

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3111 OF 2016

Rajiyabano Mohammadh Ramjan and others ... Petitioners
Vs.
Raizwan Ahmed Mohammadh Ramjan ... Respondent

Mr. Bhushan Ulhas Deshmukh for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : MARCH 11, 2016

P.C. :

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

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the order dated 04.02.2016 below exhibit-66 as also the order dated 25.02.2016 below exhibit-70 passed by the learned Civil Judge, Senior Division, Malegaon in Civil Miscellaneous Application No.35 of 2013. By order dated 04.02.2016, the learned trial Judge rejected application exhibit-66 made by the petitioners for adjourning the proceedings on the ground that the witness proposed to be examined by the petitioners went out of station for some personal chores and consequently, the said witness was not in a position to attend the Court. The learned trial Judge rejected that application on the ground that the application is vague and no name of witness proposed to be examined is mentioned. The learned Advocate appearing for the petitioners clarified that he wanted to examine attesting witness on Will. The learned trial Judge observed that the proceedings are for heirship certificate, which is of summary nature and there is no question of issue of proof of Will. Examination of attesting witness on Will is not necessary. By order dated 25.02.2016, the learned trial Judge rejected application exhibit-70 made by the petitioners for examining Mohd.

Ibrahim, who is the brother of deceased Haji Ramzan and attesting witness of the Gift Deed dated 02.10.2011. The learned trial Judge rejected the application on the ground that the proceedings of heirship certificate are of summary nature and issue of proof of Gift Deed is not before the Court. Respondent herein is nowhere concerned with the Gift Deed dated 02.10.2011. The learned trial Judge was, therefore, of the view that there was no necessity of examining witness to the Gift Deed by the petitioners herein.

3. Mr. Deshmukh strenuously contented that Mr. Mohd. Ibrahim is the brother of deceased Haji Ramzan. He is attesting witness to the Gift Deed dated 02.10.2011. On 04.02.2016, said Ibrahim could not attend the Court as he was out of Station. In view of the circumstances beyond the control of the petitioners, they could not ensure presence of the said witness. He further submitted that in terms of Order XVI, Rule 1-A of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), any part to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents. He, therefore, submitted that the learned trial Judge ought to have allowed the examination of the said witness.

4. It is not possible to accept this submission for more than one reason. It is not in dispute that respondent had instituted proceedings under the provisions of Bombay Regulation No.VIII of 1827 and for obtaining heirship certificate. Respondent claims that he is the son of Mohd. Ramjan Haji Peer Mohammad Momin from his second wife. Petitioner No.1 is the third wife and petitioners No.2 to 8 are the children of said Mohd. Ramjan Haji from third wife. Respondent has claimed that he is the legal representative of said Mohd. Ramjan Haji and has, therefore, applied for issuing heirship certificate.

5. Petitioners herein have filed application exhibit-66 for examining witness. Perusal of exhibit-66 does not indicate the name of the witness proposed to be examined by the petitioners. That apart, they have also not made it clear as to for what purpose, they want to examine the said witness. By order dated 04.02.2016, the learned trial Judge rejected the application on the ground that application is vague. It appears that during the course of hearing of that application, Advocate representing petitioners in the trial Court submitted that he wanted to examine the attesting witness on Will. The learned trial Judge considered his submission and rejected it on the ground that proceedings of heirship certificate are summary in nature and there is no question of proof of the Will and hence, examination of attesting witness is not necessary. I do not find that the learned trial Judge has committed any error, more so having regard to the assertions made in exhibit-66 as also nature of proceedings pending in the trial Court. By order dated 25.02.2016, the learned trial Judge rejected the application exhibit-70 on the ground that petitioners wanted to examine Mohd. Ibrahim, brother of deceased Haji Ramzan, who is the attesting witness on the Gift Deed dated 02.10.2011. The learned trial Judge rejected that application mainly on the ground that proceedings are for issue of heirship certificate.

6. Mr. Deshmukh relied upon Order XVI, Rule 1-A of C.P.C. to contend that petitioners can bring any witness to give evidence or to produce documents without applying for summons under rule 1.

7. Perusal of Order XVI, Rule 1-A shows that it is subject to the provisions of sub-rule (3) of rule 1. Sub rule (3) of rule 1 of Order XVI provides that the Court **may, for the reasons to be recorded**, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in

sub-rule (1), if such party shows **sufficient cause for the omission to mention the name of such witness in the said list**. In my opinion, provisions of Order XVI, Rule 1-A of C.P.C. are not applicable in the present case. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioners, 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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