

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3470 OF 2018

SHIVAJI ASHOK TULJAPURE (SURYAWANSHI)
VERSUS
BALAJI RAMBHAU SALUNKE

Advocate for Petitioner : Mr. N.P. Patil Jamalpurkar.
Advocate for Respondent : Mr. T.M. Venjane.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 20.02.2019

PER COURT :

1. The petitioner is aggrieved by the order dated 06.09.2017, by which the trial Court has concluded that it would decide Civil Miscellaneous Application No. 12/2015, on its merits and by framing proper issues including the issue of limitation. As such, application Exhibit 29 filed by this petitioner, invoking Order VII Rule 11 (d) of the Code of Civil Procedure, praying for rejection of the application, has been rejected.

2. Though the learned advocate for the petitioner has narrated the entire history of this litigation and though he is aggrieved by the observations of the trial Court, which he has himself invited, I am not considering the entire contentions of the litigating sides for the reasons set out in the following paragraphs.

3. The respondent has preferred Civil Miscellaneous Application No. 12/2015, contending that a consent decree dated 19.12.1998, passed in RCS No. 691/1998, was on misrepresentation and fraud. The trial Court called upon the respondent by its order dated 04.03.2017, to convince the Court as regards the tenability of application in the form in which it was filed and as to whether a Regular Civil Suit can be filed by him. Pursuant to the said order, the trial Court heard the litigating sides and concluded that it would be appropriate to decide the application after framing proper issues.

4. This order dated 20.06.2017, was challenged by this petitioner in Writ Petition No. 1128/2018. This Court had rejected the said petition by order dated 30.01.2018, by considering the observations of the trial Court that the law of limitation would be considered and all appropriate issues would be framed, so as to give a proper hearing to the litigating sides. This Court, therefore, dismissed the petition filed by this petitioner and concluded that the trial Court would proceed to decide the CMA No. 12/2015, on its merits.

5. Instead of proceeding with the merits of the matter, this petitioner pressed an earlier application Exhibit 29 that was filed on 14.12.2016, despite the orders of this Court dated 30.01.2018. It does not appear that the petitioner brought to the notice of this

Court, when the said order was passed that one application Exhibit 29 invoking Order VII Rule 11 (d) was still pending. The petition was dismissed without issuing notice to the respondent and hence, the respondent apparently did not get the opportunity to bring to the notice of this Court that the petitioner is suppressing the pendency of Exhibit 29.

6. I have perused Exhibit 29 which is the application said to have been filed by the petitioner, in which the following pleadings have been set out :

“That, it reveals from the petition / application and the documents filed by the petitioner / applicant on record that, the present petition / application is filed after the 16 to 17 years from passing decree in R.C.S. no. 691/1998. Therefore, petition / application filed by petitioner / applicant U/S. 151 of C.P.C. is barred by law of limitation.

Therefore, the petition / application filed by the petitioner / applicant deserves to be rejected straightway, in the given set of circumstances, and in the interest of justice.

HENCE IT IS PRAYED

The petition / application filed by the petitioner / applicant be rejected, in the given set of circumstances, and in the interest of justice.”

7. The entire pleadings of Exhibit 29 have been reproduced above. It is apparent that this petitioner has not set out adequate averments in order to press the prayer that the application be rejected under Order VII Rule 11. Nevertheless, the trial Court has extensively dealt with Exhibit 29 in a detailed order concluding that *prima facie* the respondent has made out a case of fraud. It was also concluded that considering the pleadings, the question of limitation was a mixed question of facts and law and this could be decided by framing proper issues.

8. Learned advocate for the petitioner places reliance upon the judgment of the Hon'ble Apex court in the matter of Sneh Gupta Vs. Devi Sarup and others [2009 (2) SCC (Civil) 827], wherein it is concluded that even if a decree may be void or voidable in the face of a compromise decree passed by the Court without consent of all the parties, setting aside of such a decree will attract the law of limitation. The issue of preponing the date of hearing and deciding a case without notice to the other parties was also considered and the Hon'ble Apex Court concluded that the date of hearing in a matter can be preponed only with the notice to all the sides. It was, further, held that a consent decree is merely an agreement between the parties with the seal of the Court added to it. If such compromise is to be held to be binding, it must be signed by all of the parties or

counsel or both, failing which Order XXIII Rule 3 would not be applicable.

9. I find from the record that this petitioner did not divulge to the Court that Exhibit 29 was pending, notwithstanding the fact that there are hardly any pleadings in the said application. By suppressing the said fact, Writ Petition No. 1128/2018, was canvassed. This Court dismissed the Writ Petition by concluding that the trial Court would deal with all the issues while deciding CMA No. 12/2015.

10. From the impugned order dated 06.09.2017, it appears that the trial Court has concluded that since an issue deserving an adjudication has been raised by the respondent/applicant, it would be unsafe to reject his application without giving him an opportunity of leading evidence. Such conclusions of the trial Court indicate that the Court desires to grant every opportunity to all the litigating sides. In this backdrop, the impugned order cannot be termed as being perverse or erroneous, merely because there could be a possible second view or a different view in the matter.

11. This petition, is therefore, dismissed. However, it is made clear that the observations of the trial Court in the impugned order

would be considered to be of *prima facie* nature. Though, this petitioner has invited the said observations by the application Exhibit 29, observations at a *prima facie* stage should not affect the merits of the matter and the trial Court would decide CMA No. 12/2015, on its own merits, as expeditiously as possible, and in any case on/or before 31.12.2019. Needless to state, the trial Court would frame appropriate issues and would also deal with the issue of limitation as is contended by the petitioner.

(RAVINDRA V. GHUGE, J.)

S.P.C.