
(2015) 04 BOM CK 0355
In the Bombay High Court
Case No : Writ Petition No. 988 of 2015

Veena Dilip Gorey and Others

APPELLANT

Vs

Prafulla Gopalrao Waghmare

RESPONDENT

Date of Decision : 06-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 1, Order 32 Rule 2, 151

Citation : (2015) 5 BomCR 469

Hon'ble Judges : R.K. Deshpande, J.

Bench : Single Bench

Advocate : R.N. Ghuge, Counsel, for the Appellant; R.R. Shrivastava and B.B. Mehadia, Counsels, for the Respondent

Judgement

R.K. Deshpande, J.—Rule made returnable forthwith. Heard the matter finally by consent of the learned Counsels appearing for the parties. The challenge in this petition is to the order dated 20th February, 2014, passed by the learned Joint Civil Judge, Junior Division, Washim, below Exh. 1, in M.J.C. No. 15/2013. It was an application for recall of the order dated 24th August, 2012, passed by the trial Court, permitting the original plaintiff No. 1, who is the petitioner No. 1 in this petition, to withdraw the Regular Civil Suit No. 63 of 2010. Hence, the original plaintiff No. 1 is before this Court as petitioner No. 1 and the petitioner No. 2 - Ashok Daulatrao Gorey, claims to have filed this petition as a next friend of the petitioner No. 1 who is alleged to be suffering for mental illness of unsound mind. The respondent is the original defendant.

2. The facts of the case are as under.

Regular Civil Suit No. 263 of 2010, was filed on 30th December, 2010, by the petitioner No. 1 (original plaintiff No. 1), Smt. Veena Dilip Gorey and one Smt. Shakuntalabai Doulatrao Gorey, the mother-in-law of the petitioner No. 1, claiming herself to be the next friend of the petitioner No. 1 who is alleged to be of unsound mind. The suit claims the reliefs as under.

A] to pass the decree of declaration to the effect that plff. No. 1 Veena is ill-health person (i.e. of unsound mind) not able to care of herself and her property.

B] The deft No. 1 be perpetually restrained from representing the plff. No. 1 is of sound mind and competent to execute the sale deed of the suit property.

C] The Hon''ble Court be pleased to appoint the plff. No. 2 as a guardian of plff. No. 1 Veena for taking proper care of the property and person of plff. No. 1.

D] Costs of the suit be granted.

E] Any other relief just and proper as Hon. Court deems fit may kindly be awarded.

3. The respondent in this petition Dr. Prafulla Gopalrao Waghmare, who claims to be the plaintiff No. 1's sister's husband, was joined as defendant. The plaintiff No. 2 Smt. Shakuntalabai Daulatrao Gorey, the mother-in-law of petitioner No. 1, died on 11th August, 2001. The petitioner No. 1 Smt. Veena Dilip Gorey, thereafter moved an application Exh. 34 for grant of permission to withdraw the suit unconditionally. Exh. 35 was an application filed, placing on record the death certificate of the plaintiff No. 2 - Smt. Shakuntalabai. The trial Court passed an order on 24th August, 2012, as under;

"Case is disposed off and withdrawn in view of Application Exh. No. 34. Suit is disposed off.

4. The aforesaid order was challenged in Writ petition No. 4202 of 2012 by the present petitioners in this writ petition. The learned Single Judge granted opportunity to the petitioners to move an application for recall of the order dated 24th August, 2012, before the trial Court. Letter Patent Appeal No. 444 of 2012 preferred by these petitioners was dismissed by the Division Bench, holding that there is neither any jurisdictional error, nor perversity in the approach of the learned Single Judge. All objections regarding competency of petitioner No. 2 to prosecute was also kept open.

5. The petitioner No. 2, therefore, moved M.J.C. No. 15 of 2013 for recall of the order dated 24th August, 2012. The trial Court framed an issue as to whether it has jurisdiction to entertain the suit and the application for restoration of the suit. By an order impugned dated 28th January, 2015, passed by the trial Court, it has been held that, it has no jurisdiction to entertain the original suit as well as the application for recall of the order.

6. None of the learned Counsels could point out to this Court that the application Exh. 34 filed by the petitioner No. 1 was contested. None of the Counsels are in a position to point out the date on which the application under Order 32, Rules 1 and 2 read with section 151 at Exh. 11 was filed before the trial Court. They are also not in a position to point out as to whether such application was filed before the Court passed an order permitting the petitioner No. 1 to withdraw the suit. This Court has, therefore, proceeded on the footing that the application at Exh.

11 under Order 32, Rule 1 and 2 of C.P.C. was filed by the petitioner No. 2 before the trial Court upon remand of the matter back by this Court, granting permission to move an application for recall of the order dated 24th August, 2012.

7. In the proceedings for recall of the order, the Court could not have framed issue as to whether it has jurisdiction to entertain, try and decide the suit in question. The application at Exh. 11 filed by the petitioner No. 2 was pending before the trial Court when the order impugned was passed and the said application has not been decided on its own merits. The Court could have restricted its approach to the application for recall of the order passed on 24th August, 2012. Keeping in view the nature of the suit and the reliefs claimed therein, the Court was required to consider the application Exh. 11. The Court ought to have, therefore, recalled the order dated 24th August, 2012 and should have heard the parties on the application at Exh. 11. The impugned order, therefore, suffers from procedural irregularities, resulting in failure of justice and hence, it will have to be set aside and the M.J.C. No. 15 of 2013 need to be allowed. In the result, the order dated 28th January, 2015, passed below Exh. 1 in M.J.C. No. 15 of 2013 by the trial Court is hereby quashed and set aside. The M.J.C. No. 15 of 2013 is allowed. Regular Civil Suit No. 263 of 2010 is restored. The trial Court shall proceed to decide Exh. 11 as if it is filed in Regular Civil Suit and thereafter to deal with the other controversies involved in the matter. The parties to appear before the trial Court on 20th April, 2015. The trial Court to decide the application Exh. 11 within a period of four months from the date of first appearance of the parties before it. All questions, including maintainability of the application at Exh. 11 and except those which are concluded by this judgment, are kept open. No order as to cost.