

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10000 OF 2017
(Ramrao s/o Dasrao Kadam and others Vs. Umakant Bhagwantrao
Deshpande and another)

Mr.A.N.Nagargoje, Advocate for the petitioners.
Mr.Amit S.Deshpande and Mr.G.L.Deshpande, Advocate for the
respondent No.1.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 05/10/2017

PER COURT :

1. The 9 petitioners, who are original defendants in RCS No.377/2013, are aggrieved by the order dated 08/03/2017 by which the Trial Court has recast issue No.1 by allowing application Exh.118 filed by the original plaintiff.

2. I have heard the submissions of the learned Advocates for the respective sides.

3. Issue no.1 as was earlier framed on 22/08/2014 reads as under :

"1. Does plaintiff prove that the suit way does not exist through his land ?"

4. Post the impugned order, the reframed issue No.1 reads as under :-

"1. Does defendants proves that suit way is in existence through plaintiff's land ?"

5. Learned Advocate for the petitioners has strenuously canvassed that the order dated 02/08/2013 assailed in the regular civil suit filed by the plaintiff is the one which has been passed by the Tahsildar on the application filed by the petitioner u/s 143 of the M.L.R. Code, 1966. These petitioners had contended that there is a cart way running through the land belonging to the present plaintiff and since the cart way is in existence, the obstacles created by the plaintiff should be removed. There is no dispute that the competent authority dealing with the application of the petitioners u/s 143 has concluded that these petitioners have proved that there is a cart-way existing.

6. In the above backdrop, learned Advocate for the petitioners strenuously submits that as the plaintiff has approached the Trial Court and has challenged the order of the Tahsildar dated 02/08/2013 granting the cart way, the onus and burden would lie on the plaintiff to prove that there was no cart way in existence.

7. I am unable to accept the said contention of the petitioners for the reason that the litigation has been triggered off by these petitioners who were applicants before the Tahsildar u/s 143. If they would not have approached the Tahsildar, the issue as to whether any cart way exists or not would not have cropped up. It is at the instance of these petitioners that the Tahsildar was called upon to exercise its jurisdiction to investigate whether these petitioners prove that there is a cart way. Having been convinced, the Tahsildar has then directed the removal of all obstacles in the said cart way.

8. The above facts would be squarely covered by Section 101 of the Evidence Act by which a person who has desired that the Court should deliver a judgment on a particular assertion, has to prove the said asserted factor. It were the petitioners who have asserted before the Tahsildar, though he cannot be termed as a Court of Law, and based on the said assertion, that the Tahsildar exercised its jurisdiction and was convinced about the assertion that there is a cart way in existence.

9. Considering the above, I do not find that the impugned order could be branded as being perverse or erroneous.

10. The petitioners have, however, raised an issue that after the plaintiff had completed his oral evidence and after one of the defendants had led evidence through an affidavit, application Exh.118 filed thereafter could not have been entertained by the Trial Court. It is apparent that Exhibit 118 was filed by the plaintiff after one of the defendants placed his affidavit in lieu of examination on chief on record. No doubt, the Trial Court can ensure that justice is done before it becomes too late. The hardships suffered by these petitioners could have been softened by imposing costs.

11. Considering the above, this petition is partly allowed only to the extent of imposing costs of Rs.9,000/- which the plaintiff shall deposit before the Trial Court on or before 31/10/2017. After depositing the said amount, these petitioners shall withdraw the said amount without conditions in equal proportions. Failure to deposit the amount would lead to the recast issue being set aside.

12. After compliance of the above, the defendants would be at liberty to adduce additional evidence either orally or through an additional affidavit in so far as issue No.1 is concerned. Thereafter, the plaintiff would have a right to lead evidence in rebuttal on issue

No.1 under Order 18 of the Code of Civil Procedure.

(Ravindra V.Ghuge, J.)