

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.284 OF 2014

Arvind Manikchand Bhavsar,
Age-69 years, Occu-Business,
R/o Ram Mandir Ward,
Bhusawal, Tq.Bhusawal,
Dist. Jalgaon

-- PETITIONER

VERSUS

Fulchand Onkar Agrawal
since deceased, through his LR's

1. Ravindra Fulchand Agrawal,
Age-53 years, Occu-Business,
R/o Ramji Oil Depot, New Area Ward,
Opp.Brahman Sangh, Bhusawal,
Tq. Bhusawal, Dist.Jalgaon,
2. Prakash Fulchand Agrawal,
Age-51 years, Occu-Business,
R/o as above,
3. Kamla Omprakash Gindodiya,
Age-47 years, Occu-Household,
R/o Dhule-Agra Road,
Near Pach Kandil, Dhule,
Dist.Dhule,
4. Chhaya Bhagirath Morarka,
Age-41 years, Occu-Household,
R/o Itwari, Opp.Haldiram Bhujiyawale,
Nagpur,
5. Kesarbai Fulchand Agrawal,
Age-71 years, Occu-Household,
R/o Ramji Oil Depot, New Area Ward,
Opp. Brahman Sangh, Bhusawal,
Tq.Bhusawal, Dist.Jalgaon

-- RESPONDENTS

Mr.C.K.Shinde, Advocate for the petitioner.

Mr.S.S.Gangakhedkar, Advocate for respondent Nos.1 to 5.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 09/06/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner / original plaintiff is aggrieved by the order dated 05/10/2013 by which his application below Exh.73 seeking leave to file an additional affidavit before the verification on the affidavit in lieu of examination in chief was completed, has been rejected.

3. I have considered the submissions of the learned Advocates for the respective sides and have gone through the record available with their assistance.

4. The petitioner has preferred RCS No.92/2005 seeking recovery of possession with regard to the suit shop premises. Issues were cast on 05/03/2011. An affidavit in lieu of examination in chief dated 05/04/2013 was filed by the petitioner and before the commencement of the cross examination, an application Exhibit 73

dated 25/06/2013 was filed praying for leave to submit an additional affidavit to the affidavit already filed by way of examination in chief. By the impugned order, the Trial Court has rejected the said application on the ground that order 7 Rule 14 of the CPC mandates that the plaintiff should file all the documents in his possession alongwith the plaint. Since Partition Deed is not mentioned in the list of documents, permission to file an additional affidavit cannot be granted.

5. The respondent vehemently submits that unless there are pleadings and documents on record, a party cannot lead evidence on such aspects which have not been pleaded. He submits that a detailed say at Exh.74 was also filed by the respondent opposing application Exh.73 and the Trial Court has rightly rejected the said application.

6. It appears from paragraph No.3 of the plaint that the petitioner/plaintiff has specifically pleaded about the partition that has occurred in relation to the suit property. If a document pertaining to the said document is not on record, the Trial Court can consider the said aspect since the matter then rests on an oral statement without corroborating evidence. However, if the pleading

to the extent of the partition is mentioned in the plaint, the petitioner would acquire the right to lead oral evidence on the principal of “first plead then prove”.

7. Besides the above, the Trial Court has lost sight of Order 7 Rule 14(3) of the CPC by which the plaintiff can produce documents with the leave of the Court before the commencement of the recording of evidence or the hearing of the suit.

8. Nevertheless, application Exh.73 was not with regard to production of documents. It was an application filed for seeking permission to tender an additional affidavit in lieu of examination in chief, in addition to the affidavit filed earlier. There is no express bar or exclusion of a right of a plaintiff or any witness to step into the witness box and depose in examination in chief in addition to the affidavit in lieu of such examination having been filed. So also, until the cross examination had commenced, the recording of oral evidence of the said witness cannot be said to be completed. In order to ensure that the ends of justice are met and a witness is not precluded from leading oral evidence, the Trial Court could have allowed the said application. The defendants were always at liberty to cross-examine the plaintiff after the examination-in-chief was

completed.

9. In the light of the above, this petition is allowed. The impugned order dated 15/10/2013 is quashed and set aside. Application Exh.73 is allowed so as to enable the petitioner/plaintiff to file an additional affidavit in addition to the affidavit in lieu of examination in chief, on record. After the verification is done, the defendants can proceed to cross-examine the plaintiff. Needless to state, the petitioner shall tender the additional affidavit within 2(two) weeks from today and shall not seek extension of time.

10. Rule made absolute in the above terms.

(Ravindra V.Ghuge, J.)