

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9381 OF 2015

Prabhakar Gangaram Londhe (decd.) through LRs
Pravin Prabhakar Londhe and others ... Petitioners
Vs.
Shivaji Gangaram Londhe (decd.) through LRs
Pramila Shivaji Londhe and others ... Respondents

Mr. Uday B. Nighot for Petitioners.
Ms Babita P. Pandey for Respondents No.8 to 10.

CORAM : R. G. KETKAR, J.
DATE : MARCH 10, 2016

P.C. :

Heard Mr. Nighot, learned Counsel for petitioners and Ms Pandey, learned Counsel for respondents No.8 to 10 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 04.08.2015 passed by the learned Civil Judge, Junior Division, Ghodegaon below exhibit-205 in Regular Civil Suit No.158 of 2003. By that order, the learned trial Judge rejected the application made by the petitioners, hereinafter referred to as plaintiffs, for issuing witness summons to - 1) Avinash Babanrao Kale, stamp vendor, 2) Sudam Sabaji Kale and 3) Ms Pramila Shivaji Londhe as also seeking permission to lead secondary evidence.

3. Plaintiffs have instituted Suit inter alia for partition and possession of their 1/4th share; for perpetual injunction restraining defendants No.1 and 7 from dispossessing the plaintiffs from property described in paragraph 1(c) of the plaint. During the pendency of the

Suit, plaintiffs took out application dated 30.04.2015 at exhibit-205 inter alia contending that though after institution of the Suit, defendants No.8 and 9 have purchased the properties from defendant No.7 by registered sale deeds, plaintiffs are still in possession. Defendant No.7 has not handed over possession to defendants No.8 and 9. After execution of the sale deed, on 18.08.2003, agreement was entered into among defendants No.7 to 9. Since the said agreement is in respect of the suit properties, it is necessary for the plaintiffs to prove its contents for deciding the Suit on merits. After the evidence of plaintiffs was over, application exhibit-101 was made for leading secondary evidence in respect of the said agreement. By order dated 15.03.2012, the learned trial Judge partly allowed exhibit-101 and permitted plaintiffs to produce secondary evidence namely, certified copy of agreement, if any. During the course of defendants' evidence, plaintiffs did not make any application for leading secondary evidence. The evidence of the defendants is also over and it is obligatory on the part of the plaintiffs to prove the contents of agreement dated 18.08.2003. It is in this view of the matter, plaintiffs filed application exhibit-205 for leading secondary evidence as also for issuing witness summons.

4. Defendant No.8 filed reply at exhibit-207 inter alia contending that plaintiffs cannot be allowed to lead evidence in the absence of any pleadings in that regard. By that impugned order, the learned trial Judge rejected the application.

5. Mr. Nighot reiterated the submissions that were advanced before the trial Court. He invited my attention to paragraphs 25 and 32 of the cross-examination of defendant No.8. In paragraph 25, defendant No.8 denied execution of agreement dated 18.08.2003 between defendant No.7 and defendant No.8 and in pursuance thereof, defendant No.8 and

co-purchaser Dhamale paid Rs.5,50,000/- each to defendant No.7 vide cheques exhibit-109 and 112. In paragraph 32, defendant No.8 denied agreement dated 18.08.2003 entered into among defendants No.7 to 9. He submitted that as the said agreement is specifically referred in the cross-examination of defendant No.8, the learned trial Judge ought to have allowed application exhibit-205.

6. On the other hand, Ms Pandey supported the impugned order. She submitted that as the plaintiffs have not pleaded about agreement dated 18.08.2003, they cannot be allowed to lead evidence in the absence of the pleadings.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the plaint shows that plaintiffs nowhere referred to agreement dated 18.08.2003. In reply filed by defendants No.8 and 9, they specifically averred that plaintiffs have not pleaded agreement dated 18.08.2003, and therefore, they cannot be allowed to lead evidence in respect of the said agreement. That apart, perusal of the cross-examination of defendant No.8 and in particular paragraphs 25 and 32 shows that defendant No.8 has denied existence of the said agreement. He further denied that the said agreement is in his custody.

8. As basically plaintiffs have not pleaded agreement dated 18.08.2003 in the plaint and the same is also denied by the defendant No.8, I do not find that the learned trial Judge has committed any error in rejecting 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 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
Section105(1) of C.P.C.

(R. G. KETKAR, J.)

Minal Parab