

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2667 OF 2016

SHRI. VASANT LAXMAN MAZIRE
(SINCE DECD) THROUGH LRS.
AND ORS.

...Petitioners

Versus

SHRI KISAN RAMBHAU MAZIRE
AND ORS.

...Respondents

....

Mr. Rakesh P. Saroj, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 10th MARCH, 2016

P.C.

1. Heard Mr. Rakesh P. Saroj, learned Counsel for the petitioners, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 14.10.2015 passed by learned 12th Joint Civil Judge, Junior Division, Pune below Exh.110 in R.C.S. No.300/2010. By that order, learned trial Judge rejected the application made by the petitioner, hereinafter referred to as the 'plaintiff' for issuing witness summons to the Collector (Accounts Section) for filing original service book of Shri P.L. Aaphale who was working as a

Tahsildar, Mulshi at relevant time.

3. The plaintiff has instituted the suit for partition and separate possession of his share as also for perpetual injunction against the defendants. Defendant Nos.1 and 2 filed written statement opposing the claim. In para-6, defendant Nos.1 and 2 referred to the partition effected by Tahsildar, Mulshi on 30.3.1972 as per Section 85 of the Maharashtra Land Revenue Code, 1966. On 15.9.2010, learned trial Judge framed issues at Exhibit-32.

4. Mr. Saroj submitted that by order dated 23.7.2012 learned trial Judge passed 'no-cross' order against the defendants. The defendants took out application Exh.65 for setting aside 'no-cross' order. On 20.11.2012, learned trial Judge rejected that application. The defendants thereafter filed application dated 13.11.2013 at Exh.90 allowing the defendants to lead their evidence as also for cross-examination by the plaintiff. By order dated 21.2.2014, the learned trial Judge rejected the application.

5. Mr. Saroj submitted that on 29.8.2013, the defendants

filed application Exh.82 for production of document. By order dated 29.8.2013 learned trial Judge rejected application. The defendants thereafter filed application dated 18.3.2014 at Exh.96 for exhibiting and reading into evidence order dated 30.3.1972 passed by the Tahsildar, Mulshi. By order dated 19.4.2014, the learned trial Judge allowed the production on the ground that the defendants produced the certified copy of the judgment and order passed by Tahsildar which is a public document. Learned trial Judge therefore ordered exhibition and reading same in evidence. Accordingly order dated 30.3.1972 passed by the Tahsildar, Mulshi was marked as Exhibit-97. It is in this context, the plaintiff filed application Exhibit-99 for issuing witness summons to the Resident Nayab Tahsildar, Mulshi. By order dated 2.7.2014 that application was allowed. The plaintiff also filed application under Right to Information Act, 2005 for furnishing copy of the order dated 30.3.1972 passed by Tahsildar, Mulshi. By communication dated 23.6.2009, the plaintiff was informed that the record is not available in the office and consequently copies of the documents sought for cannot be granted.

6. Mr. Saroj submitted that as far as evidence of the plaintiff is concerned, 'no-cross' order is passed against defendant Nos.1 and 2. Defendant Nos.1 and 2 are also not permitted to lead their evidence. However, they have filed application for taking on record the certified copy of the order dated 30.3.1972 passed by Tahsildar, Mulshi. That application is allowed and the order is marked as Exhibit-97. Mr. Saroj submitted that no opportunity is given to the plaintiff to meet the case set up by the defendants. The plaintiff therefore filed application Exh.110 for issuing witness summons to the Collector (Accounts Section) for production of the service book of Shri..P.L. Aaphale to substantiate that the signature appearing on the order dated 30.3.1972 is not of Shri. P.L. Aaphale. By the impugned order, learned trial Judge rejected the application. He therefore submitted that the impugned order deserves to be set aside and the application Exh.110 deserves to be allowed.

7. I have considered the submissions advanced by Mr. Saroj. I have also perused the material on record.

8. As noted earlier, the plaintiff has instituted the suit for partition and separate possession. Defendant Nos.1 and 2 filed

written statement and opposed his claim. It is also evident that 'no-cross' order is passed against defendant Nos.1 and 2 and also they are not permitted to lead evidence. At the same time, defendant Nos.1 and 2 have produced an order dated 30.3.1972 passed by the Tahsildar, Mulshi which is marked Exhibit-97. In my opinion, the application made by the plaintiff for issuing witness summons to the Collector (Accounts Section) for production of the service book of Shri P.L. Aaphale is wholly misconceived. The plaintiff made application Exhibit-110 for establishing that the signature appearing on order dated 30.3.1972 is not of Shri P.L. Aaphale. The signature appearing on the service book of Shri P.L. Aaphale does not tally with the signature appearing on order dated 30.3.1972. It has come on record that by communication dated 18.12.2014 at Exhibit-109 the Resident Nayab Tahsildar has placed on record that the case papers of the case No./partition/34/1972 are not available. In this view of the matter, even if the service book is produced it will not advance the case of the plaintiff for establishing that the signature appearing on the order dated 30.3.1972 is not of Shri P.L. Aaphale as basically the original order dated 30.3.1972 is not brought on record. In view thereof, the petition fails and the

same is dismissed.

9. It is made clear that where a decree is appealed from by the petitioner, 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 appeal as contended by section 105(1) of Civil Procedure Code.

(R. G. KETKAR, J.)

Deshmane (PS)