

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

WRIT PETITION NO. 7970 OF 2019

Shri. Satish s/o Shivchand Bhandari

vs.

Maroti s/o. Govindrao Chandel and others

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

Court's or Judge's orders

Shri. Amol S. Deshpande, counsel for the petitioner.
Shri. A. M. Ghare, counsel for the respondent Nos.1 to 3 & 5 to 7.
Shri. H. S. Chawhan for respondent No.8.

CORAM : MANISH PITALE J.

DATED : 10/08/2020

Hearing was conducted through Video Conferencing and the learned counsel agreed that the audio and visual quality was proper.

(2) By this writ petition the petitioner (original defendant No.18) has challenged order dated 10/12/2018 passed by the Court of Civil Judge Senior Division, Pusad contending that in the face of an application filed by the petitioner and the respondent No.8 herein (original defendant No.11) seeking transposition as plaintiffs, withdrawal of the suit filed by the respondent Nos.1 to 3 (original plaintiffs) could not have been permitted, without passing any orders on the said application at Exh.70.

(3) It is relevant to note here that on earlier occasion two writ petitions had been filed pertaining to the very same subject matter which were dismissed by this Court by order dated 13/08/2019 passed in Writ Petition Nos.277/2019 and 594/2019. The petitioner herein was petitioner in Writ Petition 277/2019 and a perusal of the said order passed by this Court shows that it was found that the said writ petitions filed earlier had led to confusion before this Court, as the facts were not stated with clarity and therefore, the writ petitions were dismissed with liberty to the petitioners therein to institute a proper writ petition. The petitioners, including the petitioner herein were directed to pay costs of Rs.3000/- each, to the respondent Nos. 5 to 7.

(4) It is in this backdrop that the present writ petition has been filed. This Court noted in the order dated 06/12/2019 while issuing notice that the application for transposition filed at Exh.70 was being prosecuted only by the petitioner herein (original defendant No.18) and the respondent No.8 (original defendant No.11). Therefore, this Court is proceeding on the basis that it is only these two defendants who are interested in being transposed as plaintiffs in the suit that was originally filed by the respondent Nos. 1 to 3 herein. Considering the nature of submissions made by the rival parties before this Court, it is not necessary to refer to the facts leading upto filing of the present writ

petition and it would sufficient to refer to the impugned order and to the relevant provisions of law.

(5) A perusal of the impugned order shows that the Court below has taken note of the fact that application at Exh.70 seeking transposition of certain defendants as plaintiffs has been filed and that it was being pressed before the Court below. The impugned order also shows that a pursis at Exh.69 filed on behalf of the plaintiffs (respondent Nos. 1 to 3 herein) seeking withdrawal of the suit was also taken up for consideration. Although the learned counsel appearing on behalf of the applicants in the application at Exh.70 was pressing for orders on the said application, the Court below found that it was not necessary to give next date in the matter, because the plaintiffs (respondent Nos.1 to 3) desired to withdraw the suit itself. Under such circumstances, the Court below, by the impugned order, disposed of the suit as withdrawn in the light of Exh.69 placed on record.

(6) According to the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent No.8 herein, the Court below ought to have taken into consideration the provisions of Order 1 Rule 10 r/w. Order 23 Rule 1A of the Civil Procedure Code (CPC) to decide the application at Exh.70, instead of passing the impugned order thereby permitting withdrawal of the suit itself. According to the learned counsel appearing for the petitioner and respondent

No.8, grave prejudice has been caused to the said parties as the application at Exh.70 was not decided by the Court below while passing the impugned order.

(7) The learned counsel appearing for respondent Nos.1 to 3 and 5 to 7 submitted that the writ petition is itself wholly misplaced and ill-advised because the petitioner as well as respondent No.8 cannot have any grievance in so far as the impugned order is concerned. By inviting attention to Order 23 Rule 1A of the CPC, the learned counsel for the said respondents submitted that it was only upon withdrawal or abandonment of a suit that an application in the nature of the application filed at Exh.70 could be considered on the parameters specified in the said provision. It was submitted that there was nothing to show that any adverse order had been passed against the petitioner in the present case and therefore, the writ petition deserved to be dismissed. It was further strenuously urged that the petitioner had failed to pay the amount of costs as specifically directed by this Court while dismissing his earlier writ petition and that therefore, on this ground also, the writ petition deserved to be dismissed. It was further pointed out that by filing the earlier writ petition and the present writ petition, the petitioner had been effectively enjoying interim order in respect of the entire land to the extent of 4 Hectares 48 R purchased by respondent Nos. 5 to 7, by obtaining an order of restraint against the said respondents, even though

at best the petitioner or even the respondent No.8 could have claimed interim protection only to the extent of their share, if at all, in the property in question. On this basis, it was submitted that the writ petition deserved to be dismissed with costs.

(8) Having considered the contentions raised on behalf of the rival parties and upon perusal of the impugned order, as well as relevant provisions of law, there appears to be substance in the contentions raised on behalf of the respondent Nos.1 to 3 and 5 to 7, that the petitioner as well as respondent No.8 can still pursue their application filed at Exh.70 and that the impugned order would not come in their way in prosecuting such an application. A perusal of Order 23 Rule 1A of the CPC would show that where suit is withdrawn or abandoned and a defendant applies for being transposed as a plaintiff under Order 1 Rule 10 of the CPC, the court is expected to consider such an application by examining as to whether the applicant has a substantial question to be decided as against other defendants.

(9) In the present case, the Court below is yet to apply its mind to the aforesaid aspect of the matter and the statutory mandate is yet to be put into operation by consideration of the application at Exh.70 and its disposal in accordance with law. A perusal of the impugned order shows that the Court below has permitted withdrawal of the suit in view of Exh.69 filed on behalf of the original plaintiffs (respondent Nos. 1 to

3 herein) and the filing of application for transposition at Exh.70 has been noticed. Therefore, the Court below is yet to apply its mind and to dispose of the said application at Exh.70, which the Court necessarily needs to decide in accordance with law.

(10) It cannot lie in the mouth of the petitioner or even in the respondent No.8 that the suit could not have been permitted to be withdrawn without first passing an order on the application at Exh.70. This would not be in accordance with the statutory mandate. Therefore, it cannot be said that the Court below has committed an error in passing the impugned order. Yet, there cannot be any doubt about the fact that the original defendants No.11 and 18 (respondent No.8 and petitioner herein) deserve consideration of the application at Exh.70 on merits and in accordance with law.

(11) In so far as non-payment of costs is concerned, this Court is of the opinion that the writ petition ought not to be dismissed simplicitor on that ground. Yet appropriate direction needs to be given to the petitioner for paying enhanced costs to respondent Nos. 5 to 7, in view of the failure of the petitioner to deposit costs in terms of the order passed by this Court in earlier writ petition filed by him. The extent of the interim order granted by this Court on 06/12/2019 also needs to be suitably modified. In view of the above, the writ petition is disposed of in the following terms :-

(A) This Court is of the opinion that no error can be attributed to the Court below in passing the impugned order while merely permitting withdrawal of the suit on the basis of Exh.69 filed on behalf of the original plaintiffs.

(B) The Court below necessarily needs to consider the application at Exh.70, which is now being prosecuted only by original defendants No.11 and 18 i.e. petitioner and respondent No.8 in the present writ petition. Accordingly, the Court below is directed to forthwith take up the said application at Exh.70 to pass appropriate orders in terms of the statutory mandate manifested in Order 1 Rule 10 r/w. Order 23 Rule 1A of the CPC. Needless to say the contesting respondents herein will be entitled to oppose such application in accordance with law.

(C) The petitioner shall pay costs of Rs.6000/- each to respondent Nos.5 to 7 herein within a period of **02 weeks** from today. If the said respondents refuse to accept the said amount, the petitioner shall deposit the said amount before the Court below within a period of **02 weeks** from today.

(D) The Court below shall take up the application at Exh.70 for consideration only after such amount of costs have been paid/deposited by

the petitioner within the aforesaid period. Needless to say failure to pay/deposit the aforesaid amount of costs shall result in rejection of application at Exh.70.

(E) The Court below shall take up the application at Exh.70 for consideration and dispose of the same within a period of **06 weeks** from today.

(F) The interim order passed by this Court dated 06/12/2019 to the effect that the respondent Nos.5 to 7 shall not create any third party rights in the suit property is modified and it is directed that the respondent Nos. 5 to 7 shall not create third party rights in the suit property only to the extent of the combined share of original defendants No.11 and 18, which roughly comes to about 5688 Sqft., during the pendency of the application at Exh.70.

(12) The writ petition is disposed of in above terms.

JUDGE