

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9705 OF 2015**

Smt. Bageshri Milind Kshirsagar
and Ors.

..Petitioners

Vs

1. Smt. Shanta Vasant Deshpande
(since deceased through L.Rs-
1a. Sanjiv V. Deshpande and Ors.

.. Respondents

Mr. Vishal Kanade i/b Satish S.Raut, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 09/12/2015

PC:

1. Heard Mr. Vishal Kanade, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, original defendants no.1 to 5 and 9 have challenged order dated 30.3.2015 passed by the learned Judge, Small Causes Court, Pune, below Exhibit 382 in Special Civil Appeal No.509 of 1998. By that order, the learned trial Judge discarded evidence of DW 2- Sunil Thite for considering preliminary Issues no.1 and 2.
3. It appears that respondents no.1 to 5, hereinafter referred to as 'plaintiffs', filed application at Exh.382 on 9.3.2015, inter alia, contending that the defendants have raised an issue of

limitation and jurisdiction by filing application under section 9-A of C.P.C. By order dated 20.11.2014, learned trial Judge decided issue of limitation in favour of the plaintiffs. Defendants instituted C.R.A. No.29 of 2005 in this Court. By order dated 20.6.2005, Civil Revision Application was allowed and trial Court was directed to decide those issues afresh along with other issues by leading evidence. The High Court also directed the trial court to decide those issues as preliminary issues.

4. In pursuance of that order, trial Court framed Issues on 22.4.2009 at Exhibit-114. Accordingly, issue of jurisdiction was framed as additional issue (a) and issue of limitation was framed as issue no.5. Defendants filed evidence affidavit in respect of these issues and also additional affidavit. Evidence of the defendants was over on 2.2.2015 and thereafter the defendants have filed affidavit in lieu of examination-in-chief of DW2-Sunil Thite who alleges to be attesting witness to the alleged Will of late Madhukar Pattihal dated 22.2.1995. The plaintiffs further contended in application Exh.382 that the matter was fixed for cross-examination of the said witness. The plaintiffs contended that the trial Court has to decide issue of limitation and jurisdiction as preliminary issues and for that purpose evidence of DW2-Sunil is not relevant, more so when there is specific issue in respect of Will, namely issue no.3. The plaintiffs further

contended that issue no.3 was not for consideration and, therefore, evidence of DW 2-Sunil cannot be considered while deciding preliminary issue, namely issue no.5, and additional issue (a). The plaintiffs, therefore, prayed that evidence of DW-2 Sunil may be discarded at this stage.

5. Defendants no.1 to 5 and 9 filed reply dated 12.3.2015 resisting that application. Mr. Kanade invited my attention to paragraphs 17 to 19 of the reply and submitted that for the reasons stated therein, the learned trial Judge was not justified in discarding the evidence of DW 2-Sunil.

6. It is not in dispute that this Court had directed the trial Court to decide issue of jurisdiction and limitation as preliminary issues. Defendants no.1 to 5 and 9 claim that DW 2-Sunil is attesting witness of Will dated 22.2.1995 executed by late Madhukar Pattihal. It is in this context necessary to consider whether evidence of DW-2 Sunil is necessary and relevant for deciding preliminary issues.

7. The learned trial Judge observed in paragraph 9 that presently the Court is considering two issues, namely, issue of jurisdiction and limitation and to prove these two issues, proving of the Will dated 22.2.1995 is immaterial and, therefore, at this stage evidence of DW2 is immaterial and is liable to be discarded. If the defendants succeed, namely if preliminary

issues are decided against the plaintiffs, the plaintiffs' suit will be dismissed. If preliminary issues are decided in favour of the plaintiffs, the defendants will have an opportunity to prove their title on the basis of Will. In fact, Court has also framed issue no.3 for that purpose. The learned trial Judge has, therefore, discarded evidence of DW 2-Sunil. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. The learned trial Judge has also clarified in paragraph 9 that evidence of DW2-Sunil for proving issues of jurisdiction and limitation is immaterial at this stage, thereby, meaning for deciding the two preliminary issues. It, however, does not mean that the learned trial Judge has discarded evidence of DW 2-Sunil for deciding issue no.3. That will depend upon outcome of order of the learned trial Judge on preliminary issues. Understood thus, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, 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 Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)