

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1419 OF 2016**

Shri Dattatray Hanmant Desai

..Petitioner

Vs

Shri Hrishikesh Prakash Kadam
and Ors.

.. Respondents

Mr. Dilip Bodake, Advocate for Petitioner.

Mr. R.V.Bansode, Advocate for Respondent no.1.

Mr. A.R. Metkari, A.G.P. for Respondents no. 2 and 3.

CORAM : R.G.KETKAR,J.

DATE : 08/02/2016

PC:

1. Heard Mr. Dilip Bodake, learned counsel for the petitioner, Mr. R.V. Bansode, learned counsel for respondent no.1 and Mr. A.R. Metkari, learned A.G.P for the respondents no.2 and 3 at length.

2. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'applicant', has challenged the Judgment and order dated 22.1.2016 passed by the learned Civil Judge, Sr. Dn., Karad below Exh.35 in Regular Civil Suit No.468 of 2015. By that order, the learned trial Judge

rejected the application made by the applicant for impleading him as party defendant in the suit instituted by the first respondent, hereinafter referred to as 'plaintiff'. The relevant and material facts giving rise to filing of the present petition, briefly stated, are as under.

4. The plaintiff has instituted suit on 16.12.2015, inter-alia, praying for declaration and perpetual injunction restraining respondents no.2 and 3, hereinafter referred to as 'defendants', from handing over possession of lands, bearing Gat nos.1267 to 1274, situate at Atke-Kodoli, Taluka Karad, Dist-Satara. (for short, 'suit property') in pursuance of auction conducted on 20.11.2015 (wrongly typed as 23.11.2015) to third party; for perpetual injunction restraining the defendants from excavating land and transporting 1000 Brass of sand from the suit property. During the pendency of the suit, the plaintiff took out application Exh.5 praying for temporary injunction restraining the defendants from excavating and transporting sand from suit property by handing over possession to the third party.

5. Mr.Bodake submitted that perusal of the plaint and in particular paragraph 4 and prayer clause (a) clearly shows that the plaintiff sought injunction not only against the defendants but also third party. The plaintiffs however did not implead third party. He submitted that on 3.11.2015 notice was issued for

holding auction on 20.11.2015 in respect of various properties including the suit property. Though the plaintiff has alleged that Government had sanctioned proposal for allotment of 1000 Brass sand from the suit property, he did not challenge the action of the defendants holding auction on 20.11.2015. The plaintiffs did not approach the court for injunction restraining the defendants from conducting auction on 20.11.2015. He also did not participate in the auction held on 20.11.2015. The applicant gave offer of Rs.3,35,00000/-. Offer given by the applicant being the highest was accepted by the defendants. On the same day, the applicant deposited Rs.83,75,000/- being the 1/4th amount of Rs.3,35,00000/-. In paragraph 4, the plaintiff specifically asserted that bid of the third party was accepted on 20.11.2015. Thus, the plaintiff was fully aware of these development. He, however, deliberately did not implead applicant as defendant and behind his back obtained injunction. Even the proceedings of auction held on 20.11.2015 was not challenged in the present suit.

6. He further submitted that the suit instituted by the plaintiff is nothing but abuse of process of court as also abuse of process of law. The plaintiff did not disclose full facts and has approached the court with unclean hands. When he obtained exparte relief, he is expected to state the whole case fully and fairly to the

court. The plaintiff has obtained interim order upon taking shelter of falsehood and misrepresentation as also suppression of facts. He is not entitled to equitable relief of injunction. In support of this proposition, he relied upon a decision in the case of Kishore Samrite Vs State of Uttar Pradesh, (2013) 2 SCC 398. He submitted that the injunction order obtained by the plaintiff deserves to be set aside. The impugned order also deserves to be set aside thereby allowing application made by third party Exh.35 for his impleading in the suit. Mr. Bodake has taken me through work orders issued in favour of the parties other than the plaintiff and submitted that the assertions made in paragraph 1 are contrary to material on record.

7. Mr. Bodake submitted that rights of the applicant are adversely affected and, therefore, is a necessary party. He relied upon following decisions:

- (1) Amit Kumar Shaw Vs. Farida Khatoon, 2005(5) ALL MR (S.C.) 458;
- (2) Shri Premanand Gajanan Naik Vs. Shri Sachit Gajanan Naik 2014 (6) ALL MR 6.

8. Mr. Metkari supported the petitioner. He submitted that the defendants took out application Exh.14 on 30.12.2015 for setting aside exparte order dated 19.12.2015 below Exh.1 as also no say order dated 19.12.2015 below Exh.5 and seeking permission to

file written statement and say to Exhibit 5. On the same day, the defendants filed application Exh.15 challenging the locus of the plaintiff and for framing preliminary issue as to whether suit is maintainable. The defendants also filed application Exh.16 on 30.12.2015 for impleading applicant as party defendant. On the same day, the defendants filed application Exh.17 for setting aside order dated 19.12.2015 below Exh.5 and deciding the said application on merits. The defendants also filed written arguments dated 7.1.2016 in support of application filed under Order 39, Rule 4 for setting aside order dated 19.12.2015 below Exh.5 in view of changed circumstances as also in view of the fact that they have placed material on record for vacating the said order. The learned trial Judge rejected the application Exh.14 on 7.1.2016. The defendants filed application dated 20.1.2016 at Exh.49 seeking review of order dated 7.1.2016 passed below Exh.14. That application was also rejected by the learned trial Judge on 3.2.2016. In short, he submitted that the orders passed by the trial Court directing to proceed ex parte against the defendants below Exh.1 as also dated 19.12.2015 below Exh.5, dated 7.1.2016 below Exh.14 and dated 3.2.2016 below Exh.49 may be set aside.

9. On the other hand, Mr. Bansode supported the impugned order. He submitted that the defendants sanctioned the proposal

for excavating 1000 Brass sand from the suit property as his evident from correspondence as detailed in paragraph 3 of the plaint. Despite that, the defendants proceeded to conduct auction on 20.11.2015. When the suit was instituted on 16.12.2015 the plaintiff was not aware that the applicant was declared as the highest bidder. The plaintiff, therefore, did not implead him as defendant. He submitted that it is only on 17.12.2015 the applicant's bid was accepted being the highest bidder. The plaintiff had no reason to challenge the auction conducted on 20.11.2015. The plaintiff did not implead the applicant as he is not claiming any relief against him. He further submitted that the applicant had filed Misc. Civil Appeal No.75 of 2015 challenging the order dated 19.12.2015 passed below Exh.5. However, he filed purshis Exh.33 before the District Court to the effect that he is not interested in prosecuting the appeal and the same may be disposed. By order dated 7.1.2016, appeal was disposed of. He, therefore, submitted that order dated 19.12.2015 has merged in the order of the District Court dated 7.1.2016. The applicant has also not challenged order dated 19.12.2015 below Exhibit-5. The applicant, therefore, cannot pray for setting aside order dated 19.12.2015.

10. He submitted that the plaintiff is dominus lities and he cannot be compelled to implead applicant in his suit. The

plaintiff has not sought any relief against the applicant. The applicant being a stranger cannot compel the plaintiff to join him as party as it is left to the plaintiff to choose his opponent against whom he is interested to seek relief. In support of this submission, he relied upon the decision of this Court in the case of Omprakash Vs. Parvati, 2016(1) Mh.L. J .847.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Before I deal with the contentions advanced by learned counsel appearing for the parties, it is necessary to refer to the relevant and material facts sequentially, giving rise to the filing of the present petition.

(1) On 4.8.2015, the plaintiff made application to Sub-Divisional Engineer, Public Works Sub-Division (North), Karad for releasing sand from Gat nos. 1236 to 1305 and 1306 to 1318, situate at Mouze Aatke, Taluka Karad, District-Satara (for short, 'said lands') which include suit property. He expressed his willingness to pay as per the rate fixed by the State Government.

(2) On 10.8.2015, Sub-Divisional Engineer, Public Works Sub Division, North, Karad addressed a letter to the Addl. Collector, Satara requesting the latter to grant permission to the plaintiff to excavate 1000 Brass sand from these lands upon accepting royalty from the plaintiff.

(3) On 24.8.2015, Addl. Collector, Satara submitted proposal to Dy. Secretary, Revenue and Forest Department, Mantralaya, Government of Maharashtra for sanctioning permission to the plaintiff for excavating 1000 Brass sand from the lands.

(4) On 27.8.2015, Desk Officer, Revenue and Forest Department addressed a letter to the Collector, Satara soliciting informations:

(a) whether in the year 2014-2015 auction was held for excavation of sand, estimated stock of sand as also its value;

(b) whether it was released through auction, if so, details bids received in auction;

(c) whether in the year 2015-2016 the lands are to be given in auction for excavation of sand and if so the estimated stock of the sand and its price;

(d) to submit self-explanatory opinion in respect of 1000 Brass sand from the said lands, among other things.

(5) On 3.9.2015, Addl. Collector, Satara responded to queries raised in letter dated 27.8.2015. In so far as the suit property is concerned, it was set out that bid of one Shri Tukaram Pandit Jagtap was accepted on 27.4.2015. However, he did not deposit the remaining amount within the stipulated period and, therefore, on 29.6.2015 amount of Rs.51,25,463/-, being 1/4th of 2,05,01,850/- of said Jagtap was forfeited. It was further set out

that except Gat no.1406 of Mouze Aatke-Kodoli, Taluka Karad, other lands were not included in seven proposals and a request was therefore made to pass appropriate orders for excavating 1000 Brass sand.

(6) On 1.10.2015, Desk Officer of Revenue and Forest Department addressed a letter to the Collector, Satara asking him to take appropriate decision for excavation of sand in the light of paragraph 7(e) of Government Resolution of Revenue and Forest Department dated 12.3.2013.

(7) On 3.11.2015, public notice was issued for holding e-auction for releasing stock of sand from various lands including suit property on 20.11.2015. The said public notice was published on 4.11.2015 in Daily Pudhari. Notice also stated that on 20.11.2015 from 11 am onwards office of Collector, Satara will take final decision in respect of e-auction.

(8) On 5.11.2015 submission was put up recommending to grant temporary licence for excavating 1000 Brass sand from the suit property to the plaintiff for process of auction is complete.

(9) On 20.11.2015 e-auction was actually held in respect of several lands including the suit property. Applicant gave offer of Rs. 3,35,00000/-, being the highest, it was accepted. On the same day, the applicant deposited Rs.83,75,000/- being 1/4th of Rs.3,35,00000/-.

(10) On 16.12.2015, the plaintiff instituted present suit.

12. In paragraph 1 of the plaint, the plaintiff made reference to various works. In paragraph 2, the plaintiff referred to tenders dated 1.1.2014, 8.9.2014, 22.5.2015 and 4.8.2015 and it was further asserted that Sub Divisional Engineer, Public Works Sub Division, North, Karad has released 1000 Brass sand from the suit property to the plaintiff which is subject matter of the suit. In paragraph 3, the plaintiff referred to correspondence commencing from 4.8.2015 and ending on 5.11.2015 as referred herein above. In paragraph 4, the plaintiff asserted that on 20.11.2015 offer of third party was accepted in respect of the suit property. Though the defendants are fully aware that release/excavation of 1000 Brass sand from the suit property is sanctioned in favour of the plaintiff, the defendants deceived the plaintiff and held auction. Because of this auction, the work of the plaintiff came to standstill. In paragraph 8, the plaintiff asserted that cause of action accrued to him for filing the suit on 1.12.2015. Along with the plaint, the plaintiff filed application Exhibit-5 on 16.12.2015 for temporary injunction restraining the defendants from permitting third party to excavate sand from suit property and transporting the same as also handing over possession to third party. On the same day, the plaintiff filed application Exhibit 6 praying for waiving notice under section 80

of C.P.C.

13. On 16.12.2015, the learned trial Judge passed following order in the suit.

“Order
Issue suit summons to the defendants for filing written statement and settlement of issues, returnable on 18.12.2015.

Sd/- 16.12.15
C.J.S.D.”

14. On 16.12.2015, the learned trial Judge passed following order on Exhibit-5.

“Order
Heard the Advocate. Perused record and documents. Considering the submission of Advocate and record I think fit to issue notice to defendants. Hence, I pass the following order.

Order.

1. Issue show cause notice to defendants as to why temporary injunction should not be granted against them returnable on 18.12.2015.

2. E.P. And S.B. is allowed, if required.

Sd/- 16.12.15
C.J.S.D.”

15. On the same day, i.e. 16.12.2015 Bailiff gave report to the effect that he served suit summons and application for interim relief on Barnishi clerk of defendant no.2 (Tahsildar, Karad) at 17 pm. Bailiff submitted report dated 17.12.2015 to the effect that he had served suit summons and application for interim relief on Barnishi clerk of defendant no.1 (State of Maharashtra, through

Collector, Satara) between 9.30 am and 11.30 am.

16. Though notice was made returnable on 18.12.2015, from perusal of Roznama it appears that the learned Judge was on leave. Roznama further recorded that summons was duly served on the defendants. However, they were absent. Plaintiff and his Advocate were present. Roznama of 18.12.2015 further records that matter was posted on 19.12.2015 for passing exparte order against defendants.

17. On 19.12.2015 the learned trial Judge passed order below Exh.1 (plaint), which is to the following effect :

“Order
Defendants 1 and 2 did not appear on service of summons.
Hence, suit to proceed exparte against them.

Sd/- C.J.S.D. 19.12.15.”

On the same day, i.e. 19.12.2015 below Exhibit-5 the learned trial Judge passed the following order.

“Order
Defendants did not appear in the suit. Defendants did not file say to this application. Application to proceed without say.”

Sd/- C.J.S.D 19.12.15.”

18. On 19.12.2015, the learned trial Judge allowed the application and issued injunction restraining the defendants from giving possession of the suit property and for excavating to third

party till final disposal of the suit. The said order reads thus:

“Order

“ Heard Advocate for the plaintiff. Read the documents. Defendants have not appeared.

From the submission and documents it is seen that the permission was granted to the proposal of the plaintiff for his demand of 1000 brass sand from Block No.1268 to 1274 of village Atake-Kodoli. Now the auction hold for the year 2015-2016 comprise these Block No.1268 to 1274.

Thus, prima facie case is in favour of the plaintiff. Balance of convenience is in his favour. If the auction is held then he will not get the 1000 brass sand and he will suffer irreparable loss. Hence the plaintiff is entitled for the relief of temporary injunction. Hence, I pass the order.

Order

1. Defendant nos 1 and 2 are temporary restraining from giving possession of Block No.1268 to 1274 for excavating and to third person, till final disposal of the suit.

2. Cost in cause.

Sd/- C.J.S.D. 19.12.15.”

19. Perusal of this order shows two things. The learned trial Judge recorded a categoric finding after considering the documents that permission was granted to the proposal of the plaintiff for his demand of 1000 Brass sand from the suit property. The second finding was that auction is held in the year 2015-2016 comprising the suit property. If the auction is held then the plaintiff will not get 1000 Brass sand and he will suffer irreparable loss.

20. The said findings, to say the least, are perverse. Mr. Bansode was not in a position to show that the proposal is sanctioned by the State Government. That apart, perusal of the assertions made in the plaint and also documents produced by the plaintiff, prima facie, does not indicate that proposal of the plaintiff for excavating 1000 Brass sand from the suit property was sanctioned by the defendants. In paragraph 4 the plaintiff specifically asserted that auction was held on 20.11.2015 and that bid of third party was accepted. Despite that, the learned trial Judge observed that if the auction is held then plaintiff will not get 1000 Brass sand and he will suffer irreparable loss. This prima facie shows non-application of mind on the part of the learned trial Judge. The learned trial Judge also failed to appreciate that the plaintiff did not implead third party though prayer in terms of prayer clause (a) was made on the basis of assertions made in paragraph 4 of the plaint. By clause (1) of the operative order, the learned trial Judge temporarily restraining the defendants from giving possession of the suit property and for excavating to third person. Prima facie, this also shows non-application of mind as the learned trial Judge could not have issued injunction against the third person who was not made party in the suit.

21. In the case of Maria Margarida Sequeira Fernandes Vs.

Erasmus Jack De Sequeira (dead) through Lrs, (2012) 5 Supreme Court Cases 370, in paragraphs 83 to 86 the Apex Court observed thus:

“83. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the Defendant.

84. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the Plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction.

85. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the Plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.

86. Ordinarily, three main principles govern the grant or refusal of injunction.

- a) prima facie case;
- b) balance of convenience; and
- c) irreparable injury, which guide the Court in this regard.

In the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the

documents on record and only on that basis the Court must be governed by the prima facie case. In grant and refusal of injunction, pleadings and documents play vital role.”

22. The defendants filed application Exhibit 14 on 30.12.2015 for setting aside ex parte order dated 19.12.2015 below Exh.1 and no say order below Exh.5 dated 18.12.2015 (It should be 19.12.2015) and seeking permission to take written statement and say of the defendants to Exhibit-5 on record. Along with that application, the defendants also enclosed written statement and say to Exhibit-5.

23. On 30.12.2015, the defendants filed application Exh.15 challenging the locus of the plaintiff on the ground that no right is created in favour of the plaintiff for excavating 1000 Brass sand from the suit property. The defendants prayed for framing preliminary issue as regards maintainability of the suit.

24. On 30.12.2015, the defendants filed application Exh.16 for impleading the applicant as party defendant. It was set out therein that on 20.11.2015 e-auction was held and that offer of Rs.3,35,00000/- given by the applicant, being highest, was accepted. Accordingly, agreement was also entered into between the applicant and the defendants. Though the plaintiff was fully aware that bid of the applicant was accepted, however, he did not implead applicant as party defendant and obtained ex parte order.

25. The defendants filed application dated 30.12.2015, Exh.17, for setting aside order dated 19.12.2015 below Exhibit-5 as it was

passed without giving any opportunity to the defendants and was passed *ex parte*. Prayer was, therefore, made to hear the application Exh.5 on its own merits. On 4.1.2016, the defendants filed application Exh.24 for setting aside order dated 19.12.2015 below Exh.5 and claiming compensation at the rate of 1,50,000/- per day from the plaintiff and for compensatory costs of Rs.50,000/- On the same day, the defendants filed application Exh.29 enclosing therewith list of documents at Exh.30.

26. On 7.1.2016, the defendants filed list of documents at Exh.30 enclosing therewith (1) true copy of order dated 17.12.2015, (2) true copy of agreement entered into by and between Addl. Collector Satara and application (3) Challan showing payment made by the applicant on 7.12.2015. The defendants also filed written arguments dated 7.1.2016 for setting aside order dated 19.12.2015 below Exh.5 as also in support of the application made under Order 39, Rule 4.

27. The plaintiff filed reply at Exh.25 opposing application Exh.14 made by the defendants for setting aside *ex parte* order dated 19.12.2015 in the suit and also no say order dated 19.12.2015 below Exh.5. By order dated 7.1.2016, the learned trial Judge rejected that application. In paragraphs 3 to 5, it was observed thus:

“3. The defendants have filed affidavit at Exh.20 in support of this application. It is seen that the affidavit is sworn by the clerk of office of the defendants. It is necessary that the defendants themselves or any authroised, delegated person has to file the affidavit to say that the facts mentioned in the application are true. The clerk is not delegated person and therefore this affidavit cannot be considered.

4. It is seen that the summons and notice in this suit was

received to office of the defendants on 17.12.2015 and 16.12.2015 respectively. But despite that the defendants did not appear from 19.12.2015 till 30.12.2015 i.e. within time of 10 days. It is seen that despite receiving notices, the defendants appeared due to notice in appeal filed by the third person.

5. Considering the nature of the dispute and to decide it on merits a chance to defend could have been given to the defendants. But, the application and the affidavit are against the provisions of law and defective. Hence, the application is liable for rejection. So, in the result I pass the order.”

The learned trial Judge did not point out how the application was against which provisions of law and why it was defective. The learned trial Judge also failed to take into consideration the explanation given by the defendants that certainly on 18.12.2015 Government declared holiday to Revenue Department on account of Shiv Pratap Din. The learned trial Judge failed to note that along with the application, the defendants have enclosed written statement and say to Exhibit-5. The learned trial Judge, therefore, ought to have set aside “no say order” and permitted the defendants to file written statement and say to Exhibit-5.

28. Perusal of application Exh.14 shows that in paragraph 1 it was specifically asserted that on 18.12.2015 suddenly Government holiday to Revenue Department was declared on account of Shiv Pratap Din. As offices were closed, defendants could not send their representative to the office of Government Pleader and consequently could not remain present on 18.12.2015. Against the order dated 19.12.2015 below Exh.5, applicant preferred Misc. Civil Appeal No.75 of 2015. Defendants received notice in that appeal and, therefore, they prayed for

setting aside exparte order passed in the suit as also no say order below Exh.5.

29. While rejecting application Exh.14, the learned trial Judge recorded that though the defendants were served with suit summons on 17.12.2015 and 16.12.2015 respectively, they did not appear from 17.12.2015 till 30.12.2015. They appeared only upon receipt of the notice in the appeal filed by the applicant herein. Though the learned trial Judge observed in paragraph 5 that “considering the nature of the dispute and to decide it on merits a chance to defend could have been given to the defendants. But, the application and affidavit are against the provisions of law and defective”.

30. Mr. Metkari and Mr.Bodake submitted that Court was closed due to Christmas Vacation from 22.12.2015 to 27.12.2015 Mr. Bansode did not dispute this position.

31. As noted earlier, on 16.12.2015 the learned trial Judge passed order in the suit to the effect that “issue summons to the defendant for filing written statement and settlement of issues, returnable on 18.12.2015”. While passing that order, the learned trial Judge also failed to consider that Order VIII, Rule 1 provides that the defendant has to file written statement within 30 days from the date of service of summons on him. Proviso thereto lays down that where the defendant fails to file written statement

within the period of 30 days he is allowed to file the same, not later than 90 days from the date of service of summons. The learned trial Judge not only expected the defendants to file written statement before returnable date but also issued notice and kept the matter for settlement of issues on 18.12.2015.

32. As far as application Exh.5 is concerned, the learned trial Judge issued show cause notice to the defendants as to why temporary injunction should not be granted against them returnable on 18.12.2015. The application was thereafter heard on 19.12.2015. On that date, the learned trial Judge initially passed order to the effect that the defendants did not appear in the suit. They did not file say to the application. Application to proceed without say. Immediately thereafter he allowed the application. I have already dealt with the manner in which the learned trial Judge has disposed of the application. The learned trial Judge also did not follow the principles laid down by the Apex Court in Maria Margarida Sequeira Fernandes (supra) while granting the application.

33. The applicant filed application Exh.35 for impleading him as defendant. Mr Bansode submitted that when the plaintiff instituted suit on 16.12.2015 he was not aware that offer given by the applicant in the auction held on 20.11.2015 was highest and the same was accepted. I have already held that prima

facie the plaintiff was aware of all these developments. Even assuming in favour of the plaintiff that he was not aware of acceptance of bid of the applicant on 20.11.2015, nonetheless when the applicant filed application Exh.35 on 8.1.2016, surely, it cannot be said that the plaintiff was unaware of these developments. Perusal of the application Exh.35 shows that the applicant specifically asserted that he has deposited the entire amount and on 17.12.2015 agreement was entered into between the applicant and the defendants. Despite that the plaintiff filed reply Exh.43 on 20.1.2016, inter alia, contending that the plaintiff has sought relief only against the defendants and not against the applicant. In paragraph 3 of the reply, it was once again reiterated that the Hon'ble Revenue Minister has expressed his consent for excavation of 1000 Brass sand by the plaintiff from the suit property on payment of royalty. However, the defendants have not obeyed instructions of superiors despite the plaintiff requesting orally and making written complaints and, therefore he was constrained to institute suit. Thus, prima facie perusal of the reply Exh.43 also indicates that proposal submitted by the department for sanctioning excavation of 1000 Brass in favour of the plaintiff from the suit property is not accepted by the State Government.

34. By the impugned order, the learned trial Judge held that

the plaintiff has not sought any relief against the applicant. The applicant, therefore, cannot be impleaded in the suit so as to oppose the plaintiff. Despite accepting the bid of the applicant if the Government did not hand over possession of the suit property, it was open to the applicant to institute suit against the State government for refund of the amount deposited or for compensation, among other prayers. The fact that despite depositing the amount, if the government does not hand over possession of the suit property, then in that case there would be dispute between the applicant and State government. This dispute is entirely different than the controversy raised in the suit. On these, among other grounds, the learned trial Judge rejected the application.

35. In paragraph 4 of the impugned order, the learned trial Judge referred to the following works:

- (1) Widening of four lanes of Guhagar, Chiplun, Karad, Jat, Vijapur, National High Way, 136 km, 141/600 to 145/800; Widening of four lanes of Taluka karad, District Satara and Khandala, Karad, Sangli, Shirol National High Way 142 km, 101/950 to 103/450 and tender dated 1.1.2014;
- (2) Construction of RCC Gattar on internal road 12 km wide internal road; Koyana Sanctuary, Mouze Dicholi, Taluka Patan and tender dated 8.9.2014;

(3) Construction of Vithamata School of Shri Shivaji Education Society and tender dated 4.8.2015.

36. The plaintiff claims that the said tenders are given to him and for that purpose he wants 1000 Brass land. Mr. Bodake invited my attention to works orders dated (1) 1.1.2014, (2) 2.3.2015 and (3) 22.5.2015 respectively to contend that the works at serial no. 1 to 3 were given to different parties and not to the plaintiff. The learned trial Judge, however, proceeded on the premise that these works were given to the plaintiff. In my opinion, the impugned order reflects total non-application of mind and is perverse, to say the least, and same deserves to be set aside, thereby, allowing Exh.35.

37. The defendants thereafter filed application Exh.49 seeking review of the order dated 7.1.2016 below Exh.14. By order dated 3.2.2016, the learned trial Judge rejected the application on the ground that while passing order below Exh.14 the Court had not neglected the facts on record. The Court had passed order by taking into consideration the affidavit filed by the clerk of Tahasildar office. The affidavit filed by the Tahasildar after passing of the order cannot become subject matter of review as there is no mistake apparent on the face of record. The Court did not commit any mistake while passing order below Exh.14. In my opinion, this order also shows total non-application of mind and

to say the least is perverse. The learned trial Judge also did not consider whether the case falls within the parameters of Order 47 of C.P.C. Order 47 provides that any person considering himself aggrieved by clauses (a), (b) or (c) and who, from the discovery of new and important matter or evidence **which after the exercise of due diligence**, was not within his knowledge **or could not be produced by him at the time when the decree was passed or order made**, or on account of some mistake or error apparent on the face of the record, **or for any other sufficient reason** may apply for a review.

(emphasis supplied)

38. The learned trial Judge did not consider whether the defendants have made out a case that after exercise of due diligence, they could not produce the evidence at the time when the order below Exh.14 was made. The learned trial Judge also did not consider that the defendants made out any other sufficient reason seeking review of the order. In fact, as noted earlier, Exh.14 was filed for recalling the order dated 19.12.2015 passed below Exh.1 whereby the learned trial Judge ordered suit to proceed exparte against them as also order dated 19.12.2015 below Exh.5 whereby the learned trial Judge directed application Exh.5 to proceed without say. The entire approach of the learned trial Judge is perverse.

39. As I have already extracted the orders dated 16.12.2015 passed below Exhibits 1 and 5, and referred to as also orders dated 19.12.2015 below Exhibits 1 and 5, order dated 7.1.2016 below Exhibit-14 and order dated 3.2.2016 below Exhibit-49. Though there was absolutely no urgency in the matter, the learned trial Judge finally allowed the application Exhibit-5 in the absence of the defendants. If at all the learned trial Judge was satisfied that urgency was made out; that prima facie case is made out by the plaintiff and that balance of convenience lies in his favour and that in case injunction is refused, irreparable loss would be caused to the plaintiff, surely the learned trial Judge could have granted ad-interim order. The facts in the matter under consideration is singularly singular. The entire chain of event shows adaptation of a method unknown to law in hottest of haste. The orders referred herein above have resulted into total miscarriage of justice.

40. Mr. Bansode submitted that in the present case the applicant has challenged only the order dated 22.1.2016 below Exh.35 by which the application made by the applicant for impleading him as party defendant is rejected. In other words, he submitted that while exercising powers under Article 227 of the Constitution of India, this Court cannot set aside orders which are not specifically challenged by the applicant. In any case, the

applicant has equally efficacious alternate statutory remedy challenging the order dated 19.12.2015 passed below Exh.5 by filing appeal under Order 43, Rule 1(r). He, therefore, submitted that this is not a fit case for invoking powers under article 227 of the Constitution of India.

41. It is no doubt true that in the present case, the applicant has challenged the order dated 22.1.2016 passed below Exh.35 whereby his application for impleadment was rejected. However, this Court will not remain silent and mute spectator. In the case of Surya Dev Rai Vs. Ram Chander Rai, (2003) 6 Supreme Court Cases 675, the Apex Court has dealt with powers of High Court under Articles 226 and 227 of the Constitution of India. It is also held that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved **or may even be exercised suo motu**. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that **the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. In exercise of supervisory jurisdiction the High Court may not only quash or set**

aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or **the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned.** The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly **and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.**

42. Applying the tests laid down by the Apex Court in *Surya Devi Rai*, (supra), let us come to the facts of the present case. Perusal of paragraphs 1 and 3 of the plaint prima facie shows that plaintiff came with the case that the proposal to allot 1000 Brass sand from the suit property was sanctioned by the

defendants. Prima facie, no material is produced on record to indicate that proposal referred in paragraphs 1 and 3 is sanctioned by the State Government. As against this, on 3.11.2015 public notice was issued wherein the defendants proposed to hold auction on 20.11.2015 in respect of suit land, among other lands. The plaintiff did not participate in that auction. The plaintiff though comes with the case that proposal was sanctioned by the State Government for allotment of 1000 Brass land, does not challenge the auction, qua the suit property, and allowed the auction to be held. The applicant is declared as highest bidder on the same day and that fact is asserted in paragraph 4 of the plaint. The applicant has deposited Rs.83,75,000/-, being 1/4th amount of Rs.3,35,00,000/-. Though the plaintiff is aware of these facts, he does not implead the applicant as a party defendant. The plaintiff, however, claims relief not only against the defendant but also third party. Though there was no urgency the learned trial issued notice returnable on 18.12.2015. Matter is not heard on 18.12.2015 and was heard on 19.12.2015. On the same day, the learned trial Judge directs suit to proceed exparte against the defendants. On the same day, he finally allows the application. If at all the learned trial Judge was satisfied with the urgency he could have considered issuing ad-interim order. Instead of doing that the learned trial

Judge allowed the application on the same day. In my opinion, the said order is perverse to say the least.

43. In the case of Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727, the Apex Court in paragraph 14 has laid down the following principles:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion.”

(emphasis supplied)

44. Mr.Bodake relied upon the decisions of Amit Kumar Shaw (supra) and Shri Premanand Gajana Naik (supra). In the case of Amit Kumar Shah (supra), the Apex Court held that the power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is

not added as a party. Such right, however, will include necessarily an enforceable legal right. As noted earlier, the applicant was declared as highest bidder and still the plaintiff chose not to implead him as party defendant. In the case of Shri Premanand Gajanan Naik (supra), the learned Single Judge of this Court held that power under Order 1, Rule 10 must be exercised by a civil court in a manner as to advance cause of justice by doing that which is a must for determination of real controversy involved in suit. If a party having interest in lis is most likely to be affected directly and substantially in its rights by a decision in suit, it has to be impleaded. In the facts and circumstances, I am more than satisfied that interest of third party will be substantially and directly affected.

45. Mr. Bansode relied upon decision of this Court in the case of Omprakash (supra). As noted earlier, the applicant was declared as highest bidder and still the plaintiff chose not to implead him as party defendant. In the facts and circumstances of the case, I am more than satisfied that interest of the applicant will be substantially and directly affected. Reliance placed by Mr Bansode on the decision of Omprakash (supra) does not advance the case of the plaintiff.

46. Having regard to the manner in which the applications are decided by the trial Court, in my opinion, it is necessary to direct Registrar General of this Court to place papers and proceedings of this petition and copy of this order before appropriate

authority for taking action in accordance with law, either administratively or otherwise, against the learned trial Judge.

47. Applying the tests laid down in the case of Surya Devi Rai (supra) and Wander Limited Vs. Antox India Private Limited (supra), it is necessary to set aside following orders:

- (i) Order dated 19.12.2015 below Exh.1 directing suit to proceed exparte against the defendants;
- (ii) Order dated 19.12.2015 below Exh.5 directing application to proceed without say;
- (iii) Order dated 19.12.2015 below Exh.5, thereby allowing the application Exh.5,
- (iv) Order dated 7.1.2016 below Exh.14;
- (v) Impugned order dated 22.1.2016 below Exh.35;
- (vi) Order dated 3.2.2016 below Exh.49.

48. It is necessary to restore application Exh.5 with direction to the plaintiff to implead applicant herein as party defendant. The learned Principal District Judge is requested to assign this proceeding to Judge other than the Judge who has passed the impugned order. It is expressly made clear that the observations made and the findings recorded herein are tentative and prima facie and have been made only for the purpose of considering the manner in which the learned trial Judge has passed various orders referred herein above. The learned trial Judge will decide

the application on its own merits and on the basis of material on record uninfluenced by the observations made in this order.

49. As the plaintiff has obtained interim order affecting rights of the applicant without impleading him as party defendant, this is a fit case for imposing exemplary costs which is quantified by Rs. One Lac to be paid by the plaintiff to the applicant within four weeks from today. If the plaintiff fails to pay or deposit in the trial Court within four weeks from today, same shall be recovered as a land revenue. Let office transmit copy of this order to the office of Collector, Satara.

50. Rule is made absolute in the aforesaid terms.

51. At this stage, Mr. Bansode orally applies for stay of this order for two weeks. Mr. Bodake opposes this prayer. Having regard to conduct of the plaintiff, oral application is rejected. Needless to say that the learned trial Judge seized of the application Exh.5 shall decide the application on the basis of material on record and in accordance with law uninfluenced by the observations made/findings recorded in this order. Order accordingly.

(R.G.Ketkar, J.)