

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO. 2360 OF 2014

Giridhar Gavarya Bhoir,
A/at Balkum Pada No.3,
Balkum Village, Tal. & Dist.Thane.

... Petitioner

v/s

1. Smt.Janabai Pundalik Bhoir & ors.,
All (Sr.Nos.1 to 14) residing at
Balkum Pada No.3, Balkum Village,
Tal. & Dist.Thane & ors.

... Respondents

Mr.Sandesh Patil for the petitioner.

Mr.K.K.Malpathak for Resp. Nos.1 and 3 to 5.

Coram: N.M. Jamdar, J.

Dated: 19 September 2016

ORAL ORDER:

Heard learned counsel for the parties.

2 By this petition, the Petitioner challenges the order passed by the learned Civil Judge, Senior Division, Thane, wherein permission sought by the Respondents/Plaintiffs to recall Plaintiff No.3 and produce certain documents which were received after 24 January

2012, as per the provisions of Order 18 Rule 17 of the Code of Civil Procedure, was granted. Learned counsel for the Petitioner, relying upon the decision of the Apex Court in the case of *Wadiraj Naggappa Vernekar v/s Sharadchandra Prabhakar Gogate*¹, submitted that, in the present case the discretion used by the learned Civil Judge was perverse and since the applications made earlier by the Respondents/Plaintiffs were rejected by permitting the Respondents/Plaintiffs to examine Plaintiff No.3 and producing certain documents, the prejudice is caused to the Petitioner. He submitted that the Respondents/Plaintiffs were aware of the Will and by the impugned order inspite of this position the Petitioner is permitted to fill in the lacuna in the evidence. Learned counsel for the Respondents/Plaintiffs supported the impugned order and submitted that the original Will was called for and subsequently when the Respondents/Plaintiffs came in contact with the witness of the alleged will, he handed over certain vital documents pursuant to which the present application was filed. Under Order 18 Rule 17, it is not impermissible for the Court to recall a witness. It is also not impermissible for the Court to allow production of documents on record as sought for by the Respondents/Plaintiffs. The Code has not provided any appeal or revision against such order for the reason that a latitude has to be given to the Trial Judge to conduct the trial. Power of superintendence is not to be used to interfere with each and every order even though incorrect, unless there is a failure of justice

1 (2009) 4 SCC page 410

or palpable error of the procedure. In the present case neither exists. The reason given in the application by the Respondents that Defendant No.1 had filed criminal case against the witness to the Will and in view of that copies were not obtained earlier and after coming in contact with the witness certified copies of the papers were sought for and considering that the contest between the parties was regarding the will and in view of the subsequent development which was narrated in the application, the application for recall of witness was preferred. Though, earlier, an application for production of documents by the Petitioner was rejected, in view of the subsequent events which have been narrated in the application, the exercise of discretion by the learned Civil Judge is a possible view of the matter.

3 As far as the prejudice is concerned, the contest between the parties who are brothers, is regarding the will of their father. Such disputes must be conclusively determined and fair opportunity should be given to the parties to put-forth their case, as such dispute not only affect the parties to the suit but the entire family. Keeping in mind the nature of the dispute, the learned Civil Judge has given an opportunity to the Respondents/Plaintiffs to lead further evidence. The Petitioner can always carry out a cross-examination and advance such arguments as may be permissible in law in respect of the additional evidence so adduced and, therefore, the Petitioner cannot be stated to be prejudiced. There is no question of filling up any lacuna in a case as the Respondents/Plaintiffs are only seeking to

advance contentions in respect of challenge of the will on the basis of the newly found material. Therefore, the decision of the Apex Court in the case of *Vadiraj Naggappa Vernekar* (supra), is of no assistance to the Petitioner. No interference in the impugned order is therefore warranted. As regard the additional evidence to be adduced, all contentions of the Petitioner on merits are kept open.

4 The writ petition is rejected.

(N. M. Jamdar, J.)