

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

WRIT PETITION NO.2297 OF 2014

Shri Sunil Shatrughna Mishra
 Aged about 44 years, Occ: Business,
 R/o Plot No.63, Swami Colony, Near
 Friends Colony, Katol Road, Nagpur.

...PETITIONER

---VERSUS---

1. Shri Prakash s/o Marotrao Yelekar
 Aged about 43 years, Occ: Business

2. Shri Deepak s/o Marotrao Yelekar
 (deceased) through LRs

...RESPONDENTS

2(a) Smt. Sandhya wd/o Deepak Yelekar

2(b) Sau. Manish w/o Akash Lende

2(c) Parag s/o Deepak Yelekar

2(d) Bhushan s/o Deepak Yelekar
 All R/o Plot No.67, Jaiwant Bhawan, Bajaj
 Nagar, Nagpur.

3. Smt. Jaiwantabai Wd/o Marotrao Yelakar
 Aged about 78 years, Occ: Household

Dismissed in default
 against respondent
 nos.3 and 4 vide
 order dated
 18.12.2015.

4. Shri Arun s/o Marotrao Yelekar
 Aged about 43 years, Occ: Business

5. Shri Ramesh s/o Marotrao Yelekar
 Aged about 43 years, Occ: Business,
 Respondent nos.3 to 5 R/o Resident of
 Plot No.67, Jaiwant Bhavan, Bajaj Nagar,
 Nagpur

6. Smt. Pushpa W/o Suresh Bhoyar
Aged about 43 years, Occ: Household
R/o 77-A, Bank Colony, Old Subedar
Layout, Nagpur.

Shri AA. Naik Advocate for the petitioner.
Shri K.B. Ambilwade, Advocate for respondent no.2.

CORAM : AMIT BORKAR, J.
DATED : SEPTEMBER 12, 2022.

ORAL JUDGMENT :

1. On 27.04.2011, respondent no.3 executed a registered sale deed in respect of suit property in favour of the petitioner and another person, Sangit Ashok Chavhan. Respondent no.2 has filed a present suit bearing Regular Civil Suit No.371/2011. Prayers in the present suit are as under:

(i) "It is, therefore, prayed that this Hon'ble Court be kindly pleased to declare that any transaction in respect of the property very specifically disclosed in para 11 Schedule of Property for alienation, disposal of the property or agreement executing by Defendants 1 to 4 in favour of Defendant No.5 be declared as illegal, null and void.

(ii) It is further prayed that the Defendants their agents, servants or anybody on their behalf be restrained from entering into agreement and further to alienate the property.

(iii) It is further prayed that the Defendants 1 to 4 be restrained permanently to alienate the property very specifically disclosed in para 11 Schedule of property.

(iv) It is further prayed that all the transactions in respect of the suit property to be declared as illegal, null and void

and the Defendants be permanently restrained from disposing off the property or creating third party interest over the suit property.

(v) Cost of the proceedings also to be saddled upon the Defendants throughout.

(vi) Any other relief as this Hon'ble Court deems fit and proper under these circumstances be granted."

2. During the pendency of the present suit, respondent no.5 has filed Special Civil Suit No.598/2011 seeking partition, cancellation of sale deed, declaration, and permanent and mandatory injunction in relation to the suit property. Therefore, the suit property in both suits is the same. The plaintiffs, i.e. respondents nos.1 and 2, are the defendant nos.3 and 4 in the subsequent suit filed by respondent no.5. In the said suit, defendants nos.3 and 4, i.e. plaintiffs in Special Civil Suit No.598/2011, have filed a counterclaim. Prayers in the counterclaim are as under:

"It is, therefore, prayed that this Hon'ble Court be pleased to declare that the Defendants 3 & 4 has got 1/3rd share i.e. 1/6th share each in the property very specifically disclosed in the schedule of property.

(ii) It is further prayed that the sale deed executed by Defendant no.1 in favour of Defendants 6&7 also to be declared as illegal, null and void.

(iii) It is further prayed that perpetual injunction be granted against Defendants 1,2,5,6&7 from entering into the property either by themselves, by their agents,

servants or any other person on their behalf.

(iv) It is further prayed that Defendants 1,2,5,6 & 7 be restrained from disturbing the possession of the Defendants 3 &4 over the suit property.

(v) It is further prayed that Defendants 6&7 be restrained from demolishing the suit property till the decision of the suit.

(vi) It is further prayed Defendants 6 & 7 be restrained from creating any third party interest in the suit property.

(vii) Cost of this proceedings be saddled upon the Defendants 1,2,5,6&7.

(viii) Any other relief as this Hon'ble Court deems fit and proper under these circumstances be granted."

3. On perusal of both the prayers, i.e. prayers in Regular Civil Suit No.371/2011 and a counterclaim filed by respondents nos.1 and 2, it appears that both the prayers have a similar effect. The only difference is that in the suit, prayer (i) is prior to transaction sale and prayer (ii) in the counterclaim is after the sale of the disputed property.

4. The petitioner, therefore, filed an application before the trial Court for dismissal of Regular Civil Suit No.371/2011, stating that the respondent nos.1 and 2 had filed a counterclaim for the same prayers, which are one and same with Regular Civil Suit No.371/2011, respondent nos.1 and 2's suit bearing Regular Civil Suit No.371/2011 deserves to be dismissed. However, the said application has been rejected by the impugned order. The

petitioner has therefore challenged the order by the present petition.

5. This Court issued Rule on 23.02.2016.

6. Shri Naik, learned advocate for the petitioner, submitted that the relief prayed in Regular Civil Suit No.371/2011 is similar to the counterclaim filed in Special Civil Suit No.598/2011; either Regular Civil Suit No.371/2011 will have to be dismissed or the respondent nos.1 and 2 will have to elect which proceedings they want to continue. He relied on the Apex Court's judgment in the case of **Shipping Corporation of India Ltd Vs. Machado Brothers and others**¹ to urge that such an application can be filed under Section 151 of the Code of Civil Procedure (for short, '**CPC**').

7. *Per contra*, Shri Ambilwade learned advocate for respondent no.2 submitted in the absence of specific mention of the provision in the application before the trial Court that such an application was not maintainable. Therefore, according to him, the proper course for the petitioner was to file an application under Section 9A or Order VII Rule 11 of the CPC, as those are the only provisions under which the Civil Court can dismiss the suit. According to him, therefore, the application has rightly been dismissed by the trial Court.

1 (2004) 11 SCC 168

8. Having carefully considered the submissions and perusing the plaint in Regular Civil Suit No.371/2011 and Special Civil Suit No.598/2011 and particular counterclaim filed therein, it appears that prayers in the suit and counterclaim are repugnant and inconsistent. Accordingly, after having been satisfied with the fact that the prayers and suit and counterclaim are repugnant and inconsistent, in my opinion, the 'Doctrine of Election' would be applicable.

9. I, therefore, called upon the learned advocate for respondent no.2 to elect between the continuation of suit or counterclaim. According to him, his clients, i.e. respondents nos.1 and 2, are interested in prosecuting Regular Civil Suit No.371/2011. Therefore, in that view of the matter, all further proceedings in relation to the counterclaim filed by the respondent nos.1 and 2 in Special Civil Suit No.598/2011 will have to be stayed till the final decision in Regular Civil Suit No.371/2011. I, therefore, pass the following orders:

- i. The impugned order dated 24.02.2014 passed in Regular Civil Suit No.371/2011 below Exhibit-57 is modified by directing that the proceedings in Regular Civil Suit No.371/2011 may proceed in accordance with the law. However, all further proceedings in a counterclaim filed by

respondents nos.1 and 2 in Special Civil Suit No.598/2011 shall remain stayed till the final adjudication on Regular Civil Suit No.371/2011.

ii. With this clarification, the writ petition stands disposed of.

Rule is made absolute in the above terms. No costs. Pending civil application (s), if any, stand disposed of.

JUDGE

Wagh