

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Writ Petition No.5127 of 2018
(Ganesh Vithobaji Ninawe .vs. Smt. Sumitra Balkrishna Bobde and
another)

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

Mr. A.D. Sonak, Advocate for Petitioner.
Mr. N.S. Deshpande, Advocate for Respondent No.2.

CORAM : Manish Pitale, J.
DATED : February 13, 2019.

By this writ petition, the petitioner has challenged order dated 27.06.2018 passed by the Court of Extra Joint District Judge, Nagpur (Appellate Court) in Regular Civil Appeal No.566 of 2012. The said order has been passed on an application that was moved by respondent no.2 who was an appellant before the appellate Court being a subsequent purchaser of the property from the original owner.

2. The petitioner herein had filed a suit which was decreed against the original owner as well as the respondent no.2 herein. The appeal was jointly filed by the respondent no.2 and the legal heir of the original owner. During the pendency of the appeal, the legal heir of the original owner died. In the these circumstances, the respondent no.2 moved an application under Order 22 Rule 10 of the Civil Procedure Code, 1908, seeking leave to continue the appeal. It is this application which has been allowed by

the impugned order passed by the appellate Court.

3. The learned counsel for the petitioner submits that there was no occasion for the respondent no.2 to have moved the said application because he was not only a party before the trial Court as defendant no.2 but he was also an appellant in the appeal pending before the appellate Court. According to the learned counsel, the respondent no.2, as per established position of law, was himself competent to maintain the appeal before the Appellate Court and that, therefore, the appellate Court erred in passing the impugned order.

4. The learned counsel appearing for the respondent no.2 firstly submitted that there was an alternative remedy for the petitioner to have filed an appeal under Order 43 Rule 1 (I) of the C.P.C. and that, therefore, the writ petition was not maintainable. On this basis, he submitted that the writ petition ought to be dismissed.

5. Although there might be an alternative remedy available to the petitioner, but since this Court has entertained the present writ petition, there would be no point in dismissing the petition on the ground of availability of alternative remedy. In any case, on merits it is difficult to understand as to why the respondent no.2 was required to file an application under Order 22 Rule 10 of the C.P.C. seeking leave to continue the appeal. This is particularly in the backdrop of the fact that the respondent no.2 himself is an appellant in the

pending appeal before the appellate Court. He was a party defendant in the trial court and being subsequent purchaser, whose sale deed has been cancelled by the decree passed by the trial Court, he is clearly an aggrieved party entitled to maintain the appeal before the appellate Court in his own right.

6. In fact, the appellate court in the impugned order has also specifically noted that the respondent no.2, as appellant no.2, has an independent right to challenge the judgment and decree passed by the trial Court. In these circumstances, it becomes evident that the application filed by the respondent no.2 for leave to continue the appeal, was wholly unnecessary and the appellate Court erred in allowing the same by passing the impugned order.

7. In the above circumstances, the impugned order is found to be without any merit and it deserves to be quashed and set aside. Accordingly, the writ petition is allowed and the impugned order is quashed and set aside. It is made clear that the respondent no.2 herein has independent right to maintain and pursue the appeal pending before the appellate Court.

JUDGE