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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10168 OF 2019

SHASHIKANT DASRAO PHATAK ..PETITIONER
VS.
VISHAL PARMESHWAR GADEKAR ..RESPONDENT

Mr. Vilas B. Tapkir for petitioner.
None for respondent.

CORAM : M. S. KARNIK, J.

DATE : DECEMBER 8, 2021

P.C. :

On 1/10/2019, this Court passed the following order:-

"P.C. :

1. Not on board. Taken on board.
2. Heard learned counsel for the petitioner.
3. The petitioner to serve the respondent by Advocate's notice along with the copy of this order informing the respondent that the Petition would be heard on 8/11/2019. It is made clear that an endeavour would be made to dispose of the Petition finally on 8/11/2019.
4. In the event, the respondent fails to appear despite service of Advocate's notice, the Petition would be heard on its own merits even in the absence of the respondent.
5. The Petitioner to file an affidavit of service before the returnable date.
6. List the petition on 8/11/2019."

Thereafter, on 7/12/2021 the following order came to be passed:-

P.C.

By the order dated 01/10/2019 in paragraph 4, it is mentioned that in the event, the respondent fails to appear despite service of advocate's notice, the petition would be heard on its own merits even in the absence of the respondents. An affidavit of service is duly filed. There is no appearance on behalf of the respondent. In this view of the matter, I have heard learned Counsel for the petitioner on merits. Only by way of indulgence, list the matter on 08/12/2021. If there is no appearance on behalf of respondent on 08/12/2021, this Court will be constrained to pass appropriate order upon hearing the petitioner.

2. Despite service of notice there is no appearance on behalf of the respondent.
3. Heard learned counsel for the petitioner.
4. The suit is filed by the petitioner – plaintiff for declaration that the sale deed dated 30/8/2010 executed in favour of the defendant is null and void. It is the contention of the petitioner that the possession of the property was never handed over to the defendant and moreover, the defendant failed to pay the consideration as agreed. The defendant filed the written statement. It is stated by the defendant that the defendant has sold the suit property to third parties and the same is in their respective possession. The specific contention is that the third party purchasers are not made party to the suit and hence the suit must fail on account of non-joinder of the necessary parties.

5. The application (Exhibit 33) was therefore filed under Order 1 Rule 10 (2) of the Code of Civil Procedure for impleadment of the necessary parties. The trial Court rejected the application vide order dated 28/1/2019.

6. There is no appearance on behalf of the respondent to contest this writ petition despite service. In my opinion, the impugned order calls for interference. The written statement filed by the defendant clearly states that the property has been sold by the defendant to the third parties and they are put in possession. Though the plaintiff has stated that he is in possession, even the defendant is claiming that the possession was with him and now the possession has been handed over to third parties. The trial Court therefore committed an error in proceeding on the footing that as according to the plaintiff the suit property is in possession, it is not necessary to implead third parties. Furthermore, the defendant has categorically stated in his written statement that the properties are alienated. In the application for impleadment the plaintiff has clearly listed the names of the third parties to whom the properties are

sold by the defendant. The plaintiff being *Dominus Litus*, in the present facts the trial Court was not justified in rejection of the application (Exhibit 33). No prejudice is caused to the defendant.

7. The impugned order is set aside.

8. The application (Exhibit 33) is allowed. Consequential amendments to be carried out by the plaintiffs within two weeks from 13/12/2021.

9. The plaintiff to produce the copy of this order before learned trial Judge.

10. The writ petition is disposed of.

(M. S. KARNIK, J.)