

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

926 WRIT PETITION NO.9040 OF 2021

BABURAO SAMBHAJI SHELKE AND ANOTHER

VERSUS

SAMBHAJI BALAJI PURI AND ANOTHER

...

Advocate for Petitioners : Mr. Salunke Sudarshan J

CORAM : MANGESH S. PATIL, J.

DATE : 21.08.2021.

PER COURT :

Heard learned advocate Mr. Salunke for the petitioner. The petitioners are the original defendants impugning the order passed by the learned Civil Judge on the plaint (Exh.1) directing that since a leave to prosecute the suit in a representative capacity was granted as contemplated under Order I Rule 8 of the Code of Civil Procedure by the order dated 11.10.2013, a public notice was never issued and therefore it was directed to issue such a public notice.

2. The learned advocate for the petitioners would submit that after a lapse of about seven years that for the first time such a direction is issued by the learned Judge. The suit is awaiting decision for years together. It has reached the final stage and at that stage the impugned order has been passed which has the effect of setting the clock back. He would submit that the petitioners are asserting their right, title and possession over the disputed property which is under a clog because of the pendency of the suit. Any delay in decision is likely to cause them serious prejudice and there was no reason why the learned Judge now should become active in directing a

procedure to be followed under Order I Rule 8(1) of the Code of Civil Procedure.

3. I have considered the submission, perused the impugned order and the papers.

4. It is apparent that the respondents who are the original plaintiffs have filed the suit with a prayer to restrain the petitioners from obstructing use of the disputed property as a burial ground/cremation of a Gosavi Samaj. Obviously, considering the nature of the dispute which is likely to affect all the persons from that community, a leave was sought and granted to prosecute the suit in a representative capacity as is contemplated under Order I Rule 8 of the Code of Civil Procedure by the order dated 11.10.2013.

5. If such was the state of affairs, mere granting of leave was not contemplated and was not sufficient. Over and above the provision requires a public notice to be issued so that any person interested in the suit may come forward and participate.

6. There is one more aspect which needs to be borne in mind, though the defect does not go to the root of maintainability of the suit which can still be decided as it is, but the judgment would operate in personam and would only bind the parties to the suit. If the suit is allowed to be prosecuted by following the procedure as is contemplated under Order I Rule 8 of the Code of Civil Procedure, the decision in the suit would be a judgment in rem and would bind the whole world.

7. This is what precisely seems to be the reason, though it has not been spelt out in so many words, while passing the impugned order. Once having granted a leave to prosecute the suit in a representative capacity, it was not only the duty of the respondent/plaintiffs but even the Court ought to have taken cognizance of the lapse. In any event, the impugned order only seeks to set right the irregularity which taking into account the facts and

circumstances is a step in the right direction albeit taken belatedly.

8. Considering the aforementioned facts and circumstances and the law, in my considered view there is no illegality in the order passed by the learned Judge.

9. The Writ Petition is dismissed in *limine*.

(MANGESH S. PATIL, J.)

mkd/-