

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION (CIVIL) NO.62 OF 2021
IN
WRIT PETITION NO.4612 OF 2021
(Sangita Kailas Ambre Vs. The Tahsildar and others)
AND
CIVIL APPLICATION NO.11027 OF 2021
IN
WRIT PETITION NO.4612 OF 2021
(Sulochana Laxman Navale and another Vs. The Tahsildar and others)

Mr. Satyajeet S. Dixit, Advocate for the applicants
Mr. Y.G. Gujrathi, A.G.P for the respondent/State
Mr. V.Y. Bhide, Advocate for the petitioner in writ petition

CORAM : MANGESH S. PATIL, J.

DATE : 11.10.2021

PER COURT :

Heard both the sides finally.

2. A decree for partition and separate possession, to which the petitioner from the writ petition is defendant No.7, is under challenge before the District Court in an appeal preferred by him. By moving application, purportedly under Order XLI Rule 5 of the Code of Civil Procedure, he prayed for stay to the execution of the decree. By the order, which is impugned in the writ petition, the learned District Judge inter alia directed the petitioner to furnish a security equivalent to the valuation of the suit property determined by the Sub-Registrar of Sangamner to be

furnished within 15 days as a condition precedent for staying the execution.

3. Being aggrieved and dissatisfied by such condition, the petitioner preferred this writ petition. By the order dated 06.04.2021, notices were directed to be issued to respondent Nos.1 to 3 i.e. original plaintiffs (respondent Nos.2 and 3) and the concerned Tahsildar (respondent No.1). It appears that after hearing both the sides, my esteemed predecessor decided the writ petition by the judgment and order dated 03.07.2021. He allowed the writ petition, quashed and set aside the impugned condition of furnishing security equivalent to the amount of valuation of the suit property and further directed the petitioner not to create any third party interest in the suit property.

4. Civil Application No.11027/2021 is filed by respondent Nos.2 and 3 i.e. original plaintiffs contending that in fact, after hearing both the sides on the point of interim relief, instead of granting interim relief, my esteemed predecessor decided the writ petition itself. They would further submit that even orally a notice was directed to be issued to respondent No.5, who is the original defendant No.2, who has filed Review Application (Civil) No.62/2021, which is being decided simultaneously with this application. However, when the order was uploaded, respondent Nos. 2 and 3 came to know about final decision in the writ petition. By their Civil Application No.11027/2021, they pray to recall the order.

5. The original defendant No.2 i.e. respondent No.5 in the writ petition has filed Review Application contending that though she is a defendant in the suit, it is a decree for general partition, which has declared her to be entitled to receive 1/6th share in the suit property. Therefore, though she was defendant in the suit, she was also equally interested alongwith the plaintiffs to have it executed and her share to be separated by metes and bounds. It was, therefore, imperative that she ought to have been extended an opportunity of being heard before deciding the writ petition. The decision in the writ petition in her absence is improper and gives her a right to seek its review.

6. The learned Advocate for respondent Nos.2 and 3 vehemently submits that whatever has been mentioned by respondent Nos.2 and 3 in their application were the actual happenings that had taken place during hearing of the writ petition on the point of grant or otherwise of interim relief. They were not put to any notice that the matter was to be heard and decided finally at that stage itself. They are, therefore, entitled to seek recall of the order and decision of the writ petition afresh.

7. So far as the application for review of respondent No.5 is concerned, he would, by referring to the decision in the case of ***Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. and another; (2005) 13 SCC 777***, submit that respondent No.5 is seeking review, which is a procedural review and not strictly in accordance with

Order XLVII of the Code of Civil Procedure. She ought to have been served with a notice of petition and no order could have been passed affecting her interest behind her back. Since the writ petition has been decided *ex parte* qua her, she is entitled to seek a review.

8. So far as merits of the writ petition are concerned, the learned Advocate for respondent No.5 would submit that no error or illegality was committed by the Appellate Court in insisting for a security to the tune of valuation of such property in view of specific provision under Order XLI Rule 1(3) and Order XLI Rule 5(3) of the Code of Civil Procedure. It is a matter of discretion of the Appellate Court to decide as to what could be the security for due performance of a decree. If the Appellate Court has come to a reasonable conclusion that deposit of the valuation of the suit property as the adequate security, there was no perversity or arbitrariness and this Court cannot intervene.

9. Mr. Bhide, learned Advocate for the petitioner in writ petition would strongly oppose both the applications. He would submit that as far as the application by original respondent Nos.2 and 3 is concerned, they had made an attempt to tender this application and to solicit an order from the selfsame judge. Since the court expressly refused to entertain that application, there is no question of recalling that order now. The remedy of challenge to the order is available to respondent Nos.2 and 3. Instead they are now seeking to recall the order without intending to prefer any

review.

10. As far as the review application of respondent No.5 is concerned, learned Advocate Mr. Bhide would submit that in fact, she is not a necessary party to the writ petition. The petitioner is challenging the order passed on his application. She had not put any demur by filing any say. Even the Appellate Court had decided the application in her absence. Consequently there is no error in this Court deciding the writ petition even in her absence. It is respondent Nos.2 and 3 who are the original plaintiffs, who alone had contested the application of the petitioner under Order XLI Rule 5 of the C.P.C. and after hearing the petitioner and them that the order which is impugned in the writ petition was passed. Respondent No.5 was nowhere in the picture.

11. Learned Advocate Mr. Bhide would further submit that filing of such review application is nothing but an indirect attempt by the original plaintiffs to question the decision of this court. They cannot be permitted to do this. They are merely taking a chance to somehow create some obstacle.

12. I have carefully gone through the papers and perused the impugned order. So far as the application for recalling the order passed by my learned predecessor is concerned, suffice for the purpose to observe that since it is an order, which has been passed after hearing them, any submission in the application mentioning something inconsistent with the

observations in the order is liable to be discarded at the threshold. When this court, by passing the order, has specifically mentioned that after hearing both the sides that the order was being passed, the party cannot be allowed to put forth any ground much less to recall that order. Conspicuously, respondent Nos. 2 and 3 are not seeking any review of the order and merely pray to recall it for the ground mentioned therein. In my considered view, they are not entitled to put forth any such ground to recall the order which they can challenge before the Supreme Court.

13. So far as the review application is concerned, admittedly respondent No.5, who has filed this application, was defendant No.2 before the trial court. As can be seen from the order, which is impugned in the writ petition, it was an order passed on an application filed by the petitioner. She had never raised any objection. It is respondent Nos.2 and 3 who were the plaintiffs. They alone had put opposition.

14. Apart from that, it is important to note that though she is now putting up her own case by way of review application, there is every room to believe that she is acting hand in gloves with the original plaintiffs else there could not have been a common appearance. Learned Advocate Mr. Dixit who appears for the original plaintiffs/respondent Nos.2 and 3, who have filed Civil Application No.11027/2021 for recalling the order, is the Advocate who also represents respondent No.5/original defendant No.2, who is now seeking review of the order. It is even for this reason, in my

considered view, she is not entitled to seek any review putting a ground that she is merely asking for a procedural review as is contemplated in the case of *Kapra Mazdoor Ekta Union* (supra).

15. Even, if for the sake of arguments, it is assumed that she is entitled to seek a procedural review, still the impugned order passed by the learned Judge of the Appellate Court being ex facie erroneous and arbitrary inasmuch as it seeks the petitioner to furnish a security in the form of deposit of money to the extent of valuation of the suit property, the discretion cannot be said to have been exercised by him judiciously. One cannot gather as to how such deposit of money would secure a decree for partition.

16. Considering all the aforementioned facts and circumstances, I find no merit in the application of respondent Nos.2 and 3 and the review application of respondent No.5. Both are dismissed.

[MANGESH S. PATIL]
JUDGE