

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10342 OF 2019

Shri. Mishrilal Surajmal Jain
Deceased and others

...Petitioners
[Orig. Defendants]

Versus

Shri. Dongarsingh Ambarsing Girase
Deceased through legal representative
Shri. Navalsing Dongarsing Girase

...Respondent
[Orig. Plaintiff]

Mr. Mukul Kulkarni, Advocate for the petitioners.
Mr. Shailesh Brahme, Advocate for the respondent.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 10th MARCH, 2023

ORDER :

1. Being aggrieved by impugned order dated 19.03.2019, passed by Civil Judge, Senior Division, Shahada, District- Nandurbar, below Exhibit-107 in Regular Civil Suit No. 12/2007, defendant/petitioners are before this Court.

2. A decree was passed against the respondent- Dongarsingh Girase in Regular Civil Suit No. 35/1973. In execution proceeding i.e. Regular Darkhast No. 20/1973 his property was attached. Attached property was auctioned and same was purchased by the present petitioners.

3. The respondent/original plaintiff filed Regular Civil Suit No. 12/2007 praying that auction sale of the suit property be declared illegal, null and void and he be given possession of the suit property from the petitioners.

4. The petitioners/original defendants resisted the suit by filing a detail written statement objecting to the maintainability of the suit. Defendant No. 2 in the suit filed application Exhibit-13 requesting the Trial Court to frame preliminary issue of jurisdiction, as to whether the Court at Shahada has jurisdiction to try and decide the suit, as the suit was initially filed in the Court of Civil Judge, Senior Division, at Dhule. Said preliminary issue was framed and after recording evidence, it was held that Civil Judge, Senior Division Shahada has jurisdiction to try and decide the suit.

5. Defendant No. 3 thereafter filed application Exhibit-92 *inter alia* taking a ground of Order 21 Rule 92(3) and other grounds and prayed for framing of following preliminary issues:

- (i) Whether the suit filed by the plaintiff is maintainable in law?
- (ii) Whether the suit is within limitation?
- (iii) Whether the Trial Court has jurisdiction to entertain the suit?

6. After hearing the parties, Trial Court partly allowed the application and directed to frame preliminary issues about limitation and jurisdiction. Accordingly, following preliminary issues were framed:

- (i) Whether this Court has jurisdiction to entertain the suit?
- (ii) Whether the suit is barred by limitation?

7. By the impugned order, Trial Court held that issue of jurisdiction is already decided on 11.10.2007 as per the order passed below Exhibit-19 and therefore, it had jurisdiction to entertain the suit.

On the issue of limitation, the Trial Court was of the view that the said issue is mixed question of law and fact and therefore, it was held that the issue of limitation be decided along with other issues. This order is impugned in the present petition.

8. Heard the learned advocate for the petitioners and learned advocate for the respondent at length. Perused the relevant provisions, documents placed on record and the citation relied upon by the learned advocate for the petitioners.

9. Having duly considered the rival submissions and after perusing the order passed below Exhibit-92 and Exhibit-107, this Court is of the view that the impugned order is unsustainable for following reasons;

10. In application Exhibit-92 filed by defendant No. 3, a specific ground is raised that order 21 Rule 92(3) of Civil Procedure Code mandates that after auction sale is confirmed and sale certificate is issued to the auction purchaser, no suit can be filed for setting aside the auction sale and therefore, suit filed by the plaintiff is not maintainable. In the impugned order though a vague reference of said contention is made, the Trial Court has not considered the said ground on merits. There is no finding recorded by the Trial Court in respect of said ground. It therefore, appears that there is non application of mind on the part of the Trial Court in not considering the said ground on merits, and not recording any finding on the same.

11. In view of documents placed on record which indicate that the auction sale was conducted in the year 1973 and plaintiff's father who was original defendant was party to the auction sale as his signature appears on the bailif report and

possession receipt, finding of the Trial Court that issue of limitation is mixed question of law and fact is unsustainable.

12. At this stage, learned advocate for the respondent strenuously urged that in view of pleadings of the plaintiff in the plaint, he be given an opportunity to lead evidence on the preliminary issue of limitation.

13. Taking into consideration the aforesaid aspects, this Court is of the view that the impugned order cannot be sustained as the Trial Court has failed to consider the rival contentions of the parties in the proper perspective and the impugned order is unreasoned order. Merely, citations of Supreme Court are considered by the Trial Court and has abruptly recorded a finding that the issue of limitation is mixed question of law and fact. The approach of the Trial Court in partly allowing the application is erroneous and therefore, the impugned order cannot be sustained in the law and facts of the present case.

14. In the result, writ petition is allowed.

15. The impugned order dated 19.03.2019 passed by learned Civil Judge, Senior Division, Nandurbar, below Exhibit-

107 in Regular Civil Suit No. 12 of 2017, is quashed and set aside.

16. The matter is remitted back to the Trial Court for consideration of preliminary issue as to jurisdiction in terms of Order 21 Rule 92(3) of CPC and issue of limitation afresh, after giving opportunity to lead evidence to both the parties. The Trial Court shall complete the said exercise within 12 weeks from the date of receipt of writ of this order.

[NITIN B. SURYAWANSHI, J.]