
(2011) 04 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 5340 of 2009

Sk. Naser

APPELLANT

Vs

Sk. Babu and Jakaulah Khan

RESPONDENT

Date of Decision : 27-04-2011

Acts Referred:

Constitution of India, 1950 — Article 227, 266
Specific Relief Act, 1963 — Section 15

Citation : (2011) 4 ALLMR 82

Hon'ble Judges : A.V. Nirgude, J

Bench : Single Bench

Advocate : A.S. Bajaj, for the Appellant; Sandeep Deshmukh, for the Respondent

Judgement

A.V. Nirgude, J.—This Writ Petition is filed under Articles 266 and 227 of the Constitution of India, challenging a very peculiar order dated 1st August, 2009, passed by the 2nd Joint Civil Judge (Senior Division), Aurangabad, in Special Civil Suit No. 547 of 1993. This order was passed suo-motu by the learned Judge of the trial Court.

The facts leading to the passing of the impugned order can be narrated as under:

2. Respondent No. 1 filed this Special Civil Suit No. 547 of 1993 against Respondent No. 2 for specific performance of contract for sale of a piece of land which is quite a sizable one. It was the case of the Respondent No. 1/Plaintiff that, Respondent No. 2 agreed to sell this piece of land for valuable consideration to him, on 19th October, 1991 by executing an agreement in writing. Certain amount was paid as an earnest amount. Admittedly, Respondent No. 1 was already in possession of the suit land, being tenant. The suit continued and at the fag end, when arguments were about to be heard, the Petitioner, who happened to be the brother of Respondent No. 1 made an application to the Court and requested it to implead him as Plaintiff No. 2. The original parties to the suit did not oppose this move and the Petitioner was added as Plaintiff No. 2

to the lis. Soon after, newly added Plaintiff No. 2 Petitioner effected certain amendment in the plaint and brought on record as to why he got interest in the lis. He pleaded that Respondent No. 1, has assigned suit agreement to him for valuable consideration and had already put him in possession also. The trial Court allowed the amendment and the suit remained pending for disposal. But after few months, the learned judge of the trial Court suddenly realized that newly added Plaintiff Petitioner herein had no business to be a party to the suit and suddenly without giving him an opportunity of being heard, he suomotu set aside the two orders, by which the Petitioner was added as Plaintiff No. 2 and Petitioner was allowed to amend the plaint. This order is being challenged here. Thus, the question is, whether this order is legal?, answer is negative.

3. The learned Judge, firstly, could not have passed this order without giving an opportunity of being heard to the affected party, the Petitioner. I have no difficulty for the question as to whether the learned Judge could have exercised discretion to recall the orders passed earlier in the case, but such exercise could not have undertaken without hearing the parties to the suit, specially the party who was likely to be affected by the order.

4. The Second question is, whether order is lawful?. The learned Judge probably did not read the amended plaint. He did not realize that PetitionerPlaintiff No. 2 had come to the Court with specific case that the interests in the suit agreement were assigned to him by Respondent No. 1. In view of this assertion, which prima facie appears to be truthful/maintainable, the Petitioner became a "representative in interest" of the existing party to the suit, namely, original Plaintiff. Section 15 of the Specific Relief Act 1963 allows such representative in interest of any party to the agreement to sue for specific performance of such agreement. It is, thus, clear that in view of the assignment, the Petitioner was entitled to be a coPlaintiff and to continue with lis. This aspect has not been considered by the learned Judge. This happened most probably because he did not hear the submissions of the Petitioners before he could pass the impugned order. In addition to this, a useful reference to the judgment of the Supreme Court in the case of Shyam Singh Vs. Daryao Singh (dead) by Lrs. and Others, can be made, wherein the Supreme Court held that

The Expression "any party thereto" or "their representative in interest" includes transferees and assignees from contracting party in whose favor right exists.

5. In view of this, the impugned order deserves to be set aside. However, since the suit is pending since 1993 and the amendment in the plaint is effected recently, in 2009. Respondent No. 2 Defendant should be given an opportunity to file additional written statement in respect of additional averments made in the plaint. In case, such written statement is filed the learned Judge of the trial Court should frame additional issue/s, if any, and should allow the parties to lead additional evidence, if necessary.

Rule made absolute in terms of following order:

ORDER

1. The impugned order dated 01st August, 2009, passed by the 2nd Joint Civil Judge Senior Division, Aurangabad, in Special Civil Suit No. 547 of 1993 stands set aside.
2. The Petitioner stands restored as Plaintiff.
3. Respondent No. 2 Defendant is given liberty to file additional written statement.
4. The learned Judge of the trial Court to decide this suit in accordance with law.