

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14170 OF 2016

Mohit Atul Kothare And Anr. ...Petitioners

Versus

Mohini Rajkumar Seth And Ors. ...Respondents

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Ms. Eventa A. Gonsalves, Advocate for the Petitioners.

Mr. Shailesh C. Naidu a/w. Ms. Maya Sarkar i/b. Madhukar Mumin & Co. for Respondent No.1.

Ms. Nandini G. Menon, Advocate for Respondent No.3.

Mr. Rajesh Shah, Advocate for Respondent No.4.

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CORAM : R. G. KETKAR, J.

DATE : 22nd DECEMBER, 2016

P.C.

1. Heard Ms. Gonsalves, learned Counsel for the petitioners, Mr. Naidu, learned Counsel for respondent No.1, Ms. Menon, learned Counsel for respondent No.3 and Mr. Shah, learned Counsel for respondent No.4, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants No.1(a) & 2', have challenged the judgment and order dated 16.12.2016 passed by the learned Judge, City Civil Court,

Greater Bombay in Chamber Summons No.942/2016 in Suit No.9931/1987. By that order, the learned trial Judge allowed the Chamber Summons taken out by respondent No.1, hereinafter referred to as the plaintiff, under Order VI Rule 17 of C.P.C. for amending the plaint so as to incorporate paragraph-7(a).

3. In support of this Petition, Ms.Gonsalves strenuously contended that the plaintiff has instituted suit on 21.5.1987 for declaration that she is entitled to 1/6th share in the immovable property Kirti Kunj and the structure standing thereon on the basis that Smt.Gulab Ramrao Kothare, since deceased, her mother had executed her last Will and Testament dated 12.12.1985 bequeathing the said property to her six children. She submitted that the original defendants No.1, 3 & 7 have filed written statement resisting the suit. Issues were framed on 20.7.2006. The plaintiff did not lead any oral or documentary evidence. She submitted that the defendants No.1A and 2 examined DW-1 by filing affidavit in examination-in-chief along with list of documents on 27.9.2006. DW-1 was cross-examined between 15.1.2008 and 23.10.2008. DW-2 filed affidavit of examination on 15.6.2009 and was cross-examined on 21.8.2009. The defendants took out Chamber Summons

No.576/2015 for framing additional issues. By order dated 5.2.2015, the learned trial Judge framed issue, namely, whether the plaintiff is entitled to declaration as prayed for in prayer (a) of the plaint in absence of probate or Letter of Administration of the Will dated 12.12.1985.

4. Ms. Gonsalves submitted that the matter was adjourned for final argument from time to time. It is at this stage on 14.6.2016, the plaintiff took out present Chamber Summons for amending the plaint and by the impugned order, the learned trial Judge has allowed the Chamber Summons. She submitted that serious prejudice is caused to defendants No.1(a) and 1(b). Whereas earlier suit was proceeded on the footing that it is a testamentary proceeding and now by the proposed amendment, the plaintiff has converted the suit in proceedings of intestate succession. She invited my attention to paragraph-12 of the impugned order, wherein the learned trial Judge has observed that *prima facie* the pleas are contrary and still the learned trial Judge has allowed the Chamber Summons. She, therefore, submitted that the impugned order deserves to be set aside.

5. On the other hand, Mr. Naidu supported the impugned order. He has invited my attention to paragraph-11 and submitted that basically the plaintiff has instituted the suit for partition and separate possession of 1/6th share either by testamentary or intestate succession. By the proposed amendment, the nature of the suit is not changed. He further submitted that it is not disputed by defendants No.1(a) and 2 that Gulab Kothare is the mother of the plaintiff and defendants No.1, 3, 4 & 5. Once, the relationship is not in dispute, independent of Will of Gulab Kothare, the plaintiff is entitled to claim share in the suit property.

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the suit is instituted on 21.5.1987. Obviously the suit is governed by unamended Order VI Rule 17 of C.P.C., which reads thus :

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ORDER VI
PLEADINGS GENERALLY

17. Amendment of pleadings.--The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary

for the purpose of determining the real questions in controversy between the parties.”

7. Perusal of prayer (a) shows that the plaintiff has claimed 1/6th share in the immovable property Kirti Kunj and the structure standing thereon. By the proposed amendment, the plaintiff also claims that even on the basis that Gulab Kothare died intestate, the plaintiff is entitled to 1/6th share in the immovable property. As noted earlier, the relationship between the plaintiff and Gulab Kothare is not in dispute. The plaintiff is the daughter of Gulab Kothare. In paragraph-11, the learned trial Judge has observed that the proposed amendment is in the alternative to the original claim of the plaintiff and it does not change the stand of the plaintiff as regards her 1/6th share in the suit property. Mr. Naidu stated that the plaintiff does not want to lead evidence. Statement made by Mr. Naidu is recorded.

8. In view thereof and for the reasons recorded in paragraph-11 of the impugned order, I do not find that the learned trial Judge has committed any error in allowing the Chamber Summons. Hence, Petition fails and the same is dismissed.

9. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)