

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

945 WRIT PETITION NO.4451 OF 2019

HASHMUDDIN NABIKHAN BAPUDE
VERSUS
PRABHAKAR LAXMANRAO AMBURE AND OTHERS

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Advocate for Petitioner : Mr. Sabnis Ameya N.
Advocate for Respondents : Mr. Dharashive M.L.
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CORAM : V. K. JADHAV, J.
DATE : 14.01.2020

PER COURT :-

1. Heard finally with consent at admission stage.
2. The respondents-plaintiffs have instituted the suit for perpetual injunction in respect of the road shown in the Nazari map marked as 'A,B,C' shown in red colour situated East-West direction between Gut Nos.42 and 43 situated at Wangjiwadi, Taluka Ausa. The Trial Court by judgment and decree dated 05.02.2013 has decreed in Regular Civil Suit No.472 of 2009 instituted by the respondents-plaintiffs and thereby restrained permanently, the petitioner-defendant from causing any obstruction to the respondents-plaintiffs in respect of the road shown in Nazari map marked as 'A,B,C' shown in red colour

situated East-West direction between Gut Nos.42 and 43. Being aggrieved by the same, the petitioner herein has preferred the Regular Civil Appeal No.63 of 2013 and the learned Adhoc District Judge, Latur by judgment and order dated 08.09.2015 allowed the said appeal and quashed and set aside the judgment and decree passed by the Trial Court dated 05.02.2013 in Regular Civil Suit No.472 of 2009. Being aggrieved by the same, the respondents-plaintiffs have preferred the Second Appeal No.163 of 2016, which is pending before this Court.

3. Meanwhile the respondents-plaintiffs have filed Regular Darkhast No.10 of 2013 for execution of the decree. This Court in Civil Application No.2223 of 2016 in Second Appeal No.163 of 2016 (Coram : N.W.Sambre, J.) by order dated 15.06.2017 admitted the appeal and stayed the judgment and decree of the Lower Appellate Court. Consequently, the respondents-plaintiffs / Decree Holder have filed an application Exh.16 before the Executing Court for police protection for removing the obstruction on suit way. By order dated 18.02.2019, Joint Civil Judge, Junior Division, Ausa, below Exh.16 has allowed the application and thereby directed

the Deputy Superintendent of Police, AUSA to provide police aid for removing obstruction on the disputed road mentioned in the decree passed in Regular Civil Suit No.472 of 2009 on depositing necessary fees as per rule. Being aggrieved by the same, the petitioner-original defendant has preferred this Writ Petition.

4. The learned counsel for the petitioner submits that the First Appellate Court has quashed and set aside the decree passed by the Trial Court and even if in the Second Appeal, this Court has stayed the effect of the said decree, First Appellate Court's order remained intact till it is set aside effectively by this Court in the Second Appeal and as such the judgment and decree passed by the Trial Court, which is quashed and set aside by the First Appellate Court would remain as it is. The learned counsel submits that in terms of the Doctrine of merger, only after the Appellate Court in the Second Appeal set aside the judgment and order passed by the First Appellate Court, the Doctrine of merger would be applicable. Only on the basis of the stay granted by this Court, the respondents-plaintiffs cannot execute the decree, which is quashed and set aside by the First Appellate Court and the judgment and order

passed by the First Appellate Court is still intact and the effect of that order is for time being and the effect of the said order has been stayed.

5. The learned counsel for the respondents-original plaintiffs submits that the disputed way is in existence since the time immemorable and there is no other cart way as an access to the land of respondents-plaintiffs. However, the petitioner-defendant has created the obstruction on the suit way and as such the police help is necessary to clear the way, which is only cart way access to the land of the respondents-plaintiffs. The learned counsel submits that in the Second Appeal in paragraph No.5, this Court has observed that it was expected from the Lower Appellate Court to respect the findings of the Trial Court on the issue of granting way and accordingly admitted the Second Appeal by staying the judgment and decree of the Lower Appellate Court. The learned counsel submits that there is no substance in the Writ Petition and the order passed below Exh.16 by the Executing Court may not be entertained.

6. It is true that the First Appellate Court has quashed and set aside the judgment and decree passed by the Trial Court. However, the judgment and decree passed by the Lower Appellate Court has been stayed by this Court by admitting the Second Appeal. In paragraph No.5, this Court has specifically made the observations that the Lower Appellate Court should have given respect to the findings of the Trial Court in respect of the issue of granting way. In terms of the provisions of Section 144 of the Civil Procedure Code, where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed decree or order shall, on the application any party entitled in any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified.

7. In the instant case, if the Second Appeal is decided in favour of the petitioner, the petitioner can take recourse to the

provisions of Section 144 of the Civil Procedure Code. However, in the light of the observations made by this Court in paragraph No.5 of the order dated 15.06.2017 passed in Civil Application No.2223 of 2016 in Second appeal No.163 of 2016 staying the judgment and decree passed by the Lower Appellate Court after admitting the matter and further the fact that the suit way is the only access by way of cart way to the land of the respondents-plaintiffs, I am inclined to confirm the order passed by Executing Court. The learned counsel placed his reliance in a case ***Kunhayammed and others Vs. State of Kerala and another reported in (2000) 6 SCC 359***, wherein the Doctrine of merger is elaborately discussed by the Supreme Court. The Supreme Court had made the following observations in paragraph Nos.7, 12 and 44(i) and (iii) :

“7. The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.

12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then though the decree or order under challenge

continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way – whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

44. To sum up, our conclusions are :

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.”

In terms of the ratio laid down by the Supreme Court, considering the content / subject-matter of the challenge in this Writ Petition, I am inclined to confirm the order passed by

the Executing Court for granting police protection to the respondents to clear the obstruction on the suit way, which is only cart way access to the suit land.

8. At this stage, the learned counsel submits that the interim order passed by this Court may be continued for four weeks so as to enable the petitioner to approach the Supreme Court. However, in view of the order passed by this Court in the Civil Application in the pending Second Appeal, I am not inclined to continue the interim order passed by this Court in the Writ Petition for another four weeks.

9. Hence, I proceed to pass the following order :

ORDER

The Writ Petition is hereby dismissed and accordingly disposed off.

(V. K. JADHAV, J.)

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vmk/-