

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

WRIT PETITION NO. 4955/2016

(RADHESHYAM MANGALCHAND AGRAWAL VERSUS RAJENDRA NARAYANPRASAD AGRAWAL & ORS)

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

Court's or Judge's orders

Petitioner in person.
Shri R.K. Borkar, counsel for R-1 to 4.

CORAM : A.S. CHANDURKAR, J.

DATE : AUGUST 19, 2019.

RULE. Heard finally considering the short issue involved.

The petitioner who is the original defendant no.1 in the suit filed by the respondents herein is aggrieved by the order passed by the trial Court below Exhibit 408 whereby the trial Court allowed the application for recalling the earlier order dated 24.01.2014 that was passed below Exhibit 380 by condoning delay subject to costs of Rupees One Thousand.

It is the case of the petitioner-defendant no.1 that on 24.01.2014, the trial Court passed an order below Exhibit 380 rejecting the application that was moved by the plaintiffs for cross-examining the Surveyor. The plaintiffs sought recall of that order by filing an application below Exhibit 408 with a further prayer to grant permission to examine the Surveyor who had carried out the measurement on 07.09.2009. This application was opposed by the petitioner and the trial Court allowed that application for recall on the ground that since the earlier application for joint measurement was rejected, there was no option available with the plaintiffs but to examine the Surveyor. Accordingly, the delay was condoned

subject to costs of Rupees One Thousand and the application was allowed. The subsequent application preferred by the petitioner seeking review of the order passed below Exhibit 408 came to be rejected on 28.06.2016. Being aggrieved, the present writ petition has been filed.

The petitioner in person submits that the trial Court having earlier rejected the application below Exhibit 380 on 24.01.2014 and also having observed while passing an order below Exhibit 375 that there was nothing on record to indicate that the earlier measurement report was wrong was not justified in allowing the application below Exhibit 408. It was submitted that on the backside of the application below Exhibit 408, it had been endorsed on behalf of the plaintiffs that the earlier counsel for the plaintiffs had appeared therein and application under provisions of Order XXVI Rule 9 of the Code of Civil Procedure, 1908 had been filed on 30.11.2013. Without considering these statements in that application, the trial Court proceeded to allow the same. There was no reason to recall the earlier order passed below Exhibit 380. It is thus submitted that the impugned order was liable to be set aside.

Shri R.K. Borkar, learned counsel for the respondent nos.1 to 4 who are the original plaintiffs supported the impugned order. He submitted that for the reasons mentioned in the application below Exhibit 408, the trial Court was justified in allowing that application. While allowing that application, the trial Court had imposed costs on the plaintiffs which were duly deposited. Hence, no interference was called for.

I have heard the learned counsel for the parties and I have perused the records of the case. It is seen that in the suit initially application below Exhibit 375 had been filed seeking joint measurement of Plot Nos.679 and 1055. The trial Court rejected

that application on 30.12.2013. This application had been moved by the plaintiffs on 30.11.2013. Thereafter another application at Exhibit 380 was moved by the plaintiffs for examining the Surveyor who had carried out the measurement on 07.09.2009. This application was also rejected in the light of the earlier orders passed in the proceedings. Perusal of the application at Exhibit 408 indicates that after the same was filed by the plaintiffs, further endorsements thereon were made on behalf of the plaintiffs by their learned counsel. Said endorsements are dated 28.10.2014 on which date itself the trial Court allowed that application. This is without considering the effect of the orders passed below Exhibits 375 and 380. Moreover, *Roznama* dated 28.10.2014 indicates that though application at Exhibit 408 was decided on 28.10.2014, the *Roznama* of that date refers to deposit of costs on 29.10.2014 which was the next day. Such endorsement according to the petitioner could not have been made on 28.10.2014. There is substance in the submission as made by the petitioner.

It is seen that in the impugned order, the effect of rejection of application below Exhibits 375 and 380 has not been taken into consideration. The endorsement as made on the backside of Exhibit 408 has also not been referred to. It is therefore found necessary to direct the trial Court to re-consider that application in the light of observations as made hereinabove.

Accordingly, the order passed below Exhibit 408 as well as the order passed below Exhibit 433 are set aside. The trial Court is directed to re-consider and decide the application at Exhibit 408 in the light of orders passed earlier in the suit. The Record & Proceedings be sent to the trial Court forthwith. The proceedings in the suit be decided expeditiously as per the directions issued by this Court earlier.

The writ petition is partly allowed. Rule is made absolute in aforesaid terms. No costs.

JUDGE

APTE