

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8913 OF 2022

Latabai W/o Tukaram Jodnar
and another

.... Petitioners

Versus

Dnyanoba S/o Kisanrao Jodnar
and others

.... Respondents

.....

Mr. Anant Devkate, Advocate for the Petitioner

Mr. J.R. Patil, Advocate for Respondent No.1

Mr. S.S. Bora, Advocate h/f Mr. V.S. Badakh, Advocate for
Respondent Nos. 2 to 4

Mr. S.N. Kendre, AGP for Respondent No.5

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 21st SEPTEMBER, 2023

ORDER :

1. This petition filed under Article 227 of the Constitution of India, challenges the order passed by learned Civil Judge, Junior Division, Ambad, below Exhibits 40, 42 and 50 in Regular Civil Suit No.2 of 2014.

2. Respondent No.1/original plaintiff filed civil suit for partition and separate possession of ancestral property. Petitioners along with respondent Nos.2 to 4 are original defendants in the said suit. By filing written statement, petitioners accepted the claim of plaintiff, however, in the end

of written statement, a prayer is made that if they are entitled for share in the suit property, they may be given the same. By order passed below Exhibits-5, 18 and 28, temporary injunction order is passed against defendants restraining them from alienating or creating any third party interest in suit property, till decision of suit.

3. It is the contention of petitioner in defiance of injunction order defendant Nos. 4 and 5 alienated the part of suit property, by way of registered sale deeds dated 01/09/2020 and 08/09/2020. Plaintiff is consenting party to sale deed dated 08/09/2020. After execution of sale deeds, respondent No.1/plaintiff filed *purshis* at Exhibit-40 informing the Trial Court that plaintiff and defendants have amicably settled their dispute out of Court, and he does not wish to prosecute the suit. Said *purshis* is filed on 14/12/2020. Petitioner No.2 by filing application Exhibit-42, requested the Court that he may be permitted to appear in the suit as he is son of defendant No.1, who has expired during the pendency of suit. Plaintiff objected to the said application. Defendant Nos.3 to 5 gave no objection for impleadment petitioner No.2 as party in the suit.

4. By common order passed by below Exhibits 40 and 42, Trial Court rejected the application and permitted plaintiff to withdraw the suit and disposed of the suit as withdrawn.

5. Defendant No.2 in the suit filed application Exhibit-50 praying that she may be transposed as plaintiff in the suit as plaintiff is seeking permission to withdraw the suit. Trial Court has rejected this application after hearing parties on the ground that defendant Nos.1 and 2 have admitted the claim of plaintiff, and averred in written statement that plaintiff's suit may be allowed. In written statement they have not mentioned that defendant Nos.1 and 2 have also not got share, therefore, they are also entitled for partition. On these grounds, Trial Court has rejected the application.

6. Heard learned advocate for petitioners, learned advocates for respondent No.1 to 4 and learned Assistant Government Pleader for respondent Nos.5. Perused the writ petition memo, annexures thereto, impugned order and citations relied upon by learned advocate for petitioner.

7. It is not in dispute that father of petitioner was defendant No.1 in the suit. He expired on 17/10/2015. It is also not in dispute that in the suit, by order dated 27/06/2014

passed below Exhibits-5, 18 and 28, temporary injunction was granted by the Trial Court, thereby restraining defendants from creating any third party interest in suit property. Admittedly, suit is filed by plaintiff for partition. It is settled legal position that in suit for partition, all parties are plaintiffs. It further appears from the record that during the operation of interim injunction order, the transactions are entered into and sale deeds of part of suit property are executed by some of the defendants. Even plaintiff is consenting party to one of the sale deed executed during the operation of interim injunction order.

8. It is not in dispute that petitioner is son and legal heir of defendant No.1. Though it is a fact that defendant Nos.1 and 2 have admitted the claim of plaintiff and have averred in written statement that suit of plaintiff be allowed, however, they have also claimed that if they are found to be entitled to any share in the suit property, the same may be given to them. This aspect is not properly appreciated by Trial Court, while allowing plaintiff to withdraw the suit. Trial Court has misdirected itself in rejecting application Exhibit-50 filed by defendant No.2 for transposing her as plaintiff in the suit.

Since suit is for partition, in the facts of the present case, the Trial Court ought to have allowed this application.

9. In *R.Dhanasundari Alias R. Jajeshwari Vs. A.N. Umakanth and others, (2020) 14 SCC 1*, Apex Court was considered the provision of Rule 1A of Order XXIII and Rule 10 of Order I of the Code of Civil Procedure, it is held:

"11. As per Rule 1-A ibid., in the eventuality of plaintiff withdrawing the suit or abandoning his claim, a pro forma defendant, who has a substantial question to be decided against the co-defendant, is entitled to seek his transposition as plaintiff for determination of such a question against the said co-defendant in the given suit itself. The very nature of the provisions contained in Rule 1-A ibid. leaves nothing to doubt that the powers of the Court to grant such a prayer for transposition are very wide and could be exercised for effectual and comprehensive adjudication of all the matters in controversy in the suit. The basic requirement for exercise of powers under Rule 1-A ibid. would be to examine if the plaintiff is seeking to withdraw or to abandon his claim under Rule 1 of Order 23 and the defendant seeking transposition is having an interest in the subject-matter of the suit and thereby, a substantial question to be adjudicated against the other defendant. In such a situation, the pro forma defendant is to be allowed to continue with the same suit as plaintiff, thereby averting the likelihood of his right being defeated and also obviating the unnecessary multiplicity of proceedings."

10. Since impugned orders passed by Trial Court are contrary to the above ratio, the same are unsustainable and liable to be quashed and set aside.

11. In the result, writ petition is allowed on following terms:

- (I) Impugned order dated 18/08/2022 passed by learned Civil Judge, Junior Division, Ambad, below Exhibits 40 and 42 in Regular Civil Suit No.02 of 2014 is hereby quashed and set aside.
- (II) Impugned order dated 18/08/2022 passed by learned Civil Judge, Junior Division, Ambad, below Exhibit-50 in Regular Civil Suit No.02 of 2014 is hereby quashed and set aside.
- (III) Applications Exhibits 42 and 50 filed by petitioner No.2 and petitioner No.1 respectively are hereby allowed.

[NITIN B. SURYAWANSHI]
JUDGE