

33. The learned Civil Judge sought to rely on the fact that the objection petitioners in their claim had not taken any plea to the effect that Gopalrao the seller, was not in a position to deliver possession to the decree-holders. But if this fact is apparent from

the record, then it would be idle to suggest that merely because the objection petitioners have not set out a plea in their claim, the effect would be that the statutory charge would be created.

34. The finding of the learned Civil Judge that there was a statutory charge in view of the provisions of Section 55(6)(b) of the Transfer of Property Act is based on no evidence and is clearly erroneous.

35. In the result, it appears to me that the learned Civil Judge failed to carry on the investigation enjoined by Order XXI Rule 58 of the Code of Civil Procedure. he failed to inquire as to who was in possession and on whose account. I am, therefore, satisfied that the essential question which had to be decided by the learned Civil Judge has not at all been decided by him and the conclusion is, therefore, inescapable that the learned Civil Judge failed to exercise jurisdiction vested in him under Order XXI, Rule 58 and otherwise acted with material irregularity and that, therefore, the order dated 24th December 1970 is liable to be set aside.

36. As regards the maintainability of the petition. Mr. Deshpande, the learned Advocate for the petitioners, invited my attention to a very recent judgment of the Supreme Court in Shri M.L. Sethi Vs. Shri R.P. Kapur, , in which according to Mr. Deshpande, the revisional powers of the High Court have been some what expanded, although the earlier decisions in Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, , Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai, and Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, , have not been affected and have in fact been relied upon. Mr. Kurdukar, the learned Advocate for opponents Nos. 1 and 2, has drawn my attention to the judgment of the Supreme Court in D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, , wherein it was held that unless errors of fact or errors of law have relation to the jurisdiction of the Court, it would not be competent for the High Court to correct such errors u/s 115 of the Civil Procedure Code.

37. Now in the Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others, the Supreme Court pointed out that Section 115 of the CPC applied to cases involving questions of jurisdiction. The Supreme Court made a distancing between two classes of cases and observed:

"In one, the Court decides a question of law pertaining to jurisdiction. By a wrong decision it clutches at jurisdiction or refuses to exercise jurisdiction. In other it decides a question within jurisdiction".

38. After so observing the Supreme Court held that in the case unless discussion the question as to whether there was sufficient cause for setting aside the abatement was a matter exclusively within the jurisdiction of the Court and the Court could decide it rightly or wrongly so that such a decision could not be interfered with by the High Court.

39. Again in Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai, which was a case under the Bombay Rent Act and concerned with the question of readiness and willingness to pay the standard rent, the Court held that decision of the District Court, which admittedly had jurisdiction to determine the question at issue, could not be interfered with, whether the District Court had rightly or wrongly decided the question, and observed:-

"The High Court may exercise its power in revision only if it appear that in a case decided by the Subordinate Court in which no appeal lies thereto the Subordinate Court has exercised a jurisdiction not vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity..... Therefore if the trail Court had jurisdiction to decide the question before it and did decide it, whether it decided it rightly or wrongly the \\court had jurisdiction to decide the case and even if it decided the question wrongly it did not exercise its jurisdiction illegally or with material irregularity".

40. In Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, , the Supreme Court while discussing the extent of revisional powers of the High Court held that even if it was found that the lower Court had committed an error on a question of law, interference with the order would not be justified if the question was not related to the lower Court''s jurisdiction. Thus the High Court could not correct "errors of fact however gross they may be or even errors of law". If the nexus to jurisdiction was absent, misconstruction of a decree by the lower Court, even though it amounted to an error of law, did not justify interference by the High Court, under its revisional jurisdiction.

41. In the very recent case of Shri M.L. Sethi Vs. Shri R.P. Kapur, the scope and extent of the revisional powers of the High Court has once again been analysed by the Supreme Court and the distinction between "the errors committed by Subordinate Courts in deciding questions of law which have relation to or are concerned with questions of jurisdiction of the said Courts and errors of law which have no such relation or connection" emphasised.

42. In an illuminating discussion of the "traditional" and "modern" concepts of jurisdiction, Matthew, J. who spoke for the Court, said: -

"The word ''jurisdiction'' is a verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to its in Anisminic Ltd. v. Foreign Compensation Commission, (1969) 2 AC 147 namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Derman in R.V. Bolton (1841) 1 QB 66. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd., 1969 2 AC 147 Lord Reid said:

''But there are many cases where although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. it may have given made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. it may have reused to take into account something which it was required to take into account. or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive''.

In the same case, Lord Pearce said :

''Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong question; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity''.

The Supreme Court went on to observe:-

"The dicta of the majority of the House of Lords, in the above case would show the extent to which ''lack'' and ''excess'' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of ''jurisdiction''. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as ''basing their decision on a matter with which they have no right to deal'', ''imposing and unwarranted condition'' or ''addressing themselves to a wrong question''. The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allows. In the end it can only be a value judgment(See H.W.R. Wade, ''Constitutional and Administrative Aspects of the Anismenic Case'', Law Quarterly Review, Vol. 85, 1969, P. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional

error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court".

43. Now, as I have already discussed, the learned Civil Judge in the instance case obviously asked himself the wrong question and took into account matters he was not directed to take into account. He failed to make the inquiry which he was enjoined to do under order XXI, Rule 58, C.P. Code. Instead of investigating as to who was in possession and on whose account, he concerned himself with the alleged superiority of one party''s claim over the other. In other words, he refused to exercise his jurisdiction or at any rate the nature of his inquiry shows that he acted illegally or with material irregularity in the exercise of his jurisdiction under Order XXI, Rule 58, C.P.Code. In this connection it may not be out of place to refer to an observation of the House of Lords in Bench (H.M. Inspector of Taxes) v. Doncaster Amalgamated Colliery Ltd. (1946) 27 Tax Cas 296, which is as follows:-

"Unless the Commissioners, having found the relevant facts and put to themselves the proper questions having proceeded to give the right answer, they may be said on this view to have erred in point of law".

44. There can be no disagreement with this said proposition of law and applying it to the facts of the present case one can only come to the conclusion that the learned Civil Judge did not at all ask himself the proper question. He thus failed to exercise the jurisdiction vested in him under Order XXI, Rule 58 read with Rules 59, 60 and 61 of the Civil Procedure Code. The error committed by the learned Civil Judge was clearly in relation to the jurisdiction of the Court. On this finding this revision petition is not only maintainable but ought to be allowed.

45. In the circumstances I allow the revision petition and set aside the order of the trial Court and remand the matter back to it to be tried in accordance with law. The opponents will pay the costs of the petitioner here.

46. Revisions allowed.