

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11872 OF 2015

Madan Krishna Waghmare ... Petitioner
Vs.
Ramchandra Shivram Waghmare (decd.)
through LRs Sarjerao R. Waghmare and others ... Respondents

Mr. Ramdas A. Shelke for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 09, 2015

P.C. :

Not on Board. At the request of Mr. Shelke, learned Counsel for petitioner, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.4 has challenged the judgment and order dated 28.08.2015 passed by the learned Joint Civil Judge, Junior Division, Palus below exhibit-241 in Regular Civil Suit No.406 of 2008. By that order, the learned trial Judge rejected the application made by the defendant No.4 for setting aside no evidence order dated 07.07.2015 and seeking permission to lead evidence.

3. Mr. Shelke strenuously contended that though defendants No.4 and 6 to 8 have admitted claim of the plaintiff, they have right, title and interest in the suit property. To substantiate their right, defendant No.4 wants to lead evidence. He further submitted that the learned trial Judge wrongly recorded in paragraph 4 that the Suit is old one. In fact, the evidence of the contesting defendants No.2 and 3 is not yet over. He, therefore, submitted that the impugned order requires to be interfered with.

4. With the assistance of Mr. Shelke, I have perused the written statement filed by defendants No.4 and 6. Defendants No.4 and 6 have admitted claim of the plaintiff. While rejecting the application, the learned trial Judge has noted that Suit is of the year 2004. Plaintiff has closed his evidence on 30.06.2015. The matter was posted on 07.07.2015 for evidence of defendants. On 07.07.2015, despite repeatedly calling defendants No.4 and 6 to 8 and their Advocates, they remained absent. As they have admitted the claim of the plaintiff, the learned trial Judge passed no evidence Order. On the same date i.e. 07.07.2015, the contesting defendants No.1/1 to 1/4 closed their evidence by filing purshis exhibit-240. The matter was thereafter posted on 10.07.2015, 04.08.2015 and 20.08.2015 for the evidence of the contesting defendants No.2 and 3. It is at that stage, on 25.08.2015, defendant No.4 filed application seeking a permission to lead evidence. The learned trial Judge held that as the defendant No.4 has admitted the claim of the plaintiff, he has no right to lead evidence.

5. Mr. Shelke submitted that though defendants No.4 and 6 to 8 have admitted claim of the plaintiff, they have right, title and interest in the suit property and to substantiate this, they want to lead evidence. If at all, defendants have any right, title and interest in the suit property, they could have set up that right and interest in the written statement. Mr. Shelke was not in a position to show pleadings to that effect in the written statement. In any case, at the time of hearing of the Suit, defendants can certainly request the learned trial Judge to consider determining the shares, having regard to the fact that the Suit is for partition and separate possession.

6. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the

same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) C.P.C.

(R. G. KETKAR, J.)

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