

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

995 WRIT PETITION NO.224 OF 2018

DEELIP JAYRAM GAVIT
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

.....
Advocate for Petitioner : Mr. A. S. Abhyankar h/f Mr. S. V. Natu
AGP for Respondents 1 and 2: Mr. K. B. Jadhavar
Advocate for Respondents 3 to 5: Mr. Ruchir S. Wani
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CORAM : V. K. JADHAV, J.
DATED : 29th NOVEMBER, 2019

PER COURT:-

1. The petitioner-original plaintiff has filed this writ petition against the judgment and order passed by the District Judge-1, Nandurbar, dated 28.09.2017 in Misc. Civil Appeal No. 6 of 2017.

2. Brief facts giving rise to the present writ petition are as follows:-

The petitioner-plaintiff has instituted R.C.S. No. 7 of 2017 against the respondents for declaration and decree for perpetual injunction and pending the suit has also filed an application Exh.5 for issuance of temporary injunction. By order dated 27.03.2017 the learned Civil Judge, Senior Division, Nandurbar has passed an order and by order dated 02.05.2017 further modified the said order dated 27.03.2017. Being aggrieved by certain conditions imposed in the said order passed below Exh.5 dated 27.03.2017/02.05.2017 the petitioner-plaintiff had preferred Misc. Civil Appeal No. 6 of 2017

before the District Court, Nandurbar and the learned District Judge, Nandurbar by its impugned judgment and order dated 28.09.2017 dismissed the appeal so also the cross objection Exh.18 being not maintainable. Hence, this writ petition.

3. Learned counsel for the petitioner-original plaintiff submits that the trial court by order dated 27.03.2017 below Exh.5 in R.C.S. No. 7 of 2017 directed the petitioner plaintiff to lead oral evidence in the nature of affidavit in connection with his certain statements in the affidavit at Exh.6 for deciding the application of temporary injunction at Exh.5 and further granted liberty to the respondents-original defendants to cross examine the petitioner-plaintiff in connection with the said statements in the affidavit of the oral evidence. Learned Judge of the trial court further restrained the respondents-defendants by ad-interim order of injunction from making construction on suit properties till the next date and had also directed the petitioner-plaintiff to furnish undertaking that in the event of his failing in the suit to obtain relief of interim injunction due to his false plea, then he would adequately compensate to the respondents-defendants for loss ensued due to the order of ad-interim injunction which is granted in his favour. Learned Judge of the trial court has also imposed two more conditions, however, by order dated 02.05.2017 the clause Nos. 3 and 4 of the order dated 27.03.2017 came to be modified and instead of restraining the respondents-defendants by ad-interim injunction from making construction over the suit properties till the

next date, the learned Judge has modified it as till further order and clause No.4 of the earlier order is also modified to some extent. Learned counsel submits that the appeal against the order passed under Order 39 Rule 1 (4) of C.P.C. is maintainable. Learned counsel submits that so far as the order dated 27.03.2017 is concerned, that holds the field and the subsequent modification is in the nature of clarification and as such, even if in the Misc. Civil Appeal a reference is given about challenge to the order dated 27.03.2017, it does not mean that the challenge is only made to the said order dated 27.03.2017 ignoring the modification. Learned counsel submits that however, the appellate court was of the opinion that the petitioner-plaintiff could have challenged both the orders in appeal and as such, Misc. Civil Appeal is not maintainable. Learned counsel submits that the approach of the appellate court is not proper, correct and legal.

4. Learned counsel appearing for respondent Nos. 3 to 5 submits that so far as order dated 27.03.2017 is concerned, the respondents-defendants came to be restrained temporarily from making construction over the suit properties till the next date, however, by modification dated 02.05.2017 the said injunction restraining the respondents-defendants from making construction over the suit properties came to be extended till further orders. Furthermore, clause 4 of order dated 27.03.2017 also came to be substantially modified and as such, order dated 02.05.2017 holds the field and the

petitioner-plaintiff should have challenged the said order. Learned Judge of the appellate court has rightly dismissed the appeal as not maintainable. Learned counsel in the alternate submits that if this Court is inclined to allow this writ petition by restoring the appeal before the appellate court, in that event cross objection filed by the respondents-defendants may also be restored. Learned counsel for the respondents-defendants in order to substantiate his contentions, placed reliance on the judgment of Division Bench this Court in the case of ***Radha D. Agarwal vs. Union Bank of India and others, reported in 2002 93) Mh.L.J. 25.***

5. I have also heard learned A.G.P. for respondent Nos. 1 and 2.

6. So far as order dated 27.03.2017 passed below Exh.5 in R.C.S. No 7 of 2017 is concerned, the said order is reasoned one subject to certain conditions, those are elaborated in the operative part of the order. By order dated 02.05.2017 the modification has been carried out in respect of certain conditions and it is not the case that entire order has been modified and replaced by some other order. Consequently, the order dated 27.03.2017 holds the field and modification dated 02.05.2017 would be the part of order dated 27.03.2017. The petitioner-plaintiff has challenged the order dated 27.03.2017 by preferring Misc. Civil Appeal No. 6 of 2017 before the District Court, Nandurbar and as such, the said order which includes modification of clause Nos. 3 and 4 also, the learned Judge of the

appellate court should have entertained the appeal and disposed it of on merits.

7. So far as the judgment relied upon the learned counsel for the respondents-defendants is concerned, in para 16 of the said judgment, this court has made the following observations:-

“16. Applying the aforesaid legal position, no doubt is left that order passed by the Disciplinary Authority on 31st December, 1985/9th August, 1986 and the order passed by the Appellate Authority in exercise of his powers under Regulation 17 merged in the order of the Reviewing Authority passed on 21-9-1988. It is the order of Reviewing Authority dated 21-9-1988 that holds the field and is the only operative order. The submission of the learned counsel for petitioner that Reviewing Authority having only affirmed the order of Disciplinary Authority and the order of Appellate Authority, the principle of merger is not attracted, is only noted to be rejected. Where review petition is filed before Reviewing Authority under Regulation 18, the Reviewing Authority may reverse the order/orders under review; it may modify the order/orders; it may enhance the penalty or may simply dismiss the review petition. In law, the order of confirmation passed by Reviewing Authority is quite as efficacious as an operative order as an order of reversal or modification.”

8. In the facts and circumstances of the aforesaid case, this Court held that the order of reviewing authority dated 21.09.1988 holds the field and is the only operative order. In the instant case, the order

dated 27.03.2017 is concerned, it holds the field and so far as the two conditions from original order dated 27.03.2017 are concerned, those are only modified. In view of above, the observations made by the this court in the case of ***Radha D. Agarwal vs. Union Bank of India and others (supra)*** cannot be made applicable to the facts and circumstances of the present case.

9. In view of above discussion, I proceed to pass the following order:-

O R D E R

- I. Writ petition is hereby partly allowed.
- II. The impugned judgment and order dated 28.09.2017 passed by learned District Judge-1, Nandurbar in Misc. Civil Appeal No. 6 of 2017 is hereby quashed and set aside.
- III. Misc. Civil Appeal No. 6 of 2017 alongwith the cross objection Exh.18 shall be restored to its original number. The learned District Judge, Nandurbar shall dispose of the appeal so also the cross objection on its own merits by affording opportunity of being heard to both the parties.
- IV. Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)