

(2005) 12 BOM CK 0012

In the Bombay High Court

Case No : Writ Petition No. 4556 of 2004

Sitabai Kerba Deotarse and Others

APPELLANT

Vs

Anil Sahebrao Deotarse and Others

RESPONDENT

Date of Decision : 09-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A

Specific Relief Act, 1963 — Section 39, 39(2)

Citation : (2006) 5 BomCR 833 : (2006) 4 CivCC 21 : (2006) 2 MhLj 65

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : A.L. Barhate, for the Appellant; P.F. Patni and V.H. Dighe, A.G.P. for respondent Nos. 5 to 7, for the Respondent

Judgement

S.B. Deshmukh, J.—Heard Mr. Barhate, learned Counsel for the petitioners; Mr. P. F. Patni, learned Counsel for respondent No. 1 and Mr. V. H. Dighe, learned AGP for respondent Nos. 5 to 7, respondent Nos. 2, 3, 4, absent, though served.

2. Rule. Rule is made returnable forthwith by consent of the parties concerned and heard finally.

3. This petition was taken up for admission before this Court on 9-8-2005 and this Court (Coram : S. C. Dharmadhikari, J.) directed issuance of notice to respondent Nos. 1 to 4 within two weeks and further directed that the trial Court shall not proceed ex parte against defendant Nos. 4 to 10. The defendant Nos. 4 to 10 are the petitioners in the present petition. In other words, respondent Nos. 5 to 10 were not put to notice by this Court.

4. Few facts, necessary for disposal of the present petition, are as follows :

a) Petitioners are defendant Nos. 4 to 10 in Special Civil Suit No. 26 of 1991 filed by the respondent No. 1, who was plaintiff in the said suit. The suit is for partition and possession. The suit properties, which are described in the plaint,

are landed properties and house properties.

b) The plaintiff had filed an application under Order 39, Rules 1 and 2 read with section 39 of Specific Relief Act, for temporary injunction against the defendants. The said application was taken up for orders before the learned Civil Judge Senior Division, on 25-1-1991, who by his order, restrained the defendant Nos. 4 to 10 from alienating the suit property. The ad interim injunction granted was against defendant Nos, 4 to 10 with show cause notice. A copy of written statement is annexed with the writ petition.

c) It is alleged by the plaintiff in an application, Exh. 91 that the defendant Nos. 4 to 10 have sold out their 1/4th share out of land Gut No. 277 and 280 on 2-2-2001 by a registered sale deed. These lands are described in plaint schedule. There is no serious dispute regarding alleged sale deed dated 2-2-2001 by defendant Nos. 4 to 10 in favour of the purchasers.

5. Learned Counsel Mr. Barhate, states that Written Statement was filed on 23-4-1991. Mr. Patni, learned Counsel has pointed out that defendant Nos. 4 to 10 have entered their appearance in the suit on 15-2-1991. Despite the service and knowledge of the ad interim injunction order passed by the trial Court on 25-1-1991, defendant Nos. 4 to 10 have executed a sale-deed of the suit property in relation to the land Gut Nos. 277 and 280 situated at village Nagardevale in favour of respondent Nos. 8, 9 and 10. The plaintiff, therefore, on 30-4-2001, filed an application under Order 39, Rule 2-A of CPC at Exhibit-91 in Special Civil Suit No. 26/1991 with following prayers :

(A) A contempt of Court action be initiated against the defendant Nos. 4 to 10;

(B) The defendant Nos. 4 to 10 be ordered to suffer civil imprisonment and other suitable orders be passed to that effect;

(C) Such other relief be granted in favour of the plaintiff.

6. The present petitioners have filed their reply at Exhibit-129, wherein petitioners have contended that ex parte ad interim injunction below Exhibit-5 was granted on 25-1-1991, however, said order of injunction was not properly served upon them. Moreover, respondent No. 4 is an illiterate lady. Her husband died prior to 15 years. Petitioners have also stated in their reply that defendant No. 4 cannot read and write. The order of injunction was not served on her because she has no any idea about the contents of the said application. Nobody informed in the matter that there was an injunction order against her and her daughters. So defendant Nos. 4 to 10 have no knowledge about ad interim injunction or order passed against them.

7. The trial Court by the impugned order allowed the application and held that defendant Nos. 4 to 10 have committed disobedience and breach of the order passed below Exhibit 05, dated 25-1-1991. The trial Court has further attached the interests of defendant Nos. 4 to 10 in all the suit properties. Thus, in the transaction undisputedly there are two properties bearing Gut Nos. 277 and 280.

The trial Court has also struck out the defence raised by defendant Nos. 4 to 10. This order was passed by the trial Court on 26-2-2004 which is impugned in this petition.

8. Undisputedly, Special Civil Suit No. 26/1991 is pending on the file of learned Civil Judge, Senior Division, Ahmednagar. The counsel appearing for the parties have no dispute on the factual aspect that the suit is now at the stage of recording of evidence. Learned Counsel, Mr. Barhate states that the order of ex parte ad interim injunction, passed below Exhibit-5, dated 25-1-1991 in Special Civil Suit No. 26/1991, was not properly served on the petitioners. According to Mr. Patni, the defendants have entered their appearance on 15-2-1991 and they have also filed their Written Statements on 23-4-1991. He, therefore, submits that there is no substance in the contention of the petitioners that the order was not properly served on them.

Mr. Patni, learned Counsel, has relied on the judgment of this Court in the matter of Chandrashekhar Govind Daiwatkar and Anr. v. Ramdas Govind Daiwatkar reported in 2003(2) BCR 132. The Judgment is of learned Single Judge (Coram : Dr. D. Y. Chandrachud, J.) delivered in C. P. No. 49/2002. The Hon"ble Single Judge of this Court, referring the similar arguments opined that: "There can be no doubt about the fact that once the respondent had entered appearance before the Court on the aforesaid date through an advocate, the respondent must be imputed knowledge of the proceeding before this Court...." I am in respectful agreement with the view taken by this Court in Daiwatkar's matter (supra). The submission of learned Counsel Mr. Barhate that the petitioners were not properly served, therefore, is not acceptable.

9. The application filed by the plaintiff, admittedly was under Order 39, Rule 2-A of Civil Procedure Code. However, from the order, it appears that the learned trial Court has considered the provisions laid down under Order 39, Rule II of CPC and in the operative part of the order struck out the defence raised by the present petitioners. Undisputedly, there was no application filed under Order 39, Rule 11 by the plaintiff, seeking such relief. This fact is also fairly admitted by the learned Counsel Mr. Patni for the respondents. The petitioners were not aware and could not meet the allegations. Therefore, in my view, the order passed by the trial Court, under Order 39, Rule 11, striking out the defence of the petitioner Nos. 4 to 10, is perverse. This Court, while considering the writ petition in its extra ordinary jurisdiction, is really concerned with the decision making process and not the merits of the case. Here it is a case, where the Court below has divested from the procedure, and recorded a finding against the petitioners. The petitioners are made to suffer and, therefore, that part of the order, deserves to be quashed and set aside.

10. The trial Court, while considering the application filed by the plaintiff, however, has exercised the discretion by attaching the interests of the petitioners in regard to all the suit properties. I have noticed that there are several suit properties described in the plaint. Undisputedly, the alienation dated 2-2-2001 is

pertaining to only two agricultural lands bearing Survey Nos. 277 and 280. The Court below has exercised the discretion while attaching the interests of petitioners in all the suit properties. In this view of the matter, no cognizance can be taken by this Court either by putting the petitioners behind Civil prison, as contemplated under Order 39, Rule 2-A of Civil Procedure Code, or by awarding any compensation, which is orally urged by learned Counsel Mr. Patni.

11. In this view of the matter, I am inclined to allow this petition partly to the extent of quashing and setting aside the operative part of the order set out at Item No. 4, passed by the Court below, insofar as it relates to striking out the defence raised by the petitioners, in their written statement. The order passed by the trial Court, attaching the interests of the petitioners in all the suit properties, is not disturbed. The writ petition is partly allowed. Rule is made absolute in the aforesaid terms with no order as to costs.

12. Learned Counsel Mr. Patni has pointed out that the order passed by the trial Court is dated 26-2-2004 and ad interim relief, as noted in foregoing paragraphs, was granted by this Court (Coram : S. C. Dharmadhikari, J.) on 9-8-2004. This order was in operation till today. If any application is made on behalf of plaintiff in accordance with the provisions contained in Sub-section (2) of Order 39, the concerned Court shall take into consideration this period and deal with the said application in accordance with the provisions of law.