

Mr. Surel S. Shah for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 08, 2016

P.C. :

Heard Mr. Shah, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff No.3 has challenged the judgment and order dated 29.01.2015 passed by the learned 12th Joint Civil Judge Junior Division, Pune below exhibit-212 in Regular Civil Suit No.866 of 1995. By that order, the learned trial Judge rejected the application made by the plaintiffs for deleting issues No.1, 1A and 3.

3. Mr. Shah submitted that Regular Civil Suit No.866 of 1995 was instituted by plaintiff No.1 Fakirchand Ramchandra Khinvasara (since deceased), plaintiff No.2 Subhash Fakirchand Khinvasara and plaintiff No.3 Sachin Subhash Khinvasara against defendant No.1 Ashok Fakirchand Khinvasara and 7 others. He submitted that plaintiff No.1 Fakirchand died. He had executed Will in favour of plaintiffs No.3 and 4. Defendants have disputed the Will. Therefore, the learned trial Judge framed additional issue as to whether plaintiffs prove that late Fakirchand Khivansara had bequeathed the suit property 1(a) to plaintiffs No.3 and 4. Plaintiffs, therefore, filed application for deleting

issues 1, 1A and 3. By the impugned order, the learned trial Judge rejected the application.

4. Mr. Shah submitted that though defendants have disputed exclusive ownership of plaintiff No.1 Fakirchand, they have no right to challenge plaintiffs' title over the suit property. Merely because they have disputed the title of the plaintiff No.1, the learned trial Judge was not justified in framing issues No.1, 1A and 3. By the impugned order, the learned trial Judge rejected the application. In paragraph 7, the learned trial observed that after framing issues, plaintiffs have led evidence and defendants have also cross-examined plaintiffs' witness. It is, therefore, not proper and desirable to delete issues as suggested by the plaintiffs.

5. The fact that plaintiffs' evidence is over is not disputed. In view thereof, as the plaintiffs have already led evidence on all the issues, the learned trial Judge rightly rejected the application. Hence, Petition fails and the same is dismissed. 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) C.P.C.

(R. G. KETKAR, J.)

Minal Parab