

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

WRIT PETITION NO. 10162 OF 2013

Subhash s/o Narayan Karad
Age : 43 years, occup. Agril.,
R/o Injegaon, Tq. Parli Vaijnath, .. Petitioner/ orig.
Dist. Beed. Plaintiff

versus

1. Bankat s/o Wamanrao Karad,
Age : 80 years, occup. Agril.,
R/o Injegaon, Tq. Parli Vaijnath,
Dist. Beed.
2. Ashok s/o Baburao Surwase,
Age : 43 years, occup. Agril.,
R/o Dhamoni, Tq. Sonpeth, .. Respondent/
Dist. Parbhani orig. Defendants

[writ petition dismissed against respondent
no. 2 under order dated 28-02-2014]

Mr. Vivek V. Bhavthankar, Advocate for petitioner
Mr. H. K. Munde, Advocate for respondent no. 1

CORAM : SUNIL P. DESHMUKH, J.
DATE : 28th July, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties finally by consent.
2. Petitioner, who is plaintiff in regular civil suit no. 29 of 2005 pending before Civil Judge, Junior Division, Gangakhed,

praying for reliefs, *inter alia*, of cancellation of sale deed in favour of present respondent who is defendant in said suit and also for declaration that decree passed in regular civil suit no. 220 of 2001 in favour of plaintiff therein [present defendant no.1] being not binding on present plaintiff, is before this court aggrieved by order dated 30-08-2013 rejecting his application Exhibit-47 requesting that the issue regarding maintainability of suit be decided along with other issues.

3. The background on which regular civil suit no. 29 of 2005 had been instituted, according to the petitioner, is that he is purchaser of suit property from the original owner Ashok Baburao Surwase [defendant no. 2 in the suit] in the year 1998 under a registered instrument. It so appears that said Ashok had purportedly entered into an agreement with respect to present suit property in favour of present respondent no. 1 [defendant no. 1 in the suit].

4. Subsequent to the registered sale deed executed in favour of present petitioner by Ashok, present respondent no. 1 had moved proceedings bearing regular civil suit no. 220 of 2001 against said Ashok for specific performance of agreement which presumably is shown to have been before the date of sale deed had been executed in favour of the present petitioner. Said

suit to which present petitioner had not been a party, proceeded ex-parte against Ashok and had been decreed in 2003. It further appears, after hearing learned counsel for parties, that the decree in said suit stands executed.

5. Present respondent no. 1, in regular civil suit no. 29 of 2005 on appearance, had filed application Exhibit - 33, objecting to maintainability of the suit and as proceedings for execution of decree in regular civil suit no. 220 of 2001 had been pending, additionally had requested to send regular civil suit no. 29 of 2005 to executing court pursuant to section 47 of the Code of Civil Procedure, 1908 ('CPC'). Said application came to be partly allowed under order dated 31-08-2007 by trial court allowing framing of preliminary issue as to whether instant suit is barred under section 47 of the CPC, however, had refused the request to send the matter to the executing court.

6. Thereafter, the petitioner-plaintiff filed application Exhibit-47 on 13-09-2007, requesting that since written statement is already on record all the issues be framed, including the one (preliminary issue), as directed to be framed under order dated 31-08-2007 be tried together. Said application came to be rejected under impugned order dated 30-08-2013. It is, thus, petitioner is before this court.

7. Learned counsel Mr. Bhavthankar appearing on behalf of petitioner vehemently submits that the triable issues arise from the pleadings of the parties which would require decision making on the basis of pleadings and evidence on record. As a matter of fact, according to him, section 47 of the CPC has no role to play in the present matter and the situation would not at all be governed by said provision. He contends that it is not a matter between the parties to regular civil suit no. 220 of 2001 nor present petitioner is representative of any of the parties thereto and as such, section 47 would not be available. He, therefore, submits that legitimate request being made under Exhibit-47 ought to have been considered appropriately having regard to the facts and law, however, trial court has overlooked the same and has pedantically passed the impugned order which is untenable.

8. While this is being so argued by Mr. Bhavthankar, Mr. Munde, learned counsel appearing for respondent-defendant no. 1 in regular civil suit no. 29 of 2005 contends that once preliminary issue had been framed, naturally it would have to be given precedence over all other issues and as such no fault can be found with impugned order.

9. Mr. Munde submits that although written statement has been filed, no issues as yet have been framed. He contends that if one goes by the submissions as aforesaid on behalf of the petitioner, no harm is likely to be caused to the petitioner since his contention is that the situation is not at all governed by section 47 of the CPC. He, therefore, submits that no indulgence be given to the submissions advanced on behalf of the petitioner

10. Having regard to the facts as have been briefly referred to initially and the situation is largely not disputed and also having regard to pleadings of the parties particularly on behalf of the petitioner-plaintiff, it appears, as on the date, subject, of course to the evidence as may come on record, it cannot be conclusively said that the position may be governed by section 47 of the CPC. In such a case, in stead of dwelling upon to decide preliminary issue as has been framed, in the facts and circumstances, especially taking into account pendency of the suit being from 2005, goads me consider that let the parties address on all the issues including the one framed as preliminary issue. Having regard to Order XIV, Rule 2 of the CPC, the request of the petitioner appears to be in fitness of the facts and circumstances and a legitimate one.

11. As such, writ petition is allowed in terms of prayer clause (B). Issues be framed having regard to the pleadings of the parties and same be tried along with the preliminary issue. Regular civil suit no. 29 of 2005 be proceeded with expeditiously and disposed of within a period of fifteen months from the date of receipt of writ of this order.

12. Trial court to decide the issues on their own merits without being influenced and trammelled by observations appearing in the decision in writ petition.

13. Rule stands made absolute in aforesaid terms.

SUNIL P. DESHMUKH,
JUDGE

pnd