

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7514 OF 2016

Makhanlal Bhikhranj Surekha through POA
Sudarshan Makhanlal Surekha ... Petitioner
Vs.
Dr. Virendra Jhabarmal Mishra (since deceased)
through Rajkumari Virendra Mishra and ors. ... Respondents

Mr. Jaydeep S. Deo for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : JULY 8, 2016

P.C. :

Heard Mr. Deo, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.1', has challenged the judgment and order dated 15.02.2016 passed by the appellate Bench of the Court of Small Causes at Mumbai below exhibit-45 in Appeal No.370 of 2003 arising from R.A.E.Suit No.805/2268 of 1989. By that order, the appellate Court rejected the application made by the defendant No.1 for leading additional evidence by carrying out amendment in the written statement as per the Schedule annexed to the application and for remanding the matter to the trial Court for recording fresh evidence limited to the extent of additional affidavit of evidence on issue No.1 and giving fresh findings or in the alternative, while deciding the appeal, taking into consideration the document produced vide order dated 03.03.2010 passed below exhibit-16.

3. Mr. Deo submitted that the Suit instituted by the plaintiff was decreed. Aggrieved by that decision, defendant No.1 preferred appeal. During the pendency of the Appeal, the Testamentary Suit was

compromised between the parties therein and consent terms were filed on 21.02.2006 in this Court. The Suit was disposed of by this Court in terms of the consent terms by passing a consent decree. In terms of the consent decree, each sharer is entitled to 1/7th share. He further submitted that on 30.08.2006, Memorandum of Understanding was executed whereunder it was agreed to sell property to the tenants on as is where is basis. He submitted that to bring these facts on record, application is filed by defendant No.1 at exhibit-45. By the impugned order, the appellate Court dismissed the application on the ground that by order dated 03.03.2016 below exhibit-16, the documents sought to be produced on record are already placed on record and the effect of these documents will be considered while deciding the appeal. He submitted that the opposite party should not object to the production of these documents on the ground that there is no pleading to that effect.

4. I have considered the submissions advanced by Mr. Deo. I have also perused the material on record. It is not in dispute and rather it is evident from record that defendant No.1 had filed application at exhibit-16 under Order 41, Rule 27 of C.P.C. for production of additional evidence. By order dated 03.03.2016, the appellate Court allowed the application. In paragraph 5, it was observed thus,

“5. All these documents as stated above are executed after the decision of the original suit. There are certain Orders passed by the Hon'ble High Court and in view of that Orders, memorandum of understanding came to be executed. What would be the effect of that documents on the rights of the original plaintiff cannot be decided at this stage. But, since these documents are executed or Judgment are delivered after decision of the suit, we are of the opinion that in order to decide the controversy between the parties to this appeal, it is necessary to allow that appellant to produce all these documents on record. Hence, we answer point in consideration accordingly and proceed to pass the following Order”

5. Mr. Deo did not point out that order dated 03.03.2016 is set aside.

In other words, the said order is in force. While passing the impugned order, in paragraph 10, the appellate Court has observed that appellate Court will decide the appeal by considering the documents, which are already allowed to be produced in pursuance of the order dated 03.03.2010. The appellate Court also noted that all the subsequent events narrated by the defendant No.1 in the application are already placed on record vide exhibit-16.

6. As the appellate Court has already allowed production of the documents and has also clarified that the documents will be considered while deciding the appeal, I do not find that the appellate Court has committed any error in rejecting the application. In view thereof, Petition fails and the same is dismissed. It is 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) of C.P.C.

(R. G. KETKAR, J.)

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