

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

WRIT PETITION NO. 8040/2018

(KAILASH MOTILALJI KAKARANIYA **VERSUS** HARISHANKAR RATANLALJI AGRAWAL & OTHERS)

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

Court's or Judge's orders

Shri S.A. Mohta, counsel for petitioner.
 Shri A.S. Ambatkar, counsel for R-1.
 Mrs. R.S. Sirpurkar, counsel for R-2 & 3.

CORAM : A.S. CHANDURKAR, J.

DATE : JUNE 26, 2019.

Heard finally with consent of counsel for the parties.

The petitioner is the plaintiff who has filed suit for possession of property claimed to be purchased by him from the defendant no.1. The said plaintiff is arrayed as defendant no.4 in the suit for partition and separate possession which is Special Civil Suit No.17 of 2011 that has been filed by the respondent nos.2 and 3 herein.

In the suit filed by the petitioner, the defendant no.1 moved an application seeking stay of said suit under provisions of Section 10 of the Code of Civil Procedure, 1908 (for short, 'the Code') on the ground that the suit for partition and separate possession was pending in which the petitioner herein was arrayed as defendant no.4. It was stated that the issues framed in the subsequent suit were similar to the issues framed in the earlier suit and hence the subsequent suit was liable to be stayed. In the reply filed, the prayer was opposed. However, an alternate stand was taken that the suits should be consolidated for a common trial. The trial Court by the impugned order has allowed the application filed under Section 10 of the Code.

Shri S.A. Mohta, learned counsel for the petitioner submitted that in the suit for partition and separate possession, he was arrayed as defendant no.4. The sale-deed in his favour executed on 31.01.2002 was also the subject matter of challenge. In the suit filed by the petitioner, the petitioner was seeking possession of the property purchased by him by virtue of that sale-deed. Except the fact that the suit property was similar, the other requirements of Section 10 of the Code were not satisfied. According to him, the trial Court could have directed the consolidation of both the suits instead of staying the subsequent suit.

On the other hand, Shri A.S. Ambatkar, learned counsel for the respondent no.1 and Mrs. R.S. Sirpurkar, learned counsel for the respondent nos.2 and 3 supported the impugned order. According to them, since the petitioner was claiming right in one of the house properties and the suit for partition was pending, the subsequent suit was rightly stayed by the trial Court. Further, it was submitted by the learned counsel for the respondent no.1 by relying on the decision in *S.C. Jain Versus Bindeshwari Devi* [1997(42) DRJ 239] that the prayer for consolidation of both the suits ought to be made before the trial Court. No such request was made and hence that request cannot be considered in the present proceedings.

On hearing the learned counsel for the parties, it is seen that except the fact that the property purchased by the petitioner is also involved as one of the properties in the suit for partition and separate possession, the other requirements of Section 10 of the Code are not satisfied. In the suit filed by the respondent nos.2 and 3 herein, the question is with regard the prayer for partition while the relief sought by the petitioner is grant of possession based on

his sale-deed. The whole of the subject matter in both the suits was not identical. In the reply that was filed by the petitioner herein to the application moved by the respondent nos.2 and 3, a request was made for consolidating both the suits. Though such request can always be made before the trial Court, this request can also be considered in exercise of jurisdiction under Article 227 of the Constitution of India. It is found that consolidation of both the suits would save the time and effort of all the parties as well as of the Courts. I am therefore inclined to direct consolidation of both the suits after setting aside the order passed below Exhibit 60.

Accordingly, the order passed by the trial Court below Exhibit 60 on 12.09.2018 is set aside. Instead the proceedings in Special Civil Suit No.17 of 2011 as well as Special Civil Suit No.20 of 2014 are consolidated. The trial Court shall decide both the suits together in accordance with law. The observations made in this order shall not come in the way of either of the parties. The proceedings in both the suits are expedited.

The Writ Petition is disposed of in aforesaid terms. No costs.

JUDGE

APTE