

DURGA PRASAD  
v.  
NAVEEN CHANDRA AND ORS.

A

MARCH 11, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

B

*Constitution of India, 1950 : Article 226.*

*Writ jurisdiction—Cannot be invoked for by-passing the procedure prescribed under Code of Civil Procedure, 1908.*

C

*Code of Civil Procedure, 1908 :*

*Sections 96, 104 and 115—Order 43 Rule 1—Order 9 Rule 13.*

*Suit—Decree—Application under Order 9 Rule 13 for setting aside of decree—Objection to the maintainability of application—Order rejecting objection—Writ against order—Maintainability of—Held impugned order was not appealable either under Section 96 or under Order 43 Rule 1 read with Section 104—But revision under section 115 was maintainable—Invoking writ jurisdiction instead of filing revision held not proper—Held no interference was called for against order dismissing writ petition—Appellant can avail of remedy open under law.*

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4497 of 1996.

From the Judgment and Order dated 21.12.95 of the Allahabad High Court in C.M.W.P. No. 37212 of 1995.

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M.P. Shorawala for the Appellant.

The following Order of the Court was delivered :

Leave granted.

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The respondent has filed a suit for specific performance and after the evidence of the appellant was closed on 12.3.1991, the defendant's evidence was directed to be recorded on 20.3.1991. It would appear that the matter was adjourned from time to time till 11.1.1994. On that date,

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- A the respondent seemed to have declined to contest the suit and sought adjournment. The application for adjournment was rejected and after hearing arguments, judgment was reserved and was pronounced on 14.1.1994. Respondent No. 2 made an application on 27.1.94 to set aside the decree under Order 9 Rule 13 CPC. Similar application was filed by other respondents. While that application was pending, the appellant moved an application objecting to the maintainability of the application and to hear it as a preliminary point. That petition came to be dismissed by the trial Court on 7.10.95. Against the said order, the appellant filed writ petition under Art. 226 of the Constitution and that was dismissed by the impugned order dated 21.12.95 by the High Court. Thus this appeal by
- B
- C special leave.

- On the last occasion when the matter had come up for admission, we had asked the learned counsel as to how the writ petition is maintainable in the circumstances. The learned counsel sought for and the matter was adjourned. Thus it has come up today. The appellant's counsel contended that three remedies are open to the appellant under the CPC, namely, right of appeal under section 96 or appeal under Order 43 read with section 104 or a revision under section 115 CPC. In view of the fact that the matter does not come within the four corners of any of the three remedies, the appellant is left with no other remedy except approaching the High Court under Art. 226. It is true that the impugned order is not appealable one either under section 96 or under Order 43 Rule 1 read with section 104 CPC. But still a revision would be maintainable and whether the order could be revised or not is a matter to be considered by the High Court on merits. But instead of availing of that remedy, the appellant has invoked jurisdiction under Art. 226 which is not warranted and the procedure prescribed under the CPC cannot be by-passed by availing of the remedy not maintainable under Article 226. Under these circumstances, we decline to interfere with the order, it is open to the appellant to avail of such remedy as is open under law.
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- G The appeal is accordingly dismissed. No costs.

T.N.A.

Appeal dismissed.