

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11940 of 2014

Smt. Dwarkabai Dhondu Mahajan

through LRs

Petitioner

Versus

Shri Chhatrubhuj Soma Sonawane & another

Respondents

Mr.G.V. Wani advocate for the petitioner

CORAM : **RAVINDRA V. GHUGE, J**

(Date : 25th July, 2017.)

PER COURT :-

1 The petitioner is aggrieved by the order dated 29.3.2014, by which the Trial Court has rejected the Application Exhibit 37 filed by the plaintiff, seeking an amendment so as to acquire a declaration that, he is the owner of the suit property, on the basis of a will-deed executed by the original plaintiff Dwarkabai, who has passed away during the pendency of the suit.

2 Despite service of Court notice on respondent No.1, none has appeared. The petition is dismissed as against respondent No.2 as he was unserved. Learned counsel for the petitioner submits that, respondent No.2 has passed away.

3 Mr. G.V. Wani learned advocate for the petitioner strenuously contends that Dwarkabai has executed a will-deed on 16.2.1010 and has bequeathed the property in favour of the petitioner. The suit was preferred in 2012 bearing No.RCS 365/2012. Dwarkabai did not carry the petitioner with her as a plaintiff in the said suit, which is filed only for the purpose of seeking a declaration that, the alleged special power of attorney dated 14.1.1999 purportedly executed by her in favour of defendant No.2 be declared illegal and consequently, the sale deed dated 7.7.2000 executed by defendant No.2 in favour of defendant No.1 also be declared illegal.

4 After the demise of Dwarkabai during the pendency of the suit, the petitioner moved an application Exhibit 32, claiming to be the legal representative of deceased Dwarkabai. By the order dated 16.2.2012, the Trial Court has permitted the petitioner to step into the shoes of Dwarkabi as a plaintiff and prosecute the suit.

5 The submission of Shri Wani is that, as the petitioner is permitted to be arrayed as plaintiff, on the basis of the will deed dated 16.2.2010, he will have to prove the will deed before the Trial Court in the pending suit so as to justify that he is the legal representative.

6 By the impugned order, the Trial Court has concluded that when the suit is filed only for seeking a declaration that the special power of attorney document was illegal and the sale deed dated 7.7.2000 be declared illegal, the nature of the suit would completely change, if the newly added plaintiff is permitted to seek a declaration as an owner of the suit property, on the basis of the will deed.

7 Mr. G.V. Wani relies upon Order 22 Rule 5 of the Civil Procedure Code, for the reason that the question as to who is the legal representative is to be determined. I do not find the said argument convincing; since the issue before the Trial Court is as to whether the special power of attorney is illegal and consequentially whether the sale deed is illegal. By order below exhibit 32, the petitioner has already been arrayed as plaintiff and that order has not been subjected to challenge by the defendants.

8 When the suit is merely for seeking a declaration as regards the special power of attorney and the sale deed, putting forth a prayer for proving the will deed and a declaration of ownership over the suit property, in my view would be a completely different and distinct cause of action. This cause of

action has no connectivity with the seeking of a declaration that the special power of attorney and the sale deed are illegal. As such, the conclusion drawn by the trial Court that it would be a different cause of action, if the amendment is allowed and it would change the nature of the cause of action, appears to be a correct conclusion.

9 In view of the above, this petition, being devoid of merit, is therefore, dismissed.

(RAVINDRA V. GHUGE , J)