

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

WRIT PETITION NO.9333 OF 2014

Prakash Namdeorao Surwase,
Age 50 years, Occu. Profession
r/o Jalan Nagar, Plot No.7,
Near Railway Station, Aurangabad

..Petitioner

Versus

Madhukar s/o Baburao Wadadekar,
Age 65 years, Occu. Private Service,
r/o Flat No.7, Abhishek Apartment,
Jalan Nagar, Near Railway Station,
Aurangabad

..Respondent

Mr S.S. Shinde, Advocate h/f Mr N.S. Mansingka, Advocate for
petitioner
Mr R.S. Deshmukh, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 10th March 2015

ORAL ORDER

1. Heard finally with the consent of parties.
2. The present petition is by original plaintiff to Regular Civil Suit No.797/2009 for possession of Flat No.7, Abhishek Apartment, Jalan Nagar, Near Railway Station, Aurangabad and also for permanent injunction restraining the defendants from creating third party interest.
3. The present respondents No.1 and 2 were added as defendants.
4. The suit came to be partly decreed by the judgment and decree dated 1st March 2012 by 13th Joint Civil Judge, Junior Division, Aurangabad granting decree for possession and also ordered inquiry for mesne profit.

5. The defendant No.1, feeling aggrieved thereby preferred Regular Civil Appeal No.326/2012 before the Ad-hoc District Judge, Aurangabad which came to be allowed on 16th February 2013 with following observations:

“1. Appeal is allowed as under:

2. The judgment and decree dated 1.3.2012 passed by the Civil Judge (J.D.), Aurangabad in R.C.S. No.797/2009 is hereby set aside subject to cost of Rs.5,000/- and matter is remanded back to the learned trial court to decide the same afresh giving an opportunity to the appellant/defendant to lead evidence in support of his contentions.

3. On failure to deposit the cost within 15 days from the date of this order, appeal deemed to have been dismissed.

4. On depositing the cost, it be given to the respondents and record and proceedings be sent to the learned trial court.”

6. As a consequence of above order of remand passed by lower appellate Court on 16th February 2013, the learned trial Court was expected of to decide the suit expeditiously after giving opportunity to defendant No.1 to lead evidence in support of his contentions.

7. From the record it further appears that the learned 12th Joint Civil Judge, Junior Division, Aurangabad, on 10th June 2014 passed an order below Exh.1 i.e. plaint disposing of the suit.

8. The petitioner herein then preferred an application under Section 152 of the Code of Civil Procedure for rectification/modification of the said order dated 10th June 2014 whereby the suit was disposed of. The said application came to be rejected on 7th August 2014 as not maintainable which has prompted the present petitioner-defendant No.1 to file present petition questioning the legality of the orders dated 10th June 2014 and 7th August 2014, referred supra.

9. Learned Counsel for the petitioner-defendant No.1 would urge that the learned trial Court has committed an error of law by passing the orders contrary to the directions issued by the learned District Judge in Regular Civil Appeal No.326/2012, as it was expected of the trial Court to decide the suit on its own merits instead of which the trial Court, by order dated 10th June 2014 has disposed of the Regular Civil Suit No.797/2009 and the review of which sought was also came to be rejected.

10. Leaned Counsel for the petitioner invited attention of this Court to the provisions of Order XX, so as to canvass that the right of the parties should have been decided on merit.

11. Learned Counsel for the respondent would urge that the suit was earlier decreed on 1st March 2012 whereas by order which is impugned in the present petition the suit is simplicitor disposed of. According to him, the least that was expected of the Court below was to pass the decree on merits considering the contentions of the respective parties even if the present petitioner-defendant No.1 has

failed to adduce any evidence in support of his claim. He has also prayed for remand of the matter.

12. Having considered the contentions of the parties, it is noticed that the learned District Judge, while remanding the matter had directed the Civil Judge, Junior Division to decide the suit after giving fresh opportunity to the defendant No.1 to lead evidence in support of his contentions. No doubt, the defendant No.1 has defaulted in leading any evidence in support of his defence. Be that as it may, the least that was expected of the learned trial Court to deal with the provisions of Code of Civil Procedure, particularly, the suit summons were served on the parties, parties have appeared before it and the plaintiffs have submitted their evidence.

13. The learned trial Court, in my opinion, committed error of law in disposing of the suit simplicitor without framing any issue and giving findings thereon, so also without considering the evidence brought before it by either of the parties.

14. For the above referred reasons, it will be appropriate to allow the present petition and the same is allowed in terms of prayer clause (B) which reads thus :

“B. Order dated 10.6.2014 and order dated 7.8.2014 may kindly be quashed and set aside and the trial court may be directed to decide the R.C.S. No.797/2009 afresh by delivering the judgment and decree.”

15. Though this Court has quashed the orders passed by learned Civil Judge, Junior Division, Aurangabad disposing of the suit and

refusing to review its order, however, this Court cannot lose sight of the conduct of the petitioner-defendant No.1 in not leading the evidence and seeking adjournments from time to time.

16. At this moment, the learned Counsel for the petitioner has assured that the petitioner shall not seek any adjournment in the matter for leading evidence. The above referred statement is accepted. The trial Court is expected of to keep in mind the above referred assurance given by learned Counsel for the petitioner before this Court, while deciding the suit.

17. As a consequence of above, the Regular Civil Suit No.797/2009 stands restored to the file of concerned Civil Judge Junior Division, Aurangabad, who is directed to decide the same in accordance with the provisions of Code of Civil Procedure. Having regard to the directions issued by learned District Judge in the appeal, the Civil Judge, Junior Division while deciding the suit shall keep in mind the order passed by the learned District Judge, expediting the hearing of the suit.

(N.W. SAMBRE, J.)

vvr