

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 633 OF 2013

Rajendra s/o Bajirao Gaikwad,

... Petitioner

VERSUS

Sau. Malan Bhausahab Jadhav
and others

... Respondents

.....
Mr. R. R. Karpe, Advocate for petitioner
.....

CORAM : V. K. JADHAV, J.

Date of reserving Order : 30.09.2015

Date of pronouncing Order : 01.10.2015

ORDER :-

1. The petitioner/original plaintiff has instituted a Regular Civil Suit bearing No. 110 of 2010 for partition, correction of sale deed dated 06.12.2001 and for decree of perpetual injunction. Though all the respondents including the contesting respondent Nos. 1 to 4 were served, they have failed to file written statement and hence, the suit was ordered to be proceeded without their written statement. However, subsequently, respondent No. 4 has filed his written statement and has denied the claim of the petitioner/original plaintiff. In the light of the pleadings of the parties to the suit, the learned

Judge of the trial court has framed the issues. On 16.02.2012, the petitioner/original plaintiff has filed his affidavit of evidence and he was subjected to cross-examination on behalf of respondent No. 4. It is specifically mentioned in the said affidavit of evidence that the copy of sale deed dated 06.12.2001 is placed on record. Respondent No. 4/original defendant No. 4 has also filed his affidavit of evidence and was subjected to cross-examination on behalf of the petitioner/original plaintiff.

2. On 08.10.2012, the petitioner/original plaintiff has filed an application at Exh. 44 before the trial court for production of original sale deed dated 06.12.2001. Respondent No. 4 has raised objection for the same. However, the learned Judge of the trial court has allowed the said application by order dated 08.10.2012. On 15.10.2012, the petitioner/original plaintiff has filed an application below Exh. 46 requesting the court to exhibit all the documents i.e. 7/12 extracts and the said original sale deed dated 06.12.2001. The learned Judge of the trial court, by order dated 01.01.2013, has partly allowed the said application. All the documents as per application Exh. 46 came to be exhibited except the sale deed. The learned Judge of the trial court, by order dated 01.01.2013 below Exh.

46, has observed that the sale deed has not been proved by leading evidence and therefore, cannot be exhibited. On 16.10.2012, the petitioner has filed an application at Exh. 47 for recalling the witnesses, who were already examined and to grant permission to examine the witnesses of the said sale deed and scribe. Respondent No. 4 has raised objection to the same. The learned Judge of the trial court, by impugned order dated 01.01.2013, has rejected the application below Exh. 47. Hence, this writ petition.

3. Learned counsel for the petitioner submits that the trial court, by order dated 08.10.2012 below Exh. 44, has allowed production of original sale deed. Learned counsel further submits that the petitioner/original plaintiff has instituted the suit for partition, correction in the said sale deed and a decree of perpetual injunction, and thus, the petitioner/original plaintiff's suit is based upon the said sale deed dated 06.12.2001. The learned counsel submits that the trial court has rejected the application below Exh. 47 merely on technical grounds. The learned counsel further submits that the learned Judge of the trial court has not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or assist for just and

effective adjudication of the suit. The learned Judge of the trial court has simply rejected the application below Exh. 47 on the ground that though the petitioner/original plaintiff had an opportunity to lead the secondary evidence, if at all, the original sale deed was not in his possession, and has produced the original sale deed at a later stage when the evidence of the parties was closed.

4. Learned counsel for the petitioner, in support of his contentions, placed reliance on the judgments in the following three cases :

- 1. *K.K.Velusamy v/s. N.Palanisamy, reported in 2011 (11) SCC 275,***
- 2. *Anand Rangrao Ingle and another v/s. Govind Rangrao Ingle and others, reported in 2012 (5) Mh.L.J. 955 and***
- 3. *Eric Fernandes v/s. Balbir Singh Chabra and others, reported in 2012 (4) Mh.L.J. 522.***

5. Though the contesting respondent Nos. 1 to 4 are duly served, none appears for them.

6. It is needless to say that the inherent power under

Section 151 of the Code of Civil Procedure 1908, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination and this inherent power of the court is not affected by the express power conferred upon the court under Order XVIII Rule 17 of the C.P.C..

7. The Apex Court, in the case of K.K.Vesusamy (*supra*), in paragraph No. 12 of the judgment, has made the following observations:

“12. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is

relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.”

8. In the case in hand, the petitioner/original plaintiff has already placed a copy of sale deed before the trial court. The petitioner's suit is entirely based upon the sale deed and in the light of the correction in the sale deed, as sought in the suit, further relief of partition and a decree of perpetual injunction is prayed for. The petitioner/original plaintiff is not at all benefited by suppressing the original copy of the said sale deed with him, nor would get any benefit by contending at later stage that the original sale deed was found subsequently when the evidence of the petitioner/original plaintiff was closed. Unfortunately, the learned Judge of the trial court, though referred the judgment of the Apex Court in the case of ***K.K.Velusamy v/s. N.Palanisamy (supra)***, has not considered the question as to whether it is fit case for exercise of discretion under Section 151 or Order XVIII Rule 17 of the C.P.C.. Even the learned Judge of the trial court has not considered whether the production of original sale deed on record would assist the court in clarifying the evidence led on the issues and the same is just and necessary for effective adjudication of the matter. In my opinion, the trial court has

rightly passed the order below Exh. 46 to the extent of rejection of the prayer to exhibit the sale deed. However, the impugned order dated 01.01.2013 passed below Exh. 47 in Regular Civil Suit No. 110 of 2010 is liable to be quashed and set aside. Hence the following order :

ORDER

- I. The writ petition is partly allowed.
- II. The impugned order dated 01.01.2013 passed below Exh. 47 in Regular Civil Suit No. 110 of 2010 is hereby quashed and set aside.
- III. The trial court shall decide application at Exh. 47 afresh on its own merits, taking into consideration the observations of the Supreme Court contained in the judgment in the case of **K. K. Velusamy v/s. N. Palanisamy (supra)**, after giving opportunity of being heard to the parties to the suit.
- IV. The trial court shall decide application at Exh. 47 within a period of three (03) months from today.
- V. The writ petition is disposed of. No costs.

(V. K. JADHAV, J.)

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