

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14528/2018

Salvador Francis Fernandes

... Petitioner

V/s.

Pandurang M. Mahale & Ors.

... Respondents

Mr. Ajay A Joshi for the Petitioner

Mr. C. P. Deogirikar for the Respondents

CORAM: K.K. TATED, J.

DATED : JANUARY 14, 2019

P.C. :

1 Heard. By this petition under Article 227 of the Constitution of India the Petitioner challenges the order dated 06.09.2018 passed by the District Judge, Oros below Exhibit- 45 in Regular Civil Appeal No.116/2013 instead of deciding his Application under section 10 of the Code of Civil Procedure, 1908 holding that the Application would be decided along with the appeal itself.

2 In the present proceedings, initially, the Respondent has filed Regular Civil Suit No. 39/2001 in the court of Civil Judge, Junior Division Vengurla for an order of injunction in respect of the suit property, which was decided by the Trial Court by judgment and decree dated 02.05.2013 and allowed the suit as under:

ORDER

“1 The suit is hereby decreed with costs.

2 Defendants No.1, his family members, agent, servants, or any other person on his behalf is hereby perpetually restrained from causing obstruction to possession of the Plaintiff over the suit property i.e. Sur.No.51, Hissa No.1/1, except due process of law.

3 Decree shall be drawn up accordingly.”

3 Being aggrieved by the said order, the Petitioner preferred Regular Civil Appeal No.116/2013 before the District Judge, Oros, wherein the Petitioner made an Application below Exhibit- 45 u/s.10 of the Code of Civil Procedure, 1908 to stay the further proceedings in Regular Civil Appeal No. 116/2013 till hearing and final disposal of Writ Petition No.2740/2013 which is pending before this court in which the issue of tenancy was involved.

4 The learned counsel for the Petitioner submits that the appellate court was not justified by saying that the Application will be considered at the time of final hearing of appeal. He submits that the Court below ought to have decided his Application below Exhibit- 45 before deciding the appeal on merits.

5 On the other hand, the learned counsel for the Respondent – Defendant filed Affidavit-in-Reply dated 09.01.2019. Same is taken on record. The learned counsel for the Respondent submits that in Writ Petition No.2740/2010 this court considered the order dated 05.04.2010 and declared to continue the same by order dated 13.07.2011. In support of this contention, he has

placed on record a copy of order dated 13.07.2011 being Exhibit-E to his reply on page 94. He further submits that the issue in respect of the tenancy is also considered by this court (Coram : R. G. Ketkar,J.) at the time of passing order dated 13.02.2013 in Writ Petition No.9560/2011. He further submits that in paragraph 6 of the said order, it is specifically recorded about pendency of the revenue matter in respect of the suit property. He relies on paragraph 6 of the said order, which reads thus:

“6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the Suit is instituted for injunction simplicitor and for the purpose of deciding the said issue, the only question that is relevant is whether the plaintiff is in possession of the suit land at the time of institution of the Suit. That apart, it is not in dispute that the petitioner had already moved application under Section 70(b) of the Act and the proceedings are pending in this Court. By order dated 13.07.2011 in Writ Petition No.2740 of 2010, this Court has restricted the stay of order passed by the Tribunal to the area occupied by the house and admeasuring 0.008 Gunthas in the suit land. Since the issue of tenancy was already adjudicated by the authorities under the Act and the proceedings are presently pending in this Court, the learned trial Judge thought it fit not to refer issue No.4 to the Competent Authority for decision. I do not find that the learned trial Judge has committed any error in not referring the issue No.4 to the Competent Authority. This is obviously with a view to avoiding another round of litigation on the issue of tenancy. Since the tenancy issue is already adjudicated by the Competent Authorities and the proceedings are pending in this Court, I do not find that the learned trial Judge has committed any error.”

6 The learned counsel for the Respondent submits that in view of these facts, the Trial Court has specifically directed that

the Application made by the Petitioner u/s.10 of the Code of Civil Procedure, 1908 would be decided at the time of final hearing of Regular Civil Appeal No. No.116/2013. He further submits that there is no question of granting any stay to the appeal which is pending for last several years and in fact which is against the order passed by the Trial Court in injunction suit. Hence, there is no substance in the Writ Petition. Same may be dismissed with costs.

7 It is to be noted that in the present proceedings earlier also, this court, by order dated 13.02.2013 passed in Writ Petition No.9530/2011 declined to grant any relief in favour of the Petitioner. There is a reference in paragraph 6 of the order dated 13.02.2013 in Writ Petition No.9560/2011.

8 Considering all these facts and as the appellate court has rightly held that the appeal itself is for hearing, I do not find any reason to interfere with the impugned order in the present Writ Petition.

9 If any order passed below Exhibit- 45 goes against the Petitioner, in that case, the Petitioner would have remedy to challenge the same before the appropriate court.

10 Hence, the Writ Petition stands rejected. No order as to costs.

(K. K. TATED, J.)