

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

46 WRIT PETITION NO. 9151 OF 2015

KRISHNA NARENDRASING SARDA

VERSUS

JITENDRA LAKSHMANSING SARDA AND ANOTHER

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Advocate for Petitioner : Mr. Patil Milind

Advocate for Respondent No.1 : Mr.Hon Ashwin V.

CORAM : V. K. JADHAV, J.

DATE : 15th February, 2016

PER COURT :

1. The petitioner/original plaintiff instituted the suit bearing RCS No.55/2008 for the relief of partition in the property left by one Surjit Kaur. Respondent No.1/Original defendant No.1 strongly resisted the suit by filing written statement and claimed that he had received the suit property through will deed. In support of his case, respondent No.1/defendant No.1 has examined witnesses Rajendra Baburao Shinde at Exh. 69, and Mr. Kishor Babanrao Gaikwad at Exh.70, who are attesting witnesses to the will deed, allegedly executed by Laxmansing Mangatram Sarda in his favour. Defendant No.1 filed Application Exh.74 to seek permission to recall the said witnesses for the purpose of exhibiting the will deed, which inadvertently remained to be exhibited. The

learned trial court, by the impugned order dated 03.08.2015 below Exh.74, allowed the said application. Hence, this writ petition.

2. Learned counsel for the petitioner/plaintiff submits that even though there is no specific pleading about the executant of the alleged will deed, respondent/defendant No.1 has examined the said witnesses. The learned counsel further submits that the said witnesses were duly cross examined and more particularly, witness Rajendra Baburao Shinde, who is to be recalled, was also subjected to cross examination. The learned counsel submits that to fill up the lacuna in the case, the application is filed. The learned counsel submits that the powers under Order 18 Rule 17 of the Civil Procedure Code are required to be used sparingly and no case is made out by respondent No.1/defendant No.1 to recall the said witness Mr. Rajendra Shinde. The learned counsel, in order to substantiate his contentions, has placed reliance on the following cases:

- i. 2013 CJ (SC) 141, Bagai Construction and others Vs. Gupta Building Material Store
- ii. 2009 CJ (SC) 1920, Vadiraj Nagappa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate.

3. Learned counsel for respondent No.1/defendant No.1 submits that by mistake, even though attesting witnesses of the will deed are examined, the will deed remained to be exhibited. The learned counsel submits that Application Exh.74 is filed to that extent only. The learned counsel submits that there is no question of filling up the lacuna and the application is filed only to exhibit the said will deed. The learned counsel submits that even otherwise, the witnesses to the will deed came to be examined before the trial Court and they have deposed about the execution of will deed.

4. In the written statement filed by respondent No.1/defendant No.1, he has pleaded that defendant No.1 got the suit properties through deceased Surjit Kaur under the will deed. There is no specific pleading as to the executant of the will deed in the written statement. The petitioner/original plaintiff could have raised objection before examining the witnesses of the will deed by respondent/defendant No.1. On the other hand, the plaintiff subjected to these two witnesses to cross examination at length.

5. It appears from the contents of the application Exh.74 that respondent No.1/defendant No1 has filed the

application only for the purpose of exhibiting the will deed which inadvertently remained to be exhibited. In my considered opinion, this is a fit case wherein, discretion under Order 18 Rule 17 of the civil Procedure Code is required to be exercised and the trial Court accordingly exercised the discretion correctly. However, the trial court has committed mistake in Clause 2 of the operative part of the order, wherein the permission is granted to respondent No.1/defendant No.1 to recall the witness Rajendra Shinde. The trial Court should have restricted recalling of witness Rajendra Shinde to the extent of exhibiting will deed only and nothing more than that. The order of the trial court shall stand modified accordingly.

6. With this modification, writ petition is disposed of. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

JPC