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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

28 WRIT PETITION NO. 3482 OF 2025

SANJAY BABURAO MATHPATI

....Petitioner

VERSUS

BABURAO VISHWANATHRAO MATHPATI DIED THROUGH LRS
VIJAY BABURAO MATHPATI

.....Respondent

Mr. S. S. Rathi, Advocate for the petitioner

Mr. K. M. Nagarkar, Advocate for the respondent No.1

CORAM : KISHORE C. SANT, J.

DATE : 25th MARCH, 2025

P. C.

1. Heard the parties for sometime.
2. The petitioner had challenged the order passed by the learned CJSD, Parbhani dated 28-01-2025 striking out the defense of the defendant i.e. the present petitioner under Order XXXIX Rule 11 of the Code of Civil Procedure.

3. The suit is filed by the respondent seeking mandatory injunction directing the present petitioner to hand over the possession of the three rooms. It is the case that earlier suit filed by the plaintiff was allowed. The appeal there against was dismissed and the decree attained finality till the Supreme Court and two rooms were given in possession of the plaintiff. However, later on, he filed suit for possession of three remaining rooms. In the suit he filed an application for interim mandatory injunction. The learned trial judge allowed the application for interim mandatory injunction by order dated 15-07-2023 directing the petitioner to vacate three rooms and hand over the possession to the plaintiff. Said order was challenged by filing Misc. Civil Appeal No. 58/2023. Said appeal also came to be rejected by the Principal District Judge, Parbhani by order dated 09-07-2024. Against the said order the petitioner has already filed petition bearing No. WP/9813/2024 on various grounds, mainly no interim relief could have been granted in the nature of final relief. Said petition is pending in this court. The next date is 08-04-2025.

4. In the meantime, the respondents-original plaintiff filed an application for striking out the defense of the petitioner. The learned trial court on hearing the parties come to conclusion that there is violation of mandatory injunction order and struck off defense. The petitioner has, therefore, approached before this court mainly on the ground that mandatory injunction passed is in the nature of final relief. Therefore, the petition is entertained by this court and same is pending. Though, it was pointed to the learned trial judge, that the writ petition is pending, the learned trial judge has not accepted said stating that no particulars of the writ petition are produced. He submits that when the petitioner is genuinely prosecuting his cause against the interim mandatory injunction, there was no question of coming to the conclusion that he is deliberately flouting the order passed by this court. He thus, prays for setting aside the impugned order.

5. The learned advocate Mr. Nagargkar vehemently

argued that there is history of litigation. In the earlier round the respondent succeeded in the Supreme Court.

6. Considering all these aspects, the learned trial judge has rightly passed the order directing the mandatory injunction. He justifies the order passed by the learned court directing the mandatory injunction.

7. He submits that even Misc. Civil Appeal also came to be rejected. The order is thus, confirmed. In the writ petition No. 9813/2024, there is no stay granted in favour of the petitioner. He prays for rejection of the petition.

8. Having heard the parties, this court finds that the learned trial court has mainly proceeded on the basis that no particulars of the writ petitions are given. However, that fact is not disputed even by the respondent before the learned trial court. That itself could not have been taken as willful breach of the mandatory injunction.

9. The learned advocate for the petitioner has placed reliance on the judgment in the case of Chetan Associates, A Partnership Firm Vs Abhilasha Coop. Hsg. Soc. Ltd.¹ wherein this court at Bombay has held that for passing an order under Order XXXIX Rule 11 the court has to see as to whether the default is willful and contemptuous. Whether default entailed serious prejudicial consequences to the opponent. This court finds that said judgment is squarely applicable to the facts of this case. For the first reason that the writ petition is being prosecuted by the petitioner which is pending in this court. Secondly, this court finds substance in the argument of the petitioner that interim mandatory injunction is in nature of final relief and therefore, filing of the writ petition is justified. The respondent has also not shown prejudicial consequences to the opponent as admittedly he is already in possession of two rooms of the said house.

1 AIR Online 2019 Bom 1216

10. Considering above, this court finds that case is made out to allow the writ petition. The writ petition stands allowed in terms of prayer clauses -B & C.

[KISHORE C. SANT, J.]

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