

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

WRIT PETITION NO. 4988 OF 2014

Smt. Beena wd/o Prasanna Munot,
age 49 years, R/o C/o Shri
Laxminarayan Hiralal Karwa,
Plot No. 38/2, Gujrath Colony,
Vishwesh Society, Kothrud, Pune-29 .. Petitioner

versus

01. Siddarth Prasanna Munot,
age 26 years, occupation : business,
R/o Survey 75, Plot No. 15,
ZP Colony, Agarkar Mala, Station Road,
Ahmednagar.
02. Sau. Bakul Vaibhav Takalkar,
Age: 28 years, occup. Household,
Behind Bajaj Allianz Office,
Delhi Gate, Ahmednagar .. Respondents

Mr. R.R. Mantri, Advocate instructed by
Mr. R.R. Sancheti, Advocate for petitioner
Mr. S. S. Bora, Advocate for Respondents No.1 & 2

CORAM : N.W. SAMBRE, J.
DATE : 4th March, 2015

ORDER

1. The petitioner – original plaintiff has questioned legality and validity of the order dated 10-03-2014 passed by learned Civil Judge, Senior Division, Ahmadnagar, below Exhibit 125 in Special Civil Suit No. 70 of 2008, rejecting petitioner's application as regards referring the matter to this court under the Contempt of Courts Act and deferring the decision on

petitioner's prayer to the extent it seeks striking out defence of defendants No. 1 and 2 under Order XXXIX Rule 11 of the Code of Civil Procedure, 1908 till decision in contempt petition that would be filed by the plaintiff, and also order dated 2-5-2014 rejecting application at Exhibit 132 in the said suit, seeking review / recall of above order dated 10-03-2014 on the ground that it suffers from error apparent.

2. According to Mr. Mantri, learned counsel appearing on behalf of the petitioner, this court while disposing of writ petition No. 7179 of 2010 filed by present petitioner, by order dated 11-08-2010 had directed present respondents – original defendants no.1 and 2 in said Special Civil Suit No.70 of 2008 to file an undertaking to the effect that the property involved in the said suit will not be transferred by them to the third party during pendency of the said suit. The undertaking was to be filed within a period of four months from 11-08-2010. Since such undertaking was not filed by present respondents, action under Order XXXIX, Rule 11 of the Code of Civil Procedure is invited.

3. Mr. Mantri would further urge that by order dated 10-3-2014, the learned Civil Judge, Senior Division, Ahmednagar, has observed that the petitioner was to file contempt petition to the extent it seeks reference to be made to the high court, however,

has deferred the decision on the issue of striking out defence of defendants no. 1 and 2 under Order XXXIX, Rule 11 of the Code of Civil Procedure till the decision of the contempt petition, if any, to be filed by the plaintiff-present petitioner, and by order dated 2-5-2014 on Exhibit-132, declined to recall / review the order dated 10-03-2014 on application at Exhibit 125.

4. In addition to above, Mr. Mantri would urge that the admitted position on record is that within a period of four months, in terms of the order of this court in writ petition referred to supra, requisite undertaking has not been furnished by the respondents. He would further urge that having regard to the same, learned trial court was duty bound to make reference as regards conduct of respondents-defendants no. 1 and 2 to this court and point out their act of defiance of the order of the high court dated 11-08-2010 in writ petition 7179 of 2010, by not filing the undertaking.

5. In support of aforesaid submission, Mr. Mantri has invited attention of this court to the provisions of the contempt rules framed by the high court. He would further urge that the provisions of Order XXXIX, Rule 11 of the Code of Civil Procedure are held to be mandatory by this court in the matter of **Ratnakar vs. Smita**, reported in **1996 (1) Mh. L.J. 76.**

6. According to Mr. Mantri, once the said provisions under Order XXXIX, Rule 11 of the Code of Civil Procedure are held to be of mandatory nature, it was expected of the trial court to pass appropriate order under the said provisions of law, in stead of deferring the same till decision in the contempt proceedings to be filed. He submits that the learned trial court cannot prevail upon the petitioner to file contempt petition.

7. While countering the above referred submissions, Mr. Bora, learned counsel appearing on behalf of respondents No.1 and 2, has urged that the orders passed by the high court in writ petition no.7179 of 2010 on 11-08-2010 was without notice to them. He, however, submitted that defendants no. 1 and 2 hold the order of the court in high esteem and have not disobeyed the order of the high court in any manner and have in fact, honoured the same by submitting that they have filed say at Exhibit 128 to the application at Exhibit 125. Mr. Bora submits that respondents no. 1 and 2 have not created any third party interest in the suit property and have, in fact, given an undertaking to that effect in paragraph 4 of their say at Exhibit 128 in reply to application at Exhibit 125. Mr. Bora would further urge that the learned trial court has passed order on application at Exhibit 5 injuncting the defendants from creating third party

rights in the suit property, on 28-08-2008 and the said order has already been honoured by them.

8. In addition to above, both the defendants-respondents herein have submitted an undertaking in present writ petition as well, that they shall not create third party interest in the suit property during pendency of special civil suit no.70 of 2008.

9. According to Mr. Bora, present writ petition does not call for any interference in the orders impugned and sought dismissal of the writ petition.

10. Having considered rival contentions of the parties, it is noticed that it is not in dispute that the trial court has, on 28-04-2008, passed order of injunction on application at Exhibit 5, restraining defendants no.1 and 2 from creating third party interest in the suit property. The fact remains, in reply to application by petitioner at Exhibit 125, respondents no. 1 and 2 in the wordings of undertaking have mentioned that they shall not create third party interest in the suit property and have not created such interest till the date of filing of reply i.e. 24-01-2014 to application by petitioner at Exhibit 125. Till the date of filing application before the trial court for taking out contempt proceedings against the present respondents, it is not brought on record by the petitioner that the respondents have violated

the order of injunction of the trial court or the one passed by high court on 11-08-2010 in writ petition no. 7179 of 2010, by creating third party interest as regards the suit property.

11. The purport and cumulative effect of the order of injunction with that of the order passed by this court on 11-08-2010 is to ensure that defendants no.1 and 2 should not create any third party interest in the suit property and they have, in fact, given an undertaking to that effect as is apparent from the reply filed by them on 24-1-2014 to plaintiff's application at Exhibit 125.

12. Even before this court, as stated earlier, respondents have sworn an affidavit, undertaking that they shall not create any third party interest in regard to the suit property which is the subject-matter of special civil suit no.70 of 2008. The said undertaking is taken on record and marked 'X' for the purpose of identification.

13. In view of thereof, in my opinion, claim and contention of the petitioner as regards making reference by trial court to this court for taking out contempt proceedings against respondents-defendants no. 1 and 2 does not call for consideration and consequently, rejection of the said prayer by the trial court, in my opinion, does not call for interference.

14. So far as second contention raised by Mr. Mantri as mandate of provisions of Order XXXIX, Rule 11 of the Code of Civil Procedure for striking out of defence of defendants is concerned, the said provisions are already held to be not mandatory but of directory nature in **Ramavtar Surajmal Modi vs. Mulchand Surajmal Modi**, reported in **2004 (2) Mh. L. J. 1.**

15. In that view of the matter, no case for interference is made out. Writ petition sans merits and stands dismissed.

N.W. SAMBRE, J.

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