

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO.10021 OF 2012

HARI DATTOBA PISKE AND OTHERS

PETITIONERS

VERSUS

ABHISHEK VENKAT MANDADE  
AND OTHERS

RESPONDENTS

Mr.Anajli Dube (Bajpai), Advocate for the petitioner.  
Mr.M.L.Dharashive, Advocate for respondent Nos.1, 3 to 6.  
Respondent No.2 served.

( CORAM : RAVINDRA V. GHUGE, J.)

DATE : 27/04/2016

PER COURT :

1. The petitioners / original defendants are aggrieved by the order dated 26/09/2012 by which the order dated 04/03/2010 has been recalled. The petitioners are also aggrieved by the order dated 18/10/2012 by which the application Exhibit 108, filed by the petitioners, has been rejected.

2. The submissions of the petitioners can be summarized in brief as follows :-

[a] Respondent Nos. 1, 2 and 3 are the original plaintiffs who have filed RCS No.636/2008 seeking partition and separate possession.

- [b] Defendant Nos.5 to 7 who appear as respondent Nos. 4, 5 and 6 in this petition, were not available for signing the plaint and therefore the plaintiffs have arrayed them as defendants.
- [c] In the plaint itself, the plaintiffs have contended that the said 3 defendants are formal parties and they have been arrayed as defendants since they were not available for signing the plaint.
- [d] A *purshis* was filed by the plaintiffs on 11/11/2008 contending that defendant Nos. 5 to 7 need not be summoned.
- [e] The Trial Court passed an order on 04/03/2010 thereby rejecting the plaint against defendant Nos. 5 to 7 under Order 7 Rule 11 for want of cause of action.
- [f] The plaintiff filed an application Exh.101 on 24/09/2012 praying to the Trial Court that the order dated 04/03/2010 be set aside.
- [g] The petitioners, who are original defendant Nos. 1 to 4, oppose the said application on the ground that there is a delay in putting forth the said prayer, condonation of delay is not sought by filing any application, said application is legally untenable and there are no grounds put forth by the plaintiffs.
- [h] By the impugned order dated 26/09/2012, the application was allowed and the order dated 04/03/2010 is set aside by the Trial Court.
- [i] The petitioners filed an application Exh.108 contending that the order dated 26/09/2012 deserves to be reviewed and the Trial Court should restore the earlier order dated 04/03/2010.
- [j] Rejection of the plaint against defendant Nos.5 to 7 amounts to a decree.
- [k] Such a decree is appealable.
- [l] The plaintiffs have to put forth a cause of action against the

defendants under Order 14 Rule 1(2) and on the basis of which issues can be framed under Order 14 Rule 1.

- [m] Under Order 14 Rule 2, the Court can pronounce its judgment on all issues even on a preliminary issue.
- [n] Under Order 15 Rule 2, the Court can pronounce its judgment for or against any one of the defendants who is not at issue.
- [o] Application Exhibit 101 was in fact a review application and the same is untenable on account of limitation in the light of Section 114 and Order 47.
- [p] Article 124 of the Limitation Act, 1963 prescribes a limitation of 30 days within which an application for review can be filed.
- [q] Article 137 of the Limitation Act, as is wrongly held by the Trial Court, is not applicable.
- [r] The impugned order especially order dated 26/09/2012 could not have been passed by the Trial Court u/s 151.
- [s] Reliance is placed upon the judgment of this Court in the matter of Madhumati Suresh Raut and another Vs. Namdeo Tukaram Yadav, 2006(1) BCR 505.
- [t] When the petitioners had taken a defence that the suit needs to be dismissed and as the same is already rejected against defendant Nos. 5 to 7, this defence is sought to be diluted/overcome by application Exh.101.
- [u] A suit for partition and separate possession has to be dismissed if proper parties are not arrayed as defendants.

3. Mr.Dharashive, learned Advocate appearing for respondent Nos. 1 and 3 to 6 which includes those defendant Nos. 5 to 7, who were said to be formal parties before the Trial Court, submits as

under :-

- [a] Defendant Nos. 5 to 7 are the brothers and sisters of the plaintiff.
- [b] As they were not available for signing the plaint, they were arrayed as defendants.
- [c] Though a *purshis* was filed by the plaintiffs on 11/11/2008 stating that summons need not be issued to these defendants, they had never made an application to the Trial Court praying for rejecting the plaint as against these 3 defendants.
- [d] The order dated 04/03/2010, by which the plaint was rejected as against these 3 defendants, has been passed suo motu by the Trial Court, naturally without hearing the litigating sides and in the absence of any of the litigating sides, praying for such an order.
- [e] At the time of final arguments, when the defendants put forth the point that the suit be dismissed for not impleading all the parties, that the plaintiff realized that the plaint has been rejected against these 3 defendants.
- [f] Section 151 enables the Trial Court to pass an order to ensure that justice is done and no party suffers on account of any order.
- [g] No loss or harm would be caused to the petitioners since all the litigating sides are close relatives and the suit pertains to the partition and separate possession of the ancestral property.
- [h] He, therefore, submits that even if the Trial Court has not followed any particular procedure, the fact that when justice has been done, it should not be interfered with only on the ground that there are some errors in following a procedure.

4. I have considered the submissions of the learned Advocates as recorded above.

5. There is no dispute that these 3 defendants who are represented in this petition, have been arrayed as defendants only because they were not available for signing the plaint when the suit was instituted by the plaintiffs. It is also not disputed that the petitioners were aware of the statement made by the plaintiff in the plaint that these 3 defendants are formal parties.

6. The issue that has been brought to this Court has its origin in the order dated 04/03/2010 passed by the Trial Court by which the Trial Court rejected the plaint against these 3 defendants under Order 7 Rule 11 for want of cause of action.

7. In my view, the Trial Court could have so done in suits wherein the issue of partition and separate possession is not the subject matter. In such suits, though there may be no pleadings or prayers against some of the defendants, the very fact that the suit is for partition and separate possession amongst blood relatives in relation to an ancestral property or properties, it was wholly uncalled for for

the Trial Court to reject the plaint against these 3 defendants. It is noteworthy that the order dated 04/03/2010 has been passed by the Trial Court “suo-motu”.

8. It is trite law that in the absence of arraying all the parties with regard to the ancestral property at issue, the suit in all likelihood would be defeated. It does not appear from the plaint that the plaintiffs desire that the Trial Court should reject the plaint against the 3 defendants.

9. The plaintiffs became alert at the stage of advancing final arguments that the suit may get dismissed only on account of not arraying all the parties, who were necessary considering the nature of the suit and the ancestral property being at issue. Hence application Exh.101 was filed.

10. The Trial Court has exercised its jurisdiction under Section 151 of the C.P.C. apparently to undo a mistake committed in passing the order dated 04/03/2010 suo-motu.

11. Section 151 reads as under :-

*“Nothing in this Code shall be deemed to limit or otherwise*

*affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”*

12. The petitioners have relied upon the judgment of this Court in the matter of Madhumati (supra). The facts of the said case apparently are quite different. The suit was decreed. An appeal was filed beyond limitation accompanied by an application for condonation of delay. The said application was dismissed in default. Another application was filed beyond limitation for seeking restoration of the application for condonation of delay. No application for condonation of this delay was filed.

13. In the instant case, the events recorded as above have occurred during the pendency of the suit and when the suit was yet to be adjudicated upon. The Trial Court has exercised its jurisdiction under Section 151 apparently realizing that the order dated 04/03/2010 was passed suo-motu and that too when, in a suit for partition and separate possession, all the litigating sides were close relatives. In this peculiar backdrop, when the plaintiffs did not make any prayer against the 3 defendants, when the Trial Court was not called upon by the defendants to reject the plaint to the extent of

these 3 defendants, there was no reason to pass the order “suo-motu”.

13. The Hon'ble Apex Court, in its judgment in the matter of Roshan Deen Vs. Preeti Lal, 2002 AIR (SC) 33 has concluded that if the Trial Court, though has committed an error in not following the procedure while passing the impugned order, if justice is done, the High Court should not enter into an exercise of searching for errors and mistakes and on technical grounds, set aside the order which has otherwise resulted in doing justice to the parties. The endeavour of the High Court should not be only to search for errors and mistakes while dealing with an impugned order when the said order aims at meeting the ends of justice.

15. Paragraph Nos. 2, 12, 19 of the Roshan Deen judgment (supra) read as under :-

*“2. If the Judgment of the High Court, now under attack, is termed as wrong and untenable it is only a euphemistic characterisation. It really amounted to crippling the cause of justice of a crippled man. The powers of writ jurisdiction of the High Courts are basically intended to salvage causes of justice, but the High Court, in this case, has exercised such powers for over-turning justice which a lower authority had granted to a*

*devastatingly disabled person.*

12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under [Article 227](#) of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under [Article 226](#) and [227](#) of the Constitution is to advance justice and not to thwart it. {vide [State of Uttar Pradesh vs. District Judge, Unnao and ors.](#) (AIR 1984 SC 1401)}. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

19. Learned single Judge seems to have entertained a notion that once a Commissioner happened to pass an order, however illegal, unjust or inequitable it be, or even if the Commissioner was convinced that the order was wangled from him by playing a fraud on him he would be helpless and the parties thereto would also be helpless except to succumb to such fraud. It was in this context that the decision cited before the learned single Judge of the High Court required consideration by him. [In United](#)

India Insurance Co. Ltd. vs. Rajendra Singh and ors. (supra) this Court had held thus:

*Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."*

16. In the light of the above, considering the fact that by the impugned orders, the Trial Court has ensured that the suit would not be dismissed on technical grounds when the issue of partition and separate possession is involved for which the 3 defendants were required to be on record, I do not find that the impugned orders could be termed as being perverse or erroneous or likely to cause grave injustice to the petitioners.

17. The Hon'ble Apex Court, in the matter of Syed Yakoob Vs.K.S.Radhakrishnan and others, reported at AIR 1964 SC 477 and in the matter of Surya Dev Rai Vs. Ram Chander Rai, reported at 2003(6) SCC 682, has held that unless the impugned order causes grave injustice to the petitioners, the High Court should be slow in exercising its supervisory and writ

jurisdiction.

18. As such, this petition, being devoid of merit, is therefore, dismissed.

19. At this juncture, learned Advocate for the petitioners/original defendant Nos. 1 to 4 submits that on account of the 3 plaintiffs sleeping over their rights that has led to turning back the suit by a period of 2½ years and has made the petitioners suffer rigours of litigation, costs deserve to be imposed on the plaintiffs. Learned Advocate for the petitioners prays that costs of Rs.50,000/- be awarded to the petitioners to be paid by the plaintiffs. Learned Advocate for the plaintiffs submits that lesser costs be awarded.

20. In the light of the same, the 3 plaintiffs shall pay costs of Rs.20,000/- to the petitioners by depositing the same before the Trial Court on or before 10/06/2016, considering the approaching summer vacation. On depositing the said costs, the petitioners/defendants (four persons) alone would be at liberty to withdraw the said amount in equal proportion without any conditions.

( RAVINDRA V. GHUGE, J.)