

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 563 OF 2014.

(SMT. SINDHU SURESHRAO TAIWADE..VS..RAMESH MAHADEORAO BAVISKAR & OTH.)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Mr. K.B.Ambilwade, Advocate for Petitioner.
 Mr. C.V.Kale, Advocate for Respondent No.2.
 Mr. A.K.Bangadkar, A.G.P. for Respondent No.5.

CORAM : Z.A.HAQ, J.
DATED : APRIL 15, 2015.

The petition is filed by the original non-applicant challenging the order passed by the trial Court by which the application filed by the respondent No.2 under Order 9 Rule 13 of the Code of Civil Procedure has been allowed.

2. The petitioner had filed Regular Civil Suit No. 616 of 2001 praying for decree for partition and possession which came to be decreed on 19th July, 2007. The respondent No.2 filed an application under Order 9 Rule 13 of the Code of Civil Procedure contending that he was not duly served with the summons of the civil suit and the petitioner played fraud which resulted in passing of the decree at the back of the respondent No.2 and the judgment and decree be set aside.

3. The petitioner opposed the application filed by the respondent No.2 under Order 9 Rule 13 of the Code of Civil Procedure. The petitioner filed several civil applications before the trial Court, one of which was Exh.38 by which the petitioner sought permission to lead evidence and to cross-examine the respondent No.2. The learned trial Judge proceeded with the matter and by the impugned order has allowed the application filed by the respondent

No.2 under Order 9 Rule 13 of the Code of Civil Procedure. The petitioner being aggrieved in the matter has filed this writ petition.

4. Mr. Ambilwade, the learned advocate for the petitioner has made several submissions for challenging the impugned order. However, without going into the details of the submissions made on behalf of the petitioner, I find that the learned trial Judge has overlooked the application (Exh.38) filed by the petitioner and the impugned order has been passed without deciding the application (Exh.38) which has the effect of depriving the petitioner of his valuable right of leading evidence to substantiate his contention without there being a decision that the petitioner is not entitled to adduce the evidence. By the application (Exh.38) the petitioner also sought permission to cross-examine the respondent No.2, however, the respondent No.2 has not entered the witness box and has not adduced evidence and therefore, it cannot be said that the petitioner has been deprived of the opportunity of cross-examining the respondent No.2. But, in my view, the petitioner could not have been deprived of the opportunity to lead the evidence to substantiate his claim, unless the Court comes to the conclusion that the petitioner is not entitled to adduce the evidence.

5. In view of the above, the following order is required to be passed to sub-serve the ends of justice :

- i. The impugned order is set aside and M.J.C. No. 184 of 2008 is restored.
- ii. The learned trial Judge shall decide M.J.C. No.184 of 2008 after deciding the application (Exh.38).
- iii. It is pointed out that application (Exh.39) has also

not been decided. However, the issue raised in the application (Exh.39) is required to be dealt with while deciding the M.J.C. No. 184/2008 itself.

iv. Mr. Kale, the learned advocate for the respondent No.2 has submitted that after the impugned order came to be passed, the Regular Civil Suit No.616 of 2001 came to be restored and Regular Civil Appeal No. 153 of 2009 which was filed by the respondent No.2 challenging the judgment and decree passed in Regular Civil Suit No. 616 of 2001 was withdrawn. It is submitted that as the order passed by the trial Court allowing M.J.C. No. 184 of 2008 and restoring the civil suit has been set aside by this Court, the respondent No.2 will be put to substantial prejudice.

In these facts, Regular Civil Appeal No. 153 of 2009 is restored on the file of the District Court.

v. The petitioner and the respondent No.2 undertake to appear before the learned District Judge-10, Nagpur on 15th June, 2015 at 11.00 a.m.. The learned District Judge may issue notice to other parties, if required.

The petition is **allowed** in the above terms. In the circumstances, the parties to bear their own costs.

6. As the M.J.C. is pending since 2008 the learned trial Judge is requested to dispose of the M.J.C. till 30th September, 2015.

JUDGE