

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

WRIT PETITION NO. 6174 OF 2015

Sudhakar Namdev Rane

..Petitioner

Vs

Parshuram Vishnu Rane and Ors

.. Respondents

Mr. Bhushan Walimbe, Advocate for Petitioner.

Mr. Shankar P.Thorat, Advocate for Respondent No.1.

CORAM : R.G.KETKAR,J.

DATE : 18/01/2016

PC:

1. Heard Mr. Bushan Walimbe, learned counsel for the petitioner and Mr. S.P. Thorat, learned counsel for respondent no.1 at length. On oral application of Mr. Walimbe, rest of the respondents are deleted. Amendment shall be carried out forthwith. Rule. Mr. Thorat waives service for respondent no.1. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner-original defendant no.1 has challenged the order dated 27.1.2015 passed by the learned Civil Judge, Jr. Dn., Deogad, by which he disallowed the question put in paragraph 38. By order dated 27.1.2015, notice was issued to the first respondent-plaintiff indicating that subject to time constraint and convenience of the Court Petition will be disposed of finally at the

stage of admission. Till next date, ad-interim order in terms of prayer clause (b) was granted.

3. Mr. Walimbe submitted that respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit for partition and separate possession of his 1/3 share. The plaintiff examined as PW 1. In paragraph 37, PW 1 deposed that name of his father Bhau Rane was recorded in respect of land admeasuring 40 Acres. After him, name of Kashiram is recorded as manager of the joint family. After the death of Bhau, Kashiram acted as manager of the joint family and this is supported by extract which is in his possession. He, however, has not produced the said extract. He also could not state that the mutation entry number on the basis of which Kashiram's name was recorded as manager of the joint family. Prior to 1956, entry recording Kashiram as manager of the joint family was made. For the first time, name of Kashiram Bhau Rane was recorded in the Record of Rights. He further reiterated that he could not tell the mutation entry number of 1956 recording name of Mr. Kashiram.

4. Mr. Walimbe submitted that PW 1 was asked next question as to whether he will identify the extract recording name of Kashiram Bhau in the record which was answered in the affirmative. Thereafter, PW 1 was confronted with mutation entry number 36 which recorded oral partition and names of Keshav,

Vishnu, Mahadeo, Dattu, being brothers of Kashiram having shares in the land are recorded.

5. Mr. Walimbe submitted that defendant no.1 is son of Namdeo and Namdeo is son of Kashiram. In other words, defendant no.1 is grand son of Kashiram. Mr. Walimbe submitted that whereas respondent no.1-plaintiff has instituted suit for partition, defendant no.1's case is that in the year 1956 partition is already effected and in that context PW 1 was confronted with mutation entry no.36. The learned trial Judge, however, disallowed the question recorded in paragraph 38 on the ground that if there is inconsistency between the oral evidence and the documentary evidence, documentary evidence will prevail and will have to be given more weightage.

6. He submitted that basically, PW 1 did not establish the fact that name of Kashiram was recorded as manager of the joint family in any revenue record. It is in this context the learned trial Judge ought to have allowed the question referred in paragraph 38 and further questions on mutation entry no.36 and other relevant revenue record.

7. On the other hand, Mr. Thorat supported the impugned order. He submitted that in paragraph 38 the learned trial Judge has rightly held that if there is any inconsistency between the oral evidence and documentary evidence, weightage has to be

given to documentary evidence.

8. After arguing the matter for some time, Mr. Thorat submits that by consent of the first respondent, the impugned order recorded in paragraph 38 may be set aside and defendant no.1 may be permitted to cross examine PW 1 on mutation entry no.36 and other relevant revenue record subject to the rider that the trial Court may be directed to decide the suit after weighing the evidence on record.

9. In view thereof, by consent of the parties, the impugned order recorded in paragraph 38 is set aside. Defendant no.1 is permitted to cross examine PW 1 on mutation entry no.36 and any other relevant revenue record. While deciding the suit, learned trial Judge will weigh the evidence and pass order in accordance with law. All contentions on merits of the parties are expressly kept open.

10. Rule is made absolute in the above terms with no order as to costs. Parties including trial Court to act upon the authenticated copy of this order.

(R.G.KETKAR, J.)