

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 3668 OF 2016

MANOHAR LAXMAN SAWANT
AND ANR.

...Petitioners

Versus

BHANUDAS VITHOBA BHOSALE
AND ORS.

...Respondents

....

Mr. Vaibhav R. Gaikwad, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 28th MARCH, 2016

P.C.

1. Not on board. At the request of Mr. Gaikwad, taken up in the production board.
2. Heard Mr. Vaibhav Gaikwad, learned Counsel for the petitioners, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the order dated 15.3.2016 below Exh.154 in Regular Civil Suit No.115/2015 passed by learned Civil Judge, Junior Division, Wai. By that order, learned trial Judge rejected the application made by the petitioners, hereinafter referred to as the plaintiffs, for filing additional affidavit of examination-in-chief.

4. The plaintiffs have instituted the suit for declaration that defendant Nos.1 to 4 have no right, title and interest in the suit property; for declaration that after death of Sonubai the plaintiffs became owner of the suit property; for partition and separate possession of the suit property as also for perpetual injunction restraining the defendants from causing obstruction to their possession. Defendant Nos.1 to 4 filed written statement dated 28.3.2006 at Exhibit-12 opposing the suit. On 3.9.2007 the learned trial Judge framed as many as seven issues. Issue Nos.1, 2 and 7 are as under :

- “1. Whether Plaintiffs have share in the suit property ?
2. Whether Plaintiffs are entitled to partition and possession of suit properties ?
7. Whether sale deed dated 17/05/1974 is legal and valid ?”

5. The plaintiffs filed affidavit of evidence of plaintiff No.2 Uddhav Laxman Sawant on 22.10.2007. He was also cross-examined by the defendants. The defendants filed affidavit of evidence on 21.6.2012 and was cross-examined. On 8.3.2006 the plaintiffs filed application under Order 14 Rule 5 of CPC for

deleting issue Nos.1 and 2 and for recasting issue No.7. Issue No.7 proposed by the plaintiffs is to the following effect :

“ Whether Defendant 1 to 4 prove that the sale deed dated 17/05/1934 is legal and valid ”

6. In pursuance thereof, the learned trial Judge deleted issue Nos.1 and 2 and recast issue No.7 as proposed by the plaintiffs. It is thereafter the plaintiffs filed an application Exhibit-154 for filing additional affidavit of examination-in-chief. By the impugned order, the learned trial Judge rejected the application on the ground that the plaintiffs and defendants have already adduced sufficient evidence regarding their case. No sufficient ground is made out by the plaintiffs for adducing evidence. The application is very vague and the plaintiffs have not specified on what issues or subject they want to lead evidence. It is against this order, the plaintiffs have instituted the present Petition.

7. Mr. Gaikwad strenuously contended that the defendants are claiming that by sale deed dated 17.5.1934, their grand-mother Sakhubai had purchased Survey No.409 from Daji Naru Sawant. Vithoba Bhosale, father of defendant Nos.1

to 4 had purchased Gat No.73 admeasuring 2 Hectare and 36 Ares from Genu Bhau Mozar by registered sale deed and since then they are in possession of these lands. He submitted that the learned trial Judge has committed error in marking the sale deed as exhibit merely on the ground that it is 30 years old. The plaintiffs are not given any opportunity to lead evidence on issue No.7 which was recast pursuant to the application made by them. The plaintiffs therefore filed application for filing additional affidavit of evidence in support of issue No.7. He, therefore, submitted that the impugned order deserves to be set aside.

8. I have considered the submissions advanced by learned Counsel Mr. Gaikwad. I have also perused the material on record.

9. On 3.9.2007 the learned trial Judge framed the issues. Issue No.7 was “whether the sale deed dated 17.5.1934 [wrongly typed as 1974] is legal and valid?”. Perusal of this issue indicates that it was not clear as to on whom the burden was cast to prove this issue. The plaintiffs thereafter filed application on 8.3.2016 for deleting issue Nos.1 and 2 and

recasting issue No.7. Issue No.7 proposed by the plaintiffs was “Whether defendant Nos.1 to 4 prove that the sale deed dated 17.5.1934 is legal and valid”. The learned trial Judge accepted the application and deleted issue Nos.1 and 2 and recast issue No.7. Perusal of issue No.7 shows that the burden is squarely on defendant Nos.1 to 4 to prove legality and validity of sale deed dated 15.7.1934. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. It is for defendant Nos.1 to 4 to establish the legality and validity of the sale deed. It will be open to the plaintiffs to cross-examine the witness of defendant Nos.1 and 2. Understood thus, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed.

10. It is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of CPC.

(R. G. KETKAR, J.)