

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 3217/2018

(GANESH EDUCATION SOCIETY, NAGPUR & OTHERS **VERSUS** SUDHAKAR NARHARI CHIMOTE)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri P.V. Vaidya, counsel for petitioners.
 Shri Y.V. Nayyar, counsel for respondent.

CORAM : A.S. CHANDURKAR, J.

DATE : JUNE 17, 2019.

The challenge in this writ petition filed under Article 227 of the Constitution of India is to the order dated 07.02.2018 in M.J.C. No.520 of 2016. By that order, the application for review of the judgment dated 17.09.2016 in Special Civil Suit No.620 of 2014 has been rejected.

The petitioners are the original plaintiffs who had filed Special Civil Suit No.620 of 2014 for removal of encroachment and recovery of possession. The said suit proceeded *ex-parte* against the defendant. The plaintiffs led their evidence and the trial Court by its judgment dated 17.09.2016 held that the plaintiffs had failed to prove any encroachment made by the defendant. It was further held that the suit was not maintainable without the consent of the Charity Commissioner. The plaintiffs then filed a review application stating therein that since the suit had proceeded *exparte*, no issues were framed. The plaintiffs had no opportunity to address the Court on the aspect of the objection with regard to the maintainability of the suit in absence of any permission from the Charity Commissioner. As the plaintiffs were not heard on that point, the judgment was sought to be reviewed. Another error referred to by the plaintiffs was with regard to ownership of land admeasuring 46 acres. The trial Court observed that the plaintiffs

were heard when the suit was decided and the grounds raised in the application for review did not indicate any error apparent on the face of record. Hence, the application came to be rejected.

Shri P.V. Vaidya, learned counsel for the petitioners submitted that as the plaintiffs were not heard on the point with regard to maintainability of the suit in absence of any permission from the Charity Commissioner, there was an error apparent on the face of record. He submitted that if an opportunity would have been given to the plaintiffs, they would have sought to convince the Court on that aspect. He further submitted that in Special Civil Suit No.619 of 2014 that was filed by the present petitioners against the brother of the defendant, the trial Court had held such permission to be not necessary. Though the plaintiffs were owners of only 0.46 acres land, the Court had erroneously observed about non-measurement of 46 acres of land. Relying upon the decisions in *Investment Combine Versus Shree Tatyasaheb Kore Warana Sahakari Sakhar Karkhana Ltd.* [2013 BCI 941], *Dinkar Kisanrao Warade Versus Gajanan Prasad Sahakari Gruh Taran Sanstha & Others* [2013 BCI 787], *Inderchand Jain (D) through L.Rs. Versus Motilal (D) through L.Rs.* [2009 DGLS(SC) 1067], *Park View Cooperative Housing Society Limited Versus Union of India* [2014 BCI 489], *Ramlal Versus Madan Gopal & Others* [1995 Supp.(4) SCC 655] and *Lily Thomas & Others Versus Union of India & Others* [(2000) 6 SCC 224], it was submitted that a case for review was made out.

On the other hand, Shri Y.V. Nayyar, learned counsel for the respondent supported the impugned order. He submitted that the petitioners are seeking setting aside of the judgment passed by the trial Court in the suit against which an appeal under Section

96 of the Code of Civil Procedure, 1908 is maintainable. He further submitted that the trial Court rightly observed that there was absence of any error apparent on the face of record and that the decree as passed could be challenged in appeal. He referred to the decision in **Civil Appeal No.230 of 2007** [*Ajay Bansal Versus Anup Mehta & Others*] to substantiate his contentions.

Heard the learned counsel. Perusal of the judgment in Special Civil Suit No.620 of 2014 indicates that the trial Court had framed two points therein. One point relates to the aspect whether the plaintiffs had proved that the defendant had made any encroachment and erected a tin shed over the suit property. The other point framed was with regard to the maintainability of the suit without consent of the Charity Commissioner. Even if the contention with regard to absence of opportunity to address the Court on the aspect of absence of consent of the Charity Commissioner is accepted for a while, it is seen that the trial Court has referred to the evidence on record and then concluded that the encroachment as alleged by the plaintiffs to have been committed by the defendant was not proved. This finding is recorded after referring to the evidence on record alongwith the map at Exhibit 30. The trial Court while considering the review application has therefore rightly observed that these are findings that could be assailed in an appeal. The suit in question stands dismissed on merits. An appeal is maintainable against that decree which requires adjudication after considering the entire evidence on record. After considering the ratio of the various decisions relied upon by the learned counsel for the parties, it is found that the trial Court was within its rights in rejecting the application for review. Special Civil Suit No.619 of 2014 has been decided by another co-ordinate Court and not by the same Court.

In the light of the fact that the remedy of filing an appeal for challenging the decree passed in Special Civil Suit No.620 of 2014 is available to the petitioners, I am not inclined to entertain the writ petition.

By keeping the challenges raised in the review application open for being raised in appeal if filed by the petitioners, the writ petition is disposed of. The points raised are kept open. If any appeal is filed, the Court shall take into consideration the period spent in prosecuting the review application and the present writ petition.

JUDGE

APTE