

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12287 OF 2015

Mangal Shiddeshwar Kamble and another ... Petitioners
Vs.
Shaikddin Balabhai Mulani (decd) through LRs
Mahibub S. Mulani and others ... Respondents

Mr. Shashank Mangale a/w. Mr. Hamid Mulla for Petitioners.

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

P.C. :

Not on Board. At the request of Mr. Mangale, taken up for admission.

2. Heard Mr. Mangale, learned Counsel for petitioners at length.

3. By this Petition under Article 227 of the Constitution of India, original defendants No.2 and 3 have challenged the order dated 08.09.2015 passed by the learned Civil Judge, Junior Division, Mangalwedha, Solapur below exhibit-82 in Regular Civil Suit No.144 of 2001. By that order, the learned trial Judge partly allowed the application made by the plaintiff for recasting the issues which were framed at exhibit-19.

4. Mr. Mangale submitted that Shaikddin Balabhai Mulani, hereinafter referred to as original plaintiff, has instituted Suit against defendant No.1 - Shahiramard Shaikddin Mulani and present petitioners, hereinafter referred to as defendants No.2 and 3 for declaration that the marriage of defendant No.1 with one Tajoddin Nijamuddin Mulani solemnized on 14.07.1980 was subsisting, and therefore, the decree

dated 03.04.1995 in Regular Civil Suit No.27 of 1995 and decree dated 07.07.2001 in Civil Appeal No.18 of 1998 is not binding on them and that original plaintiff be declared as owner of the property in dispute. Original plaintiff also prayed that in case the Court finds that he is not in possession of the property in dispute then the possession may be recovered from the defendants. Defendants No.1, 2 and 3 filed separate written statements. It appears that initially, issues were framed on 08.04.2003. The issues were re-cast on 12.03.2004 and lastly, on 05.12.2014, additional issue was framed. Original plaintiff died leaving behind respondents No.1A to 1E, hereinafter referred to as plaintiffs. Plaintiffs filed application dated 22.07.2015, exhibit-82 for re-casting all issues framed earlier. Defendants No.2 and 3 filed reply dated 18.08.2015. By the impugned order, the learned trial Judge partly allowed the application and added issues No. 2 and 3 as also issue No.4, as suggested by the plaintiffs.

5. Mr. Mangale submitted that the learned trial Judge did not give any reasons and has wrongly placed burden on the defendants. The learned trial Judge partly allowed the application only by observing that there is substance in the submission of the plaintiffs and the earlier exhibit - 19 need to be re-cast.

6. I have considered the submissions advanced by Mr. Mangale. As noted earlier, original plaintiff filed Suit for declaration that as the marriage of defendant No.1 with Tajoddin Nijamuddin Mulani solemnized on 14.07.1980 was subsisting, the decrees dated 03.04.1995 and 07.07.2001 passed in Regular Civil Suit No.27 of 1995 and Civil Appeal No.18 of 1998 respectively are not binding on them. Defendant No.1 filed written statement inter alia contending that her marriage with Tajoddin was solemnized on 14.07.1980 and when she performed

marriage with the original plaintiff, that time, Tajoddin was not alive. Defendant No.1 contended that her earlier husband Tajoddin expired 20 years back before her marriage with original plaintiff. It is in these circumstances, the learned trial Judge has framed additional issue as to whether the defendant No.1 proves that her earlier husband Tajoddin had expired 20 years back before her marriage with the plaintiff. I, therefore, do not find that the learned trial Judge has wrongly placed burden on defendant No.1 for establishing that her earlier husband was already dead at the time of her marriage with the plaintiff.

7. 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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