

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Writ Petition No. 02605 of 2015

District : Latur

Babuappa Shivramappa Shetkar,
Age : 85 years,
Occupation : Agriculture
(Through the Power of Attorney
Holder)
Rajkumar Babuappa Shetkar,
Age : 45 years,
Occupation : Agriculture,
R/o. Nilanga, Taluka Nilanga,
District Latur.

.. Petitioner.

versus

Prakash Kashinath Shetkar,
Age : 45 years,
Occupation : Agriculture,
R/o. Nilanga, Taluka Nilanga,
District Latur.

.. Respondent.

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*Mr. E.S. Murge, Advocate, holding for
Mr. A.S. Bayas, Advocate, for the petitioner.*

Mr. S.S. Halkude, Advocate, for the respondent.

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CORAM : SUNIL P. DESHMUKH, J.

DATE : 06TH JUNE 2017

ORAL JUDGMENT :

01. Rule. Rule made returnable forthwith and heard learned Advocates for the parties finally by consent.

02. Petitioner is plaintiff in Regular Civil Suit No. 062 of 2011 filed for removal of encroachment and restoration of possession,

against present respondent - defendant in said suit. It appears to be the case of the petitioner that partition had been effected under document dated 01st May, 1964, distributing property among three brothers. Pursuant to partition, names of three brothers were mutated in revenue record and were being shown accordingly. Plaintiff alleges, subsequently, defendant - his cousin, has caused encroachment over certain property owned by the petitioner under partition. In a joint measurement report of the properties, it has clearly come out that defendant has caused encroachment over plaintiff's property and as such, the suit ensued.

03. Application Exhibit 92 had been moved by the petitioner - plaintiff requesting to exhibit partition deed, being a thirty year old document. However, under order dated 29th November 2013, the request had been turned down observing that contents of the document will have to be proved by the plaintiff. Subsequently, petitioner had moved application Exhibit 94 seeking issuance of witness summons to the person named under the application. However, the same came to be rejected observing that partition deed would be irrelevant to prove encroachment over plaintiff's land by defendant and on the same day, it is stated, no evidence order came to be passed.

04. Petitioner thereafter moved to have the order dated 11-12-2013 to be set aside for the reasons contained in the application - Exhibit 98. The same was resisted by the defendant and an order came to be passed on 28.03.2014 whereby the application was rejected observing that plaintiff's witness no.03 was cross examined on 25.03.2013 and since then till 11.12.2013, plaintiff did not lead further evidence and as such his evidence was closed.

05. The suit had been posted for evidence of defendant and in the meanwhile, application - Exhibit 94 was filed. The order observes that many times witness summons was issued, the plaintiff having not adduced evidence and has tried to protract the trial. Further it has been observed that the plaintiff has not clarified on which point he wants to lead evidence.

06. Mr. Murge, learned Counsel appearing for the petitioner submits that the order has been passed without referring to the contents of the application Exhibit 94 which referred to that the matter relates to immovable property and witness summons had been sought to prove the document. Said application had been rejected and evidence was ordered to be closed. He further submits that the petitioner's case is about encroachment by defendant over plaintiff's land which has come to him under partition. In the circumstances, the observations of the court while rejecting the application for witness summons Exhibit 94 are not proper and do not reflect proper application of mind to the pleadings of the parties and the issues to be decided. Plaintiff should get opportunity to establish the case about partition. The encroachment claimed by him would be a clearer matter in such an event. The orders hitherto passed challenged in Writ Petition, would not be conducive to the case of the plaintiff for want of opportunity to lead proper evidence. Learned Counsel, therefore, urges to allow the Writ Petition and set aside the orders dated 29.11.2013, 11.12.2013, 28.03.2014 on Exhibits 92, 94, 98, respectively and the order dated 07.01.2015 upon application Exhibit 103. Application Exhibit 92 was filed by the petitioner with a prayer to consider the partition deed as evidence in the suit, whereas application - Exhibit 94 was filed by the petitioner for issuing witness summons to the witness of partition deed.

Application - Exhibit 98 was filed by the petitioner for setting aside order in respect of closure of evidence and to allow him to lead evidence. Learned Counsel submits that Exhibit 103 has been rejected primarily for the reason that the issues raised by the petitioner had already been adjudicated and as such, may not be open for adjudication.

07. Mr. Halkude, learned Counsel appearing for the respondent - defendant, resisted the request being made on behalf of the petitioner, by submitting that the petitioner is trying to lengthen pendency of the litigation on one pretext or the other. Exhibit 92 had been rejected for proper reasons. As such, Exhibit 92 is hardly amenable for consideration. He contends that the request under Exhibit 94 is little apart from earlier request made by filing under Exhibit 92, whereunder it has been referred to that the witnesses to the alleged partition deed are difficult to be found and come forward since it is an old document and in the circumstances, application Exhibit 94 for issuing witness summons has been rightly rejected, may be reasons assigned are different. He submits that the reasons given for rejection of application Exhibit 94 are hardly amenable for consideration. He contends that the observations appearing in paragraph nos. 04 and 05 of the order dated 28.03.2014 on application Exhibit 98 are based on the record. The plaintiff appears to be reluctant to adduce proper evidence and had been protracting the litigation. He, therefore, submits that in view of decisions on applications at Exhibits 92, 94 and 98, it would emerge that the decision on Exhibit 103 would be hardly tenable and as such application Exhibit 103 had been rightly rejected. No second request could have been entertained by the Court under application Exhibit 103. He, therefore, submits that the orders passed hitherto are proper and this Court may not interfere in the impugned orders.

08. It appears that the petitioner - plaintiff has sued the respondent - defendant for removal of encroachment with reference to the partition deed. However, it may not be out of place to refer that the genesis of the property to be ancestral does not appear to be a matter at dispute. In the circumstances, the background in which the suit has been filed, may be that the matter is pending for one reason or the other since 2011, yet it may have to be considered that it is the petitioner - plaintiff who is seeking possession of the property by removal of encroachment, he can hardly be said to derive any benefit from protracting the litigation, nor it is the case of any one that the petitioner - plaintiff has derived benefit from the same. Looking at the proximity of the dates of the orders which have been passed since December 2013, and the application Exhibit 98 preferred in February 2014 and decision thereon in March 2014, subsequent application Exhibit 103 preferred in October 2014 and order thereon in January 2015 and the Writ Petition being pending since then, staying further proceedings in the suit, in the circumstances and looking at the nature of litigation, it is expedient to partly allow the Writ Petition by setting aside the orders on applications at Exhibits 94, 98 and 103 by awarding costs to be paid to the respondent - defendant to compensate inconvenience caused to the defendant in the proceedings, with a further direction to the trial Court to proceed with the suit expeditiously and dispose of the same within a period of six months from the date of receipt of writ of this Court.

09. Learned Counsel for the parties refer to that while issuing notice and granting interim relief in the present matter on 11th March 2015, the petitioner had been directed to deposit Rs. 10,000/- in this Court which are accordingly been deposited.

10. In the circumstances, the Writ Petition is partly allowed.

(a) The impugned orders dated 29.11.2013, 11.12.2013 and 28.03.2014 passed by the trial Court, on applications Exhibits 92, 94 and 98, respectively, so also order dated 07.01.2015 on application Exhibit 103 are set aside.

(b) The trial Court to proceed with subject to that the amount of Rs.10,000/- deposited in this Court would be appropriated towards costs payable to the defendant to compensate inconvenience caused to him, as stated herein above. The amount is allowed to be withdrawn by the respondent - defendant from this Court.

(c) The trial Court to proceed with the suit expeditiously and dispose of the same as early as possible, preferably within a period of 06 (six) months from the date of receipt of this order.

(d) Rule is made absolute partly in the above terms.

(Sunil P. Deshmukh)
JUDGE

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