

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

WRIT PETITION NO. 6681 OF 2014

Satishkumar Parmanand Sharma
Age 68 years, occup. Business,
R/o 12, "Durgesh", near Mahabal Stall, .. Petitioner/
Jalgaon, District Jalgaon. orig.Deft.No.5

versus

1. Pratik Deelip Choudhari,
Age 24 years, occup. Education,
R/o 5, Dhake Colony, Zilla Peth,
Jalgaon, District Jalgaon
2. Dr. Deelip Deoram Choudhari,
Age 55 years, occupation :
Medical Practitioner
3. Sau. Vijaya Deelip Choudhari,
Age 51 years, occup. Pathologist,

R. Nos. 1 and 2 R/o 29, Deoramnagar,
Gat No.81/B, Nimkhedi Shivar,
Jalgaon, District Jalgaon,
4. Smt. Kamaltai Deoram Choudhari,
Age 80 years, occup. Household,
R/o 5 Dhake Colony, Zilla Peth,
Jalgaon, District Jalgaon,
5. The Bhusawal Peoples Co-operative
Bank Ltd., Station Road, Bhusawal,
Tq. Bhusawal, District Jalgaon,
through its Managing Director,
6. The ICICI Bank Limited,
Branch at Jalgaon, District Jalgaon,
Through its Branch Manager .. Respondents

Mr. Vinayak. D. Hon, Advocate for petitioner
Mr. S.P. Brahme, Advocate for respondent no. 1
Mr. A. S. Kulkarni, Adv. i/b Mr. A. N. Nagargoje,
Advocate for respondents no. 2 and 3
Mr. Chandrakant P. Patil, Adv. for respondent no.4
Mr. D. B. Thoke, Advocate for respondent no. 5
Mr. M.S. Kulkarni, Advocate for respondent no. 6

CORAM : SUNIL P. DESHMUKH, J.
DATE : 18TH JUNE, 2015

Oral judgment :

1. Rule. Rule made returnable forthwith. Heard learned counsel finally by consent.

2. Petitioner-original defendant no. 5 is purportedly aggrieved by order dated 05-07-2014 passed by learned 2nd Joint Civil Judge, Senior Division, Jalgaon, allowing Exhibit-79 filed by respondent no.1-original plaintiff seeking permission, to withdraw special civil suit no. 138 of 2008 instituted for partition and possession in respect of the properties referred to in the schedules to the plaint and to institute a fresh suit. The suit has been instituted in 2008 depicting plaintiff to have attained majority.

3. The petitioner is purchaser of the property in the auction sale at the instance of defendant no. 5 - Bhusawal Peoples Co-operative Bank Limited. It appears that, present respondents no. 2 and 3 are defendants no. 1 and 2 in said suit and happen to be father and mother of present respondent no. 1 who had mortgaged property purchased by present petitioner with aforesaid bank way back in 1994 for loan obtained by them from Defendant no. 5. Since loan had not been repaid, defendant no.5 - Bank prosecuted defendants no. 1 and 2 for recovery of loan amount and the mortgaged property had been put to auction.

Accordingly, said property was auctioned and was sold to the petitioner who purchased the same. It is being contended on behalf of the petitioner that the bank had already taken-over possession of the property and while it came to giving possession of the same by bank to the petitioner, series of litigations had taken place.

4. Mr. Hon, learned senior advocate appearing for petitioner makes reference to the order passed by this court in writ petitions bearing no. 4229 of 2009 on 08-12-2009. The writ petition had been filed by present respondents no. 2 and 3. The division bench had dismissed the challenge in said writ petition to the proceedings being prosecuted pursuant to section 101 of said Act, observing in paragraphs 13 and 14 thus;

“13. It will be unreasonable to keep respondent No.8 in a hanging situation waiting for fruits of his huge investment, for no fault on his part. The final advertisement is dated 4th January, 2008, wherein the date of auction, as 23rd Jan.2008, was also indicated but the petitioner did not activate his compliance. The laxity all throughout embroilment demonstrated by the petitioner has to be shared by himself, for which the Bank, as a financial institution, need not be be jeopardized. There is no renegation and mala fides in the Bank's approach, to the petitioner.

14. The allegation that few officers or the Directors of the Bank are interested in the property is not substantiated by any evidence, least any suggestive circumstances. ”

5. Writ petition no. 4195 of 2012 at the instance of present respondents no. 2 and 3 purported to challenge order dated 8th June, 2009 passed by District Deputy Registrar, confirming auction sale, along with challenge to said proceedings culminating into order dated 31-03-2012 in revision. Learned single judge had dismissed the writ petition under order dated 17-06-2014 and upon request to stay the judgment and order, had in paragraphs 35 and 36 observed thus;

“35. At this stage, Mr. A.N. Nagargoje, learned Counsel for the petitioners prays for stay of the judgment for a period of eight weeks. He submits that since the property was mortgaged in 2005 to the Bank, the petitioners are in peaceful possession of the property in question. The request made on behalf of the petitioners is strongly opposed by the learned Counsel for the respondents.

36. In view of the fact that the order passed by the Division Bench of this Court in Writ Petition No.4229 of 2009 has attained finality in the Honourable Apex Court and having regard to the observations made in this judgment, the request made on behalf of the petitioners is rejected. ”

6. According to contention of the petitioner, after failure of parents of present respondent No. 1 posing challenges to proceedings under the Maharashtra Co-operative Societies Act, 1960 referred to hereinabove, application (Exhibit-79) for withdrawal of suit under the garb that it suffers from formal defects had been moved with intention to forestall giving of possession of the property to the petitioner.

7. It also transpires after hearing learned counsel that during the course of these proceedings after institution of aforesaid regular civil suit no. 138 of 2008, present respondent no. 1 had filed regular civil suit no. 77 of 2010, posing challenge to notice dated 19-03-2010 by tahsildar in execution proceedings pursuant to recovery certificate under section 101 of said Act. Those proceedings went upto second appeal and present respondents failed all through.

8. Plaintiff-respondent no. 1 herein had moved application (Exhibit-79) in special civil suit no. 138 of 2008, purportedly under Order XXIII, rules 1 and 2 of the Code of Civil Procedure, 1908 seeking leave to withdraw said suit and file a fresh suit on the same cause of action, contending that he had 1/3rd share in the property and its possession should not be given to defendant no.5-present petitioner. It is being referred to that since defendant no. 4 is a co-operative bank and that it had obtained certificate under section 101 of said Act and that the auction had illegally taken place and further that since defendant no. 1 is still in possession of the property and as the dispute is pending between defendant no. 1 and present petitioner-defendant no. 5 in the high court, the tenability of the present suit is in question for want of notice under section 164 of said Act and as it has been realized that the suit may be bad for want of compliance of said provision, a request has been made under Exhibit-79 that the suit may be

allowed to be withdrawn with permission to file fresh suit on the basis of same cause of action.

9. It appears that, defendants no. 4 and 5 have not contested the application at Exhibit-79 and defendants no. 1 to 3 consented to the application. However, defendant no. 5 has resisted the application. Learned judge, it appears, relying on decision in *Jijamata Sahakari Sakhar Karkhana Ltd. v. Sukhdeo Rambhau Fulzade*, reported in 2011 (3), Bom. C.R. 413, allowed the application under order dated 05-07-2014 which has been impugned in present petition.

10. Learned senior advocate Mr. Hon appearing for petitioner vehemently submits that the plea which is being pressed into service is merely a subterfuge, for, the suit is for partition, injunction and declaration in respect of 1/3rd of share claimed by plaintiff in the suit property. It is being submitted by him that as a matter of fact, the suit is collusive, for, all the properties of joint family and ancestral are not included in the suit. He refers to averments in the plaint and contends that those do not dispute correctness or legality of the action taken by the bank for recovery of the loan amount. He submits that looking at the averments as contained in the plaint, it cannot be said that the suit relates to or touches the business carried on by defendant no.4-Bank. According to him, what is being questioned is the legality and authority of defendants no. 1 and 2 to enter into transaction with respect to suit properties. In such a case, the

court ought not to have considered the application and, in fact, ought to have dismissed the same. He submits that the entire effort is to delay and thwart delivery of possession of property purchased by petitioner under auction by following all the procedure as is required under the law. He submits that, authority referred to by learned judge would not apply to and hold the present case as, the same deals with a completely different set of facts and situation.

11. Learned senior advocate Mr. Hon submits that the impugned order is bad, for, it does not deal with the basic issue and decide upon as to whether suit can be deemed to be in respect of any act touching the business of the society. In the absence of the same, impugned order is unsustainable and deserves to be set aside. He submits, having regard to the conduct of respondents no. 1 to 4, it is discernible that the same is in abuse of process of law.

12. Mr. Brahme, learned counsel appearing for respondent no.1-original plaintiff, contends that respondent no. 1 cannot be left in lurch and should not be rendered remediless. If the petition is allowed, plaintiff will have no remedy open to assert his right in respect of suit property. He submits, in the present scenario of interim relief being granted, respondent no. 1 is not in a position to prosecute either the old suit or the fresh suit as has been filed pursuant to the impugned order. He contends, rights of

respondent no.1 in the property purportedly dealt with in auction sale are at stake and it is not in dispute that said property is ancestral property.

13. Section 164 of the Maharashtra Co-operative Societies Act reads thus;

“164. NOTICE NECESSARY IN SUITS

No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.”

14. The decision in citation referred to in impugned order appears to have been rendered in peculiar set of facts therein and may not govern present case. Perusal of the impugned order shows that the issue which has been raised by learned senior advocate will have bearing on the outcome of application-Exhibit-79. Though Mr. Brahme has other point of view, I deem it appropriate, in the facts and circumstances of the case, petitioner deserves an opportunity to defend the application and it would be appropriate that trial court may decide the application on merits taking into account submissions as would be advanced with reference to section 164 of said Act.

15. As such, the impugned order dated 05-07-2014 passed by learned 2nd Joint Civil Judge, Senior Division, Jalgaon, allowing application at Exhibit-79 filed by respondent no.1-original plaintiff seeking permission to withdraw special civil suit no. 138 of 2008 with permission to file fresh suit stands set aside. Exhibit-79 is restored to its position as had been subsisting immediately before the impugned order had been passed. It is open for the parties to take up relevant grounds as advised before the trial court, in their respective cases. All contentions of parties are kept open.

16. It is clarified that in view of aforesaid, all the interim orders stand vacated and shall be deemed to have been vacated.

17. Writ petition stands allowed accordingly. Rule stands made absolute in aforesaid terms.

SUNIL P. DESHMUKH, J.

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