

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7956 OF 2015

Malati @ Malan Bhauso Pawar ... Petitioner
Vs.
Mahipati Krushna Karne and another ... Respondents

Mr. R. P. Hake Patil i/b. Mr. Sanjeev P. Kadam for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : 11TH AUGUST, 2015

P.C. :

Heard Mr. Hake Patil, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 13.07.2015 passed by the learned Civil Judge, Junior Division, Satara below exhibit-74 in Regular Civil Suit No.345 of 2007. By that order, the learned trial Judge rejected the application filed by the petitioner, hereinafter referred to as the plaintiff, under Order I, Rule 10 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for transposing the defendant No.2 as plaintiff No.2.

3. In support of this Petition, Mr. Hake Patil submitted that the plaintiff has instituted Suit against the respondent No.1, hereinafter referred to as the defendant No.1, and respondent No.2, hereinafter referred to as the defendant No.2 *inter alia* praying for directing defendant No.1 to handover possession of the property more particularly described in paragraph 1(B) of the plaint (for short 'suit property') to the defendant No.2 as also has claimed possession from defendant No.1. The Suit is instituted in the Court of Civil Judge, Junior Division, Satara on 11.09.2007. Defendant No.2 has instituted Special Civil Suit No.71

of 2007 in the Court of Civil Judge, Senior Division, Satara against the plaintiff and the defendant No.1 for perpetual injunction restraining the defendants from causing any obstruction to his possession. In the alternate, defendant No.2 has claimed possession of the suit property from the defendants as also in case the Court holds that the sale deed in favour of the defendant No.2 is illegal, in that event, the consideration of Rs.8,05,000/- paid by the defendant No.2 to the plaintiff herein may be recovered from him along with interest @ 10% p.a.

4. Mr. Hake Patil submitted that comparison of the prayers in the Suit instituted by the plaintiff and the defendant No.2 shows that defendant No.2 is also claiming possession of the suit property. Defendant No.2 has supported the case of the plaintiff. In case the defendant No.2 is transposed as plaintiff No.2, the controversy raised between the parties will be effectually and completely adjudicated upon. He submitted that the learned trial Judge however, rejected the application on the ground that the final arguments of the defendant No.1 were heard entirely and at that stage, plaintiff filed application for transposition. The learned trial Judge further held that the application need not be allowed for determining the real controversy between the parties. There is no bonafide mistake committed by the plaintiff. After the arguments of the defendant No.1 in all the Suit were over, plaintiff moved this application. Mr. Hake Patil submitted that thereafter plaintiff filed application exhibit-79 on 23.07.2015 seeking adjournment on the ground that she desires to challenge order dated 13.07.2015 below exhibit-74. However, the learned trial Judge rejected the application on 23.07.2015.

5. Mr. Hake Patil relied upon the decision of the Apex Court in the case of *Mukesh Kumar Vs. Col. Harbans Waraiah*, **1999 (9) SCC 380** to

contend that as the nature of the Suits are one and the same, the nature of the Suit originally instituted will remain the same after transposition of defendant No.2 as plaintiff.

6. I have considered the submissions advanced by Mr. Hake Patil. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit in the Court of Civil Judge, Junior Division, Satara on 11.09.2007 for recovery of possession from defendant No.1 and handing it over to the defendant No.2. Defendant No.2 has instituted Special Civil Suit No.71 of 2007 in the Court of Civil Judge, Senior Division, Satara for perpetual injunction and in the alternative, for possession among other reliefs. The Suit is instituted on 23.04.2007. Though the Suits are instituted in the year 2007, for the first time, plaintiff made application exhibit-74 on 22.06.2015 for transposing defendant No.2 as plaintiff No.2. Defendant No.1 filed reply dated 24.06.2015 opposing the application inter alia contending that defendant No.1 has finished final arguments in the Suit. On 22.06.2015, the learned trial Judge allowed the application of defendant No.2 for setting aside 'no arguments order'. However, despite that, neither the defendant No.2 nor the plaintiff proceeded to argue the case. The application is made only with a view to delaying the Suit.

7. The learned trial Judge rejected the application on the ground that the present application is filed only after defendant No.1 finished the arguments in all 4 Suits. There is no bonafide mistake committed by the plaintiff. Further, allowing of application is not necessary for determining the controversy between the parties.

8. Perusal of application at exhibit-74 filed by the plaintiff does not indicate any reason for moving the application at belated stage. In fact,

there is absolutely no explanation for moving the application on 22.06.2015 particularly when both the Suits were filed in the year 2007 itself. In paragraph 4, it is merely stated that the present application for transposition is made for various reliefs on account of bonafide mistakes. However, the said application is also bereft of any particulars. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order.

9. Mr. Hake Patil relied upon the decision of the Apex Court in the case of **Mukesh Kumar** (*supra*). In that case, the question was whether Section 21 of the Limitation Act, 1963 is applicable in case of transposition of parties. The Apex Court held that Section 21 has no application to the cases of transposition of parties. In my opinion, the said decision has no application to the facts of the present case. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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