

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

WRIT PETITION NO. 781 OF 2003

- 1 Zainabee w/o Mohammad Bashir,
Aged 62 years, Occupation : Household.
- 2 Shaikh Iqbal.
- 3 Shaikh Gaffar.
- 4 Shaikh Sattar.
- 5 Shaikh Rashid.
- 6 Shaikh Shafi.

Nos.2 to 6 sons of Mohammad Bashir,
Aged 41, 37, 34, 31 and 27 years respectively.
All Labourers and residents of
Sanjaynagar, Zopadpatti, Old Jalna,
District Jalna.

...PETITIONERS
(Original Plaintiffs)

-VERSUS-

- 1 Shivkumar
- 2 Prabhulal
- 3 Madhusudan
- 4 Jagdish.

Nos.1 to 4, sons of Bankatlal Jaiswal
Aged 47, 42, 37 and 32 respectively.

- 5 Pramilabai w/o Shivnarayan Jaiswal,
Age : 50 years.
(Deleted as per order dated 04.02.2005).
- 6 Sharad s/o Champatlal Jaiswal,
Age : 37 years.

All Agriculturalists and Businessman,
Resident of Nehruroad, Jalna.

- 7 Prakash Laxman Prasad Jaiswal,

Aged : 37 years,
Occupation : Agriculturist and Businessman,
R/o Kadrabad, Jalna.

8 Shankarlal s/o Hiralal Jaiwal,
Aged : 37 years,
Occupation : Agriculturist and Businessman,
R/o Tirthpuri, Tq.Ambad, Dist.Jalna.
(Abated as per order dated 17.06.2005).

9 Salikram s/o Ramlal Jaiswal,
dead by his heirs and legal representatives:-
9/A Sheshnarayan s/o Salikram Jaiswal,
Aged : 57 years, Occupation : Businessman.
R/o Bhajimandi, Kadrabad, Jalna.

9/B Ramesh s/o Salikram Jaiswal,
Aged : 52 years,
Occupation : Businessman,
R/o Bhajimandi, Kadrabad, Jalna.

9/C Usha w/o Rajendra Prasad,
Aged : 49 years,
Occupation : Household,
R/o Tanga Stand, Sadar Bazar,
Jalna.
(Deleted as per order dated 04.02.2005).

9/D Shakuntalabai w/o Prakash,
Aged : 47 years,
Occupation : Household,
R/o Near Zenda, Kadrabad,
Jalna.

...RESPONDENTS
(Original Defendants)

WITH
CIVIL APPLICATION NO.7105/2014
IN WP/781/2003

ZAINABBEE MOHAMMAD BASHIR AND OTHERS.
VERSUS

SHIVKUMAR BANKATLAL JAISWAL AND OTHERS.

...

Advocate for the Petitioners : Shri Babasaheb V. Dhage.

Advocate for Respondents 1 to 4, 6, 7, 9A, 9B and 9D : Shri L.V.Sangit.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 15th September, 2017

Oral Judgment :

1 Considering the fact that a short issue has been raised for consideration of this Court in this petition, by consent of the parties, the Civil Application No.7105/2014 praying for listing the Writ Petition for final hearing out of turn is disposed of and the petition is taken up for final hearing.

2 The Petitioners/ original Plaintiffs are aggrieved by the order dated 09.09.2002 by which the application Exhibit-47 filed by the Petitioners seeking deletion of all 13 issues and framing of new issues, has been rejected. The Petitioners are similarly aggrieved by the same order by which their application Exhibit-49 filed under Order 18 Rule 1 of the Code of Civil Procedure praying that the Defendants should commence the recording of oral evidence, has also been rejected.

3 The learned Advocate for the Petitioners has strenuously criticized the impugned order. It is also pointed out that this petition was filed on 29.11.2002 and by the order dated 08.02.2005, interim relief was

granted in terms of prayer clause (D), which reads as under:-

"(D) To stay further proceedings in Regular Civil Suit No.516 of 2000 pending before the Civil Judge, Junior Division, Jalna, until disposal of this Writ Petition."

4 Pursuant to the said relief, RCS No.516/2000 (Old Special Civil Suit No.11/1995) filed by these Petitioners has been stayed.

5 It is further contended that a registered mortgaged deed was executed in favour of the Defendants Late Surajlal and Late Bankatlal by Tamizbee. She passed away on 30.09.1972. The Defendants, by playing a fraud, got the Sale Deed registered on 29.12.1972 bearing No.2047.

6 Insofar as Tamizbee is concerned, the contention of the Petitioners is that she was a lady belonging to the Muslim religion. She was a *pardanashin* and was leading a secluded life. Late Bankatlal and Late Surajlal were owning the adjacent agricultural land and could be said to be the owners of the neighbouring land. Tamizbee reposed faith in these two persons and executed the mortgage deed. She was, however, not explained the contents of the said deed bearing No.1082 in respect of Survey No.288 admeasuring 16 Acres and 8 Gunthas and Survey No.290 admeasuring 31 Acres and 32 Gunthas at Jalna. The said registered mortgage deed dated 25.04.1966 is the result of the fraud played by the said two persons and by exerting undue influence. Being an illiterate and a villager, Tamizbee did not understand what has actually been transacted

by the said mortgage deed.

7 After Tamizbee passed away, Zainabee and her five sons were taken on record as legal heirs. Subsequently, Zainabee has also passed away and now the suit is being contested by her five sons.

8 It is in the above set of facts that the application Exhibit-47 was filed by the Petitioners praying for deletion of all 13 issues and framing new issues, which were proposed by the said application.

9 Upon considering the submissions of the learned Advocates for the respective sides on Exhibit-47, I find that a skeletal application was filed by the Petitioners, which is completely vague in nature. Solitary aspect of Tamizbee being an illiterate and *pardanashin* lady, has been canvassed over and over again without any pleading and averment as to why all 13 issues deserve to be discarded and the issues proposed by the Petitioners need to be cast.

10 It also appears from the proposed issues that the entire burden on various aspects of the case has been tried to be placed on the Defendants. In short, the Plaintiffs do not want the burden on themselves to establish any aspect of the pleadings in the suit, when in fact the principles of pleadings are "*first plead and then prove*" and "*one who pleads shall prove*".

11 The Trial Court has noted that insofar as the mortgage deed dated 25.04.1966 is concerned, as the Petitioners have claimed that the

said document is void, the *onus probandi* would lie on the shoulders of the Plaintiffs. It also cannot be ignored that once the Plaintiffs discharge their burden, the onus would shift on the Defendants. On account of the same, I do not find that the conclusion of the Trial Court that Exhibit-47 requires no consideration, could be termed as being perverse or erroneous merely because a different view could be possible.

12 Insofar as the sale deed dated 29.12.1972 is concerned and which has acquired the registration No.2047, it is contended by the Plaintiffs that Tamizbee has died on 30.09.1972. The copy of the Death Certificate issued by the Health Department, Municipal Council, Jalna under Section 12/17 of the Registration of Births and Deaths Act, 1969 and Rule 8/13 of the Maharashtra Registration of Births and Deaths Rules, 2000, is shown to the Court, which indicates the date of death of Tamizbee as being 30.09.1972. This document was issued on 12.02.2016.

13 Shri Sangit, learned Advocate for the Respondents/ Defendants, submits that he cannot make any statement as to whether, the death of Tamizbee is admitted by the Defendants, though they will have to take a stand before the Trial Court when the recording of evidence commences.

14 In this backdrop, the onus and burden of proving the registered sale deed dated 29.12.1972 would lie on the Defendants considering the scope and effect of Section 111 of the Indian Evidence

Act, 1872 and the view taken by the Honourable Supreme Court in the matter of Krishna Mohan Kul @ Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 SCC 468 : AIR 2003 SC 4351 and the Gauhati High Court in Mustt.Jubeda Khatun vs. Sulaiman Khan, AIR 1986 Gauhati 71.

15 By the filing of Exhibit-49, the Plaintiffs have invoked Order 18 Rule 1 of the Code of Civil Procedure. The contention is that the Defendants should step into the witness box first and should lead evidence. Order 18 Rule 1 speaks about the right to begin which would mean that a particular party might express its desire to begin the recording of its evidence as a matter of right.

16 Order 18 Rule 1 reads as under:-

"Order XVIII : Hearing of the suit and examination of witnesses.

"1. Right to begin :- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts allegedly by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

17 By the application Exhibit-49, the Plaintiffs are not seeking the exercise of the right under Order 18 Rule 1. The Plaintiffs are attempting to project that Order 18 Rule 1 can be invoked to push the Defendants into the witness box first as if the Plaintiffs have the right to

demand that the Defendants should first lead evidence. I do not find that Order 18 Rule 1 indicates in any way that such relief can be sought by the Plaintiffs, who do not exercise their right to begin and desire that the Defendants should begin recording their oral evidence first.

18 The Plaintiffs contend that as the sale deed dated 29.12.1972 has been registered after the demise of Tamizbee, the onus and burden of proving the truthfulness and legality of the sale deed would lie on the Defendants. The Trial Court has observed in the impugned order that it would be the primary duty of the Plaintiffs to establish that the mortgage deed is a void document. Insofar as the registered sale deed dated 29.12.1972 is concerned, naturally the Defendants will have to prove that the said sale deed has legal sanctity which would occur only in the backdrop of the Plaintiffs proving that their maternal grandmother Tamizbee has died on 30.09.1972.

19 None of the citations placed on record by the Petitioners would indicate that a the *pardanashin* lady, while invoking Section 111 of the Indian Evidence Act, could seek an order under Order 18 Rule 1 for refraining from stepping into the witness box and per contra, seeking a direction to the Defendants to commence their evidence.

20 In Bhagirath Shankar Somani vs. Rameshchandra Daulal Soni, 2007 (5) Mh.L.J. 508 : 2007(4) ALL MR 514, this Court concluded that if the Defendant decides to lead evidence first and is so permitted by the

Court, the Plaintiff can always lead evidence in rebuttal. The Trial Court does not have the power to issue a direction to the Defendant compelling him to lead his evidence before the Plaintiff adduces his evidence under Order 18 Rule 1. Only when the Defendant claims a right to begin under Rule 1 and the Plaintiff disputes existence of such right, the Court will have to decide the question whether, the Defendant has acquired a right to begin.

21 This Court, in Dattatray Namdeo Patil vs. Ram Namdeo Patil and others, 2010(3) Mh.L.J. 801, dealt with a similar issue and concluded in paragraphs 3 and 4 that Rules 1 and 2 of Order 18 of the Code of Civil Procedure would entitle the Defendant, who admits the fact, to begin the recording of his evidence first. It is an enabling provision. If the Defendant applies and makes a request or claims such a right, the Court may pass an order permitting the Defendant to step into the witness box first.

22 In Metafield Coil Private Limited vs. Nikivik Tube Industries Private Limited, 2012 (1) Mh.L.J. 289, while considering such an issue under Order 18 Rule 1, this Court concluded that a consistent view taken by the courts is that a direction against the Defendant to lead evidence before the Plaintiff leads his evidence, cannot be issued under Order 18 Rule 1. The scheme of law appears to be that of a normal rule and it would be a privilege of the Plaintiff to lead his evidence first. However, it enables the Defendant to exercise the right in the contingency mentioned

in the rule. After the Plaintiff exercises his option to lead evidence first, it is for the Defendant to decide whether, he would like to lead evidence and make such a formal request to the Court. If the Court permits the Defendant to lead evidence first, the Plaintiff can always lead evidence in rebuttal. The Court does not have the power to issue a direction to the Defendant so as to compel him to step into the witness box first and lead evidence.

23 In my view, the effect of Section 111 of the Indian Evidence Act will surely be considered by the Trial Court keeping in view the contentions that Tamizbee was a *pardanashin* lady and has contended that a fraud was played and her illiteracy has been exploited by the Defendants. All the male members of the Petitioners' family are now the Plaintiffs before the Trial Court. In some of the issues, the burden has been cast on the Plaintiffs and insofar as the Sale Deed of 29.12.1972 is concerned, the same has been cast upon the Defendants.

24 In that view of the matter, I do not find that the impugned order could be termed as being perverse or erroneous or likely to cause grave injustice to the Petitioners. This Writ Petition, being devoid of merit is, therefore, dismissed. Rule is discharged.

25 However, I deem it appropriate to order the Trial Court to decide the Regular Civil Suit No.516/2000 as expeditiously as possible and preferably within a period of NINE MONTHS from today, keeping in

view that the suit has been instituted sometime in January, 1995. The litigating sides shall render their cooperation to the Trial Court for such expeditious disposal.

kps

(RAVINDRA V. GHUGE, J.)