

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10674 OF 2016

SANJAY BALKISHAN MUNDADA
VERSUS
YOGESH NEMICHAND SHAH

...
Advocate for Petitioner : Mr. Kulkarni Mukul S.
Respondent served - absent
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 22-08-2017

ORAL JUDGMENT :

1. Despite service of notice on the respondent for final disposal of the writ petition looking at the nature of writ petition, no appearance has been caused on behalf of the respondent.
2. Learned counsel for the petitioner submits that suit has been filed seeking specific performance of agreement of sale executed by respondent in favour of petitioner for an area admeasuring 23500 square feet, as referred to in the pleadings.
3. Pursuant to the agreement, the land was to be measured and property is to be transferred as per the provisions of the agreement. While the agreement had been entered into, there had

been no separation of shares of the property among family members where respondent was a member. Later, from the record, the property appears to have been sub-divided and the one bearing no. 1446/4 admeasuring about 3527.75 square meter has come to share of the respondent. Rest of the property is shown to have been gone to share of the other family members.

4. In the suit the respondent appeared and resisted the same. Some time had been consumed in the suit since the advocate initially appearing for petitioner had succumbed to cancer during the pendency of suit and a new advocate had been engaged for conducting trial.

5. During this period, it came to the light that respondent had executed sale deeds in respect of property of his share under two transactions dated 10-01-2014. Accordingly, the petitioner, with a view to bring to the fore, aforesaid transactions in the matter as the transactions were by present respondent from his share and may impinge upon the property claimed under the suit, had applied for amendment vide application exhibit 36. Said application had been rejected and, as such, present writ petition.

6. Learned counsel Mr. Kulkarni submits, although the suit had not proceeded further than framing of issues, it had been considered that as the sale deeds are of 10-01-2014, they are prior to commencement of trial, and, as such, having regard to proviso to order VI rule 17 of the code of civil procedure, the same could not be considered.

7. Learned counsel for the petitioner submits that the consideration by which the trial court had got swayed away having regard to the factual events which have not been disputed, could not be a proper consideration, as it clearly emerges that the transactions entered into by the respondent are subsequent to the institution of the suit and as soon as two transactions were noticed, immediately application has been moved as trial in the real sense has not commenced in the present matter. He submits the proviso would not be an impediment, particularly having regard to the applications have been moved diligently immediately after knowing about the transactions. Further, it is submitted that, it is not the case of the other side that the transactions were known to the petitioner from the date of execution of the sale deeds.

8. Aforesaid submissions on behalf of the petitioner in the absence of appearance on behalf of the respondent go unchallenged

and the absence, to a large extent depicts tacit acceptance of the request made under the writ petition.

9. The impugned order appears to be passed rather perfunctorily going by the events. Having regard to the submissions advanced, it would be expedient and in the interest of justice, to allow the writ petition.

10. Writ petition, as such stands allowed in terms of prayer clause (A). The impugned order dated 16-07-2016 passed by 3rd joint civil judge senior division, Dhule on exhibit 36 in special civil suit no. 106 of 2013 is set aside and the application exhibit 36 in special civil suit no. 106 of 2013 pending before the 3rd joint civil judge senior division, Dhule stands allowed.

11. Writ petition stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/