IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2458 OF 2016

SUMANBAI KONDIBA HUSSEKAR
VERSUS
DIGAMBAR RAGHOJI CHINTAKUTE AND OTHERS
...
Advocate for Petitioner : Smt. Deshmukh Charuta Sunil
Advocate for Respondents 1 to 6 : Shri Gangakhedkar S.S.
...
CORAM : RAVINDRA V. GHUGE, J.
Dated: April 04, 2016
...

PER COURT :-

1. The petitioner / plaintiff is aggrieved by the order dated 7.12.2015 delivered by the learned trial Court below Exhibit 43 in RCS No.40 of 2013 and the order dated 15.12.2015, thereby, refusing to set aside the earlier order dated 7.12.2015.

2. Learned Advocate on instructions prays for deleting respondent No. 7. Leave to delete is granted at the risk of the petitioner. Deletion be carried out forthwith.

3. The petitioner submits that in so far as the issue of res-judicata is concerned, the trial Court had passed an order below Exhibit 37 on 18.11.2014, by which the application filed by the defendant under Section 11 of the Code of Civil Procedure was rejected. Once the said application was rejected, the trial Court was not withing its rights in framing an issue No. 3A with regard to whether the suit was barred on the principle of *res judicata*.

4. Learned Advocate appearing on behalf of respondent Nos.1 to 6, supports the order. Respondent No.8, though served, is absent.

5. In so far as the issue of *res judicata* and the grievance of the petitioner is concerned, the defendant had moved Exhibit 37 seeking the framing of the preliminary issue of *res judicata*. The trial Court concluded that the issue of *res judicata* is a mixed question of fact and law and hence a preliminary issue need not be cast. It, therefore, rejected Exhibit 37, refusing to deal with the issue of *res judicata* as a preliminary issue. In this backdrop, I do not find that this petition deserves to be entertained as the trial Court has framed the said issue to be tried along with all other issues and more so in light of the fact that the order dated 18.11.2014 has not been challenged by any party and has attained finality. I, therefore, do not find any reason to interfere with the framing of issue No.3A.

6. The petitioner is also aggrieved on account of the framing of issue No.3B, which is with regard to whether the plaintiff would be entitled for partition when the suit against one of the necessary parties i.e. defendant No.5 is dismissed in default. Grievance is that when the issues were framed on 30.4.2015, these two issues, 3A and 3B, were not framed. The petitioner has concluded recording of his evidence and has also submitted a closing purshis. It is, therefore, strenuously submitted by Smt. Deshmukh that the trial Court could not have framed an issue after the recording of evidence of the plaintiff was concluded.

7. Shri Gangakhedkar, learned Advocate submits that the suit was dismissed as against defendant No.5 on 27.8.2014. Though the issues were cast on 30.4.2015, as the suit involves the issue of partition and separate possession, issue No.3B would be necessary. He, therefore, submits that the impugned orders dated 7.12.2015 and 15.12.2015 do not require any interference.

8. I have considered the submissions of the learned Advocates, which are recorded as above.

9. The issues cast on 30.4.2015 are as under:-

> "(1) Whether plaintiff prove that suit property are their ancestral property ?
>
> (2) Whether plaintiff is entitled to 1/7th share as prayed? If not then what would be respective shares of parties?
>
> (3) Whether plaintiff is entitled to the relief of P.I.?
>
> (4) What order and relief?"

10. The two added issues Nos.3A and 3B framed on 7.12.2015 read as under:-

> "(3A) Whether suit is barred by the principle of res judicata?

(3B) Whether the plaintiff is entitled for partition, when suit against one of the necessary party i.e. defendant No.5 is dismissed in default?"

11. Since the issue of partition and separate possession is involved and the litigating sides are close relatives and are concerned with the ancestral property, I do not find that the trial Court has committed any error in framing issue No.3B. So also, the power of the Court to frame additional issues, amend or strike out issues at any stage is recognised under Order XIV Rule 5 of the Code of Civil Procedure.

12. Learned Advocate for the petitioner submits, on instructions, that the petitioner / plaintiff is initiating steps for restoration of the suit against defendant No.5. In the light of the said statement, in case the plaintiff initiates any steps for restoring the suit against defendant No.5, the trial Court shall consider the same on its own merits after hearing all the litigating sides and without being influenced by its order dated 7.12.2015 below Exhibit 1 and the order dated 15.12.2015.

13. Notwithstanding the above, it cannot be ignored that the petitioner / plaintiff has concluded the recording of oral and documentary evidence. Issue Nos.3A and 3B are said to have been framed after the evidence has been concluded on the part of the plaintiff. The trial Court has permitted the petitioner to lead oral and documentary evidence with regard to issue Nos.3A and 3B.

14. In the light of the above, keeping the option of initiating steps with regard to defendant No.5 open, this petition is disposed off without causing any interference in the impugned order, considering the fact that the trial Court has granted liberty to the petitioner to lead additional evidence in relation to issue Nos.3A and 3B.

(RAVINDRA V. GHUGE, J.)

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akl/d