

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.964 OF 2016

Khajahussain Nabilal Nadaf and others ... Petitioners
Vs.
Tukaram Parshuram Raut and others ... Respondents

Mr. Tejpal S. Ingale for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 22, 2016

P.C. :

Heard Mr. Ingale, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 28.11.2015 passed by the learned 6th Joint Civil Judge Junior Division, Pandharpur below exhibit-154 in Regular Civil Suit No.132 of 1998. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as plaintiffs, under Order 14, Rule 5 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for deleting the following additional issue:

“Whether the Suit is barred by the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short 'Act')?”

3. Plaintiffs have instituted Suit inter alia for declaration that the property, more particularly described in letters 'A', 'B', 'C', 'D' in paragraph 1B of the plaint is jointly owned by plaintiffs and defendant No.1; mandatory injunction directing defendant No.1 to remove the construction in the property described in paragraph 1B of the plaint; for perpetual injunction restraining defendant No.1 from carrying out any

construction in that property; for cancellation of the building permission given by the defendant No.2 to defendant No.1 and for perpetual injunction restraining defendant No.2 from giving permission in future to defendant No.1.

4. On 09.01.2002, the learned trial Judge framed issues at exhibit-42. On 18.03.2015, the learned trial Judge framed additional issue, namely, whether the Suit is barred by the provisions of the Act. On 06.04.2015, the plaintiffs filed application at exhibit-147 under Order XIV, Rule 5 of C.P.C. for deleting the additional issue. The said application was rejected on 21.04.2015. Plaintiffs thereafter filed application under Section 151 of C.P.C. on 09.06.2015 at exhibit 149 for recalling the order dated 21.04.2015 passed below exhibit-147. By order dated 06.07.2015, the learned trial Judge allowed the application and recalled the order dated 21.04.2015. Defendant No.1 thereafter filed application in July 2015 at exhibit-152 for recalling the order dated 06.07.2015 passed below exhibit-147. That application was rejected on 01.10.2015.

5. Mr. Ingale submitted that on the same day i.e. 01.10.2015, the learned trial Judge, on her own, framed the additional issue as to whether the Suit is barred by the Act. Plaintiffs, therefore, took out application exhibit-154 on 30.10.2015 under Order 14, Rule 5 of C.P.C. for striking out additional issue framed on 01.10.2015. By the impugned order, the learned trial Judge rejected the application. It is against this decision, plaintiffs have instituted the present Petition.

6. Mr. Ingale submitted that by order dated 06.07.2015, the learned trial Judge had deleted the additional issue and recalled the order dated 21.04.2015 passed below exhibit-147. He submitted that the said order

is not challenged by the defendant No.1. That apart, defendant No.1 filed application exhibit-153 for recalling the order dated 06.07.2015 passed below exhibit-147. That application was rejected by the learned trial Judge on 01.10.2015. The learned trial Judge, therefore, was not justified to suo motu frame additional issue on 01.10.2015. However, by the impugned order, the learned trial Judge rejected the application. He, therefore, submitted that the impugned order is liable to be set aside thereby deleting the additional issue.

7. I have considered the submissions advanced by Mr. Ingale. I have also perused the material on record. It is not in dispute that plaintiffs have challenged the building permission granted by the defendant No.2- Pandharpur Municipal Council in favour of defendant No.1. It is in that context, on 18.03.2015, the learned trial Judge framed additional issue. It is no doubt true that plaintiffs filed application exhibit-147 on 06.04.2015. Initially by order dated 21.04.2015, the learned trial Judge rejected that application. Plaintiffs thereafter filed application exhibit-149 under Section 151 of C.P.C. on 09.06.2015 for recalling the order. By order dated 06.07.2015, the learned trial Judge allowed that application. In my opinion, the application made by the plaintiffs under Section 151, itself, was wholly misconceived. It is settled position in law that Section 151 being inherent power of the Court can be invoked if there is no other provision. In the present case, admittedly, plaintiffs filed application under Order 14, Rule 5 of C.P.C. on 06.04.2015 for striking out the additional issue. The learned trial Judge rejected that application on 21.04.2015. Instead of challenging that order, plaintiffs filed application exhibit-149 under Section 151 of C.P.C. The learned trial Judge allowed the application. It is no doubt true that the defendant No.1 did not challenge the order dated 06.07.2015. It is material to note that plaintiffs thereafter filed

application exhibit-152 under Section 114 read with Order 47 of C.P.C. for recalling order dated 06.07.2015 passed below exhibit-147. In other words, plaintiffs also wanted trial Court to retain additional issue so framed. The learned trial Judge rejected that application on 01.10.2015. Thereafter, the learned trial Judge, on her own, framed the additional issue, namely, whether the Suit is barred by the provisions of the Act.

8. Order 14, Rule 5 reads thus,

“5. Power to amend and strike out issues.- (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.”

9. Perusal of the above extracted provision shows that before passing a decree, Court has power to amend the issues or frame additional issues at any point. Having regard to the prayers made by the plaintiffs, and in particular prayer clause (d), in my opinion, the issue as to whether the building permission granted by defendant No.2 in favour of defendant No.1 is legal or not arises between the parties. It is in that context, defendant No.1 has urged that in view of the provisions of the Act, the Suit is barred. The said issue squarely arises in the Suit. In view thereof and also for the reasons stated in paragraph 10 of the impugned order, I do not find that the learned trial Judge has committed any error more so when even the plaintiffs at one stage wanted to retain that issue. Hence, Petition fails and the same is dismissed.

10. 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) of C.P.C.

(R. G. KETKAR, J.)

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