

Sequeira

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

Writ Petition No. 8098 of 2014

Kalpana Madhukar Deshmukh & ors. .. Petitioners

Vs

Vikram Madhukar Deshmukh and anr. .. Respondents

Mr.Drupad Patil, for Petitioners.

None for Respondents.

***CORAM : N.M.Jamdar, J.
Friday, 7 October 2016.***

P.C. :

By order dated 8 June 2016, notice was issued to Respondents for 'final disposal'. The learned counsel for Petitioners states that affidavit of service has been filed and Respondent Nos.1 and 2 have been served. In view of this statement Petition is taken up for disposal.

2. The Petitioners are the original Plaintiffs. The Petitioner - Original Plaintiff No.4 was the mother of Plaintiff No.3, Plaintiff No.1 is the wife of Plaintiff No.3 and Plaintiff No.2 and Defendant Nos.1 and 2 are their sons i.e. Defendant Nos.1 and 2 are children of Plaintiff No.4. The suit was filed by the Plaintiffs seeking a declaration that the Will executed by Shankar Madhavrao

Deshmukh i.e. the husband of Plaintiff No.4 is bogus and be cancelled and declaration be issued that it is cancelled and for relief of injunction against Respondents in respect of the suit property. The suit was filed on 5 December 2011 and application for amendment was moved on 17 August 2013 which has been rejected by the impugned order dated 29 March 2014 passed by the learned Civil Judge Junior Division, Nashik. The learned Civil Judge has come to the conclusion that Petitioners / Plaintiffs are trying to change their entire case and are trying to bring on record contradictory facts and such amendment cannot be permitted.

3. Heard learned counsel for Petitioners.

4. Learned counsel for Petitioners submitted that the amendment was immediately moved and the impugned order is not passed on the basis that the amendment has been moved at an earlier stage. He submitted that the findings whether contradictory stands have been taken is incorrect and the position regarding the status of the property was brought within the knowledge of Petitioners when Petitioners obtained a copy of the letter issued by Co-operative Society where the plot is situated, addressed to Shankar Madhavrao Deshmukh and from which position regarding the status of the plot became clear. He submitted that this is a fit case where amendment ought to have been allowed.

5. In the plaint what is sought is cancellation of a Will executed by Shankar Madhavrao Deshmukh, and the challenge is to be raised on two grounds. Firstly, that the property is an ancestral property and therefore, deceased Shankar Madhavrao Deshmukh did not have any right to execute the Will in favour of Defendant – grandson. Second ground taken is that the Will itself is bogus, and there is no examination of the doctor, there are intrinsic irregularities in the Will itself which will show that it is a got-up document. By way of amendment it is sought to be contended that the plot is a self-acquired property of deceased Shankar Deshmukh.

6. Therefore even though the second ground that the property is an ancestral property no longer is pressed forth as ground of challenge, the first ground of challenge that the Will is bogus and not executed in fit state of mind still remains and therefore by merely replacing the second ground of challenge based on the property being ancestral property no prejudice is caused to Respondents-Plaintiffs. No prejudice is caused is clear also from the fact that they have not appeared to contest the Writ Petition. Even otherwise, the amendment which was moved immediately after filing of the suit is only substituting one ground of challenge, could not have been rejected by the learned Judge. Furthermore, it is not impermissible for a party to advance alternate positions. It could have been contended that it is held that if the properties are not joint family

properties still the challenge on the ground that the Will is bogus remains. Therefore, the learned Civil Judge has committed an error in rejecting the amendment on the ground that contradictory stands are being taken. The stage at which the amendment was moved ought to have been kept in mind. In the present case since the first ground of challenge still continues there is no question of withdrawal of any admission.

7. In the circumstances, the Writ Petition deserved to be allowed and is accordingly allowed in terms of prayer clause (a) and (b). Amendment to be carried out within period of six weeks from today.

(N.M.Jamdar, J.)