

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3652 OF 2015

Shivaji Anant Shelke (decd.) through LRs
Vimal Shivaji Shelke and others ... Petitioners
Vs.
Babanrao Anant Shelke and others ... Respondents

Mr. S.M. Gorwadkar, Senior Advocate i/b. Mr. Onkar Warange for Petitioners.
Mr. Niten S. Venegaonkar for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : 26TH FEBRUARY 2016

P.C. :

Heard Mr. Gorwadkar, learned Senior Counsel for petitioners and
Mr. Venegaonkar, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 05.08.2014 passed by the learned Joint Civil Judge, Junior Division, Satara below exhibit-35 in Final Decree Application No.5 of 2013. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as respondents No.1A to 1D under Section 47 of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. Mr. Gorwadkar submitted that respondent No.1, hereinafter referred to as plaintiff, instituted Suit for partition and separate possession in respect of following properties:

- i. House properties bearing City Survey No.186-B admeasuring 3600 sq.ft. with building consisting of ground plus one floor, more particularly described in paragraph 1(a) of the plaint;

- ii. House properties bearing Grampanchayat No.65, east-west, admeasuring 20 khan with open space, more particularly described in paragraph 1(c) of the plaint; and
- iii. Agricultural lands, more particularly described in paragraph 1(b) of the plaint.

4. Plaintiff, however, did not include other joint family properties, namely, plot No.9 out of Revision Survey No.122/2/1 admeasuring 138.5 sq.mtrs. and plot No.55 in Revision Survey No.518/1/22 admeasuring 106.75 sq.mtrs., more particularly described in paragraph 2A and 2B of the application (for short 'these properties'). Respondents No.1A to 1D filed application to include these properties in the final decree proceedings as these properties are not included in the Suit. However, by the impugned order, the learned trial Judge rejected the application. Respondents No.1A to 1D have instituted Special Civil Suit No.33 of 2014 for effecting partition of these properties and the same is pending. He further submitted that in fact the Courts should have dismissed the Suit for partition for non-inclusion of all the joint family properties. Mr. Gorwardkar relied upon Section 152 of C.P.C. to contend that as there is omission in the judgments in not including these properties, the same may be corrected.

5. On the other hand Mr. Venegaonkar supported the impugned order. He submitted that the Suit instituted by the respondent No.1 was decreed by the trial Court. The decree was confirmed by the District Court as also by this Court and finally, by the Apex Court. In none of the proceedings, respondents No.1A to 1D took up the plea that these properties were not included in Suit for partition. Even that plea was not raised in written statement. In short, he submitted that for the first time, respondents No.1A to 1D have raised these objections in an application

under Section 47 of C.P.C. and Section 152 of C.P.C. is not applicable. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. With the assistance of the learned Counsel appearing for the parties, I have perused the copy of the plaint as also the written statement. Mr. Gorwadkar could not point out plea was taken by respondents No.1A to 1D to the effect that as the plaintiff did not include all the joint family properties including these properties, the Suit is liable to be dismissed. That apart, Mr. Gorwadkar was not in a position to show from the judgments of the trial Court, District Court, High Court and the Apex Court wherein respondents No.1A to 1D have raised this contention. In other words, for the first time, in final decree application proceedings, respondents No.1A to 1D have raised this objection by filing application under Section 47 of C.P.C. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order, more so when the executing Court cannot go behind the decree. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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