

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7920 OF 2015
(Chandrakant Dattatraya Ruikar Vs. Mukund Sawalarampant
Ruikar and others)

Mr.R.N.Dhorde, Senior Advocate h/f Mr.V.R.Dhorde, Advocate for the
petitioner.

Mr.Arvind Deshmukh, Advocate for respondent No.1.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 29/08/2017

PER COURT :

1. The petitioner/original plaintiff is aggrieved by the order dated 01/07/2015 passed by the Trial Court, by which application seeking framing of an additional issue regarding the alleged insanity of defendant Nos. 3 and 4 has been rejected.

2. Defendant Nos. 3 and 4, who are respondent Nos. 2 and 3 in this petition, have not caused an appearance either through any Advocate or in person. It is informed that both these defendants have not appeared before the Trial Court and have not filed their written statements.

3. This is a second round of litigation between the litigating sides upto this Court.

4. I have considered the submissions of the litigating sides.

5. It is trite law that issues have to be cast based on the pleadings and averments of the parties, the documents relied upon and the material available before the Court at the stage of framing of the issues. Without specific pleadings, the Trial Court would be justified in refusing to cast an issue.

6. The petitioner/plaintiff submits that defendant Nos. 3 and 4 are physically and mentally unable to perform their day to day activities in life and as such they could not have executed a power of attorney without being in a stable state of mind. Consequentially, the sale of the portion of the suit property by such defendants to respondent No.1 herein purchaser, would be affected. This is the basis for the plaintiff praying for a declaration that the said sale deed is null and void and would not be binding upon the petitioner/plaintiff.

7. I have gone through paragraph Nos. 8, 9, 10, 11 and 14 of the plaint, which is at page Nos. 39 and 40 in the petition paper book. The plaintiff has specifically averred that Dinkar and Suman, who are brother and sister of the petitioner, are physically handicapped. Dinkar has been

suffering from poor memory since birth and is unable to perform day to day activities. Sumanbai is also dumb and deaf. Considering their physical status, the petitioner was appointed as the 'Karta' of the family, by virtue of the mutation entry No.168 dated 27/08/1964 with regard to S.No.140, presently Gat No.439 which was effected pursuant to the demise of the father of these siblings, Dattatraya on 06/05/1963.

8. It is, therefore, apparent that the plaintiff has pleaded in the plaint that Dinkar and Suman were physically challenged and could not have been conscious about the happenings with regard to the suit properties and that they were not in a stable and proper state of mind to execute the power of attorney in favour of Kanchan, the real sister of these siblings. Hence the alleged surreptitious sale of the portion of the suit property by Kanchan would be unsustainable and not binding on the plaintiff. With these averments on record, the Trial Court could have suitably framed an issue by maintaining the onus and burden upon the plaintiff to prove that aspect as the principle is that one who pleads has to prove.

9. The Trial Court had earlier directed the medical examination of Dinkar and Suman by order dated 11/03/2014. The said order was set aside by this Court by order dated 12/01/2015 in WP No.2790/2014 which

was filed by the purchaser.

10. By the impugned order, The Trial Court has declined to frame an issue as the plaintiff has specifically sought the framing of the issue with regard to the insanity of defendant Nos. 3 and 4.

11. Mr.Deshmukh, learned Advocate appearing on behalf of respondent No.1/purchaser has vehemently opposed this petition and has prayed for its dismissal by imposing heavy costs.

12. What intrigues me is that Dinkar and Suman are not appearing before the Trial Court as well as before this Court to raise any grievance about framing of any issue as regards their purported disability. The purchaser seems to be carrying the mantle on his shoulders as if he is holding the brief for Dinkar and Suman. Even if an issue is cast in the light of the pleadings of the plaintiff, the onus and burden would be on the plaintiff to prove the said issue and once the burden is discharged, the onus would then shift on the defendants. In any case, if the pleadings are available in the plaint, the Trial Court cannot refuse to cast an issue based on the pleadings.

13. The petitioner has placed reliance upon the division bench

judgment of the Madras High Court in the matter of G.V. Lakshminarayanan Vs.G.V.Nagammal and others (AIR 2007 Madras 231) to support his contention that the Court can exercise its powers under Order 32 Rule 15 to verify as to whether any litigating side is mentally challenged or not.

14. Considering the above, this petition is partly allowed. The impugned order dated 01/07/2015 is quashed and set aside and application Exh.188 is partly allowed. The Trial Court shall therefore frame an additional issue as under :-

"Whether the plaintiff proves any mental disability with reference to defendant Dinkar and any physical disability with reference to defendant Sumanbai which can be said to have affected their ability to execute a power of attorney in favour of Kanchan ?"

15. Needless to state, after the addition of the above issue, the litigating sides would be at liberty to lead further evidence, in as much as, the Court may consider the aspect of summoning Dinkar and Sumanbai in the said proceedings.

(Ravindra V.Ghuge, J.)