

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

WRIT PETITION NO.7530 OF 2019

Shri Manoj Yashwant Gawande and others
Vs.
Prabhakar s/o Dayaram Neware and another

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

Court's or Judge's orders

Mr. Omkar R. Deshpande, Advocate for petitioners.

Mr. C. S. Dhore, Advocate h/f Mr. A. S. Dhore, Advocate for respondents.

CORAM : AVINASH G. GHAROTE, J.
DATE : 03/12/2021

Heard Mr. Deshpande, learned counsel for petitioners and Mr. C. S. Dhore, learned counsel holding for Mr. A. S. Dhore, Advocate for the respondents.

2. The application filed under Section 10 of the CPC by the present petitioners, who are the defendants in RCS No.38 of 2019 for stay of the suit, has been rejected by the impugned order dated 04.10.2019. Mr. Deshpande, learned counsel for the petitioners submits that RCS No.35 of 2012 (Sandeep Yashwantrao Gawande Vs. Chandarrao Raoso Khomne and others), for declaration and permanent injunction, was filed by the petitioner on 20.03.2012, claiming that the property in question was an ancestral property, and therefore, the petitioner/plaintiff therein was entitled to retain possession of the suit land and to enjoy it.

3. Subsequently, the suit property came to be sold by Chandarrao Raoso Khomne the defendant No.1 in RCS No.35 of 2012, in favour of Prabhakar Dayaram Neware and Felix Prabhakar Neware by virtue of three sale deeds, two dated 06.03.2019 and one dated 07.03.2019, on the basis of which, Prabhakar and Felix, filed RCS No. 38 of 2019 for injunction, claiming that they were entitled to retain possession of the property purchased by them under the aforesaid sale deeds. In this suit a defence (which is the plea in the plaint in RCS No. 35 of 2012) has been raised that the property was the ancestral property, was in possession of the petitioner/defendant in RCS No.38 of 2019, and therefore, the sale deed was not legal and binding. Mr. Deshpande, learned counsel for the petitioners contends that considering the pleas raised in both the suits regarding the nature of the property, and the possession thereto, the pleas in both the suits were identical and since the plaintiffs in RCS No.38 of 2019 were claiming through the defendant No.1 in RCS 35 of 2012, and what was required to be decided in the both the suits was identical, RCS No.38 of 2019 being later in point of time was required to be stayed. He submits that this position has been totally lost sight of by the learned Trial Court merely by stating that the issues involved would be different without considering the nature of pleas raised and what was required to be determined in both the suits. He therefore, submits that the impugned order cannot be sustained and was required to be quashed and set aside.

4. Mr. Dhore, learned counsel for the respondents submits that the prayer made in the later suit bearing RCS No.38 of 2019, and the one made in the previous suit were different, and therefore, there was no identity of the subject matter, and therefore, Section 10 of CPC was not attracted, for which, reliance is placed on *Aspi Jal and another vs. Khushroo Rustom Dadyburjor*, (2013) 4 SCC 333.

5. A perusal of the plaint in RCS No.35 of 2012, indicates that the Court therein is required to determine the nature of the suit property whether it was ancestral or otherwise, the answer to which would determine the legality and validity of the sale deeds executed by the defendant No.1 in RCS No.35 of 2012, in favour of the plaintiffs in RCS No.38 of 2019. So also, the issue of possession in respect of which, counter claims are being made by the parties will also have to be decided in RCS No.35 of 2012 in which, the plaintiff/petitioner claims to be in possession of the suit property, whereas in RCS No.38 of 2019 the plaintiff/respondent claims to be in possession of the suit property on the basis of the sale deeds dated 06.03.2019 and 07.03.2019. The basic requirement for applicability of a plea under Section 10 of CPC would be whether the findings rendered in the earlier suit, would act as *res judicata* in the subsequent suit and considering what has been said above, regarding the reliefs claimed in both the suits, in my considered opinion, they would, as it is not a case that the plaintiffs in RCS No.38 of 2019, are

claiming any independent right in the suit property, rather, they are claiming through and under the defendant No.1 in RCS No.35 of 2012. For this reason also *Aspi Jal and another* (supra) is not applicable on the facts of the matter.

6. Considering this, the impugned order passed by the learned Trial Court cannot be sustained. The same is hereby quashed and set aside.

7. The application below Exh.27 is allowed. The petition is accordingly allowed, in the above terms. No costs.

JUDGE

Sarkate