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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.9573 OF 2013

Bhagwan s/o Venkati Peddawad,
Age : 71 years, Occu.Aгри & Pensioner,
R/o: D-8, Melody Apartment,
12-ICS Colony, Pune.

...Petitioner...

Versus

Suryakant s/o Venkati Peddawad,
Age : 73 years, Occu. Agri.& Medical
Practitioner, R/o : Nalgir, Tq. Udgir,
Dist.Latur, At Present R/o :
Bunglow No.31, Bhagyanagar,
Nanded.

...Respondent...

.....

Shri A.N. Nagargoje, Advocate for petitioner.
Shri A.G. Godhamgaonkar, Advocate for respondent.

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CORAM: RAVINDRA V. GHUGE, J.

DATE: 08.03.2016

ORAL JUDGMENT :

1] Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2] The petitioner is aggrieved by the order dated 11.6.2013 passed by the trial Court thereby allowing application (Exh.27) and ordering Police protection to

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the respondent – plaintiff. The petitioner – original defendant is also aggrieved by the order dated 3.10.2013 by which application (Exh.34) filed by the respondent for recalling the order of “No WS” and permitting the petitioner to file his written statement. By the impugned order, application (Exh.34) has been rejected.

3] I have heard the learned Advocates for the respective sides for quite some time.

4] The litigating sides are biological brothers. Regular Civil Suit No.228/2011 has been filed by the respondent – original plaintiff seeking perpetual injunction as against the petitioner to the extent of half share of the agricultural lands bearing Survey No.184/1 admeasuring 3 H 98 R, land Survey No.42/6 admeasuring 24 R and land Survey No.187/3 admeasuring 1 H 80 R. So also the house property bearing No.455 situated at village Nalgir Tq.Udgir is also subject matter of the suit.

5] It is undisputed that application (Exh.5) filed by the respondent – plaintiff under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908, seeking injunction against the petitioner has been allowed ex-parte as the

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petitioner – defendant failed to file his written statement and say. It is also undisputed that “No WS” order was passed on 20.4.2013.

6] The petitioner has preferred an application for recalling of the “No WS” order on 5.8.2013. The trial Court, by the impugned order dated 3.10.2013, has concluded that it does not have the jurisdiction to deal with the said application. I am of the view that considering the fact that the application for recalling “No WS” order was filed without much delay, the trial Court should have allowed the application so as to ensure that the suit would be decided on its merits. The delay caused does not appear to be either inordinate or deliberate. The petitioner gains no advantage by causing delay in filing the written statement and suffering an order of “No WS”.

7] In the light of the above, the impugned order dated 3.10.2013 is quashed and set aside. The petitioner has made a statement that the written statement has already been filed on record alongwith the said application (Exh.34), which, therefore, stands allowed. The written statement shall be taken on record.

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8] The petitioner has also challenged the order dated 11.6.2013 by which application (Exh.27) filed by the petitioner seeking Police protection for implementing the temporary injunction order has been allowed. It is trite law that Police protection can be granted by the trial Court only in exceptional circumstances and in rarest of rare situations. The remedy for ensuring the implementation of the temporary injunction order passed under Order XXXIX Rule 1 is available under Order XXXIX Rule 2 of the CPC. Without taking recourse to the available remedy, application (Exh.27) was filed.

9] Notwithstanding the above, since the temporary injunction order is an *ex-parte* order, the petitioner can surely move an application before the trial Court for recalling of the *ex-parte* order, after the filing of the written statement. If such an application is filed, the trial Court can decide the same on its own merits and in accordance with law.

10] It is in these circumstances and after considering the contention of the respondent that the petitioner may move the trial Court for recalling the *ex-parte* order of injunction, I am not causing any

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interference in the impugned order dated 11.6.2013. Needless to state that grant of Police protection pursuant to the *ex-parte* injunction order will always be subject to the result of the application, for seeking the vacating of the *ex-parte* order, if filed by the petitioner.

11] In the light of the above, this petition is partly allowed to the extent of prayer clause (A). Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)