

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 316 OF 2016

PRAKASH VISHNUPANT NAGARE AND OTHERS
VERSUS
ASHOK VISHNUPANT NAGARE

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Advocate for Petitioners : Shri Avinash N. Patil
h/f Shri S.S.Chapalgaonkar
Advocate for Respondent : Shri Mukul S. Kulkarni

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 14, 2017

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PER COURT :-

1. The petitioners by this petition have putforth prayer clause 19(B) as under:-

“(B). Quash and set aside the impugned order dated 13.6.2013 and 1.10.2015 thereby confirming order dated 15.6.2015 passed by the learned Civil Judge J.D. Kopargaon below Exhibit 66 in Regular Civil Suit No.34 of 2009 and allowed the impugned application below Exhibit 66 dated 23.9.2015 and No cross order dated 13.6.2013 may kindly set aside and for that purpose issue necessary orders.”

2. I have considered the strenuous submissions of the learned Advocates for the respective sides.
3. RCS No. 34 of 2009 is pending before the trial Court, wherein,

final arguments have already been advanced by the original plaintiff / respondent. The petitioners have suffered a “No cross” order on 13.6.2013. On 13.8.2014, the plaintiff closed his evidence by filing a purshis. No prayer was putforth by the defendants seeking leave to cross examine the plaintiff. No application was filed.

4. On 15.6.2015, after granting the petitioners a period of ten months and two days for leading evidence, having failed to do so led the trial Court to pass the order of “No evidence.”

5. On 23.9.2015, the petitioners filed an application praying for leave to set aside the “No evidence” order and prayed for leading oral evidence. Even in the said application Exhibit 66, the petitioners did not pray for leave to cross-examine the plaintiff. It is in this backdrop that I do not deem it appropriate to entertain this petition to the extent of the “No cross” order dated 13.6.2013.

6. While hearing this petition, the petitioners were directed on 21.1.2016 to deposit an amount of Rs.5,000/-, which has been done. On 20.8.2016, this Court has passed the following order:-

“1. The petition is filed to challenge the orders made by the learned Trial Court Judge in a suit filed for partition and injunction by respondent. Plaintiff Ashok is real brother of defendant Prakash and others are also their brothers or legal

heirs of successors of their mother Venubai.

2. *The suit is filed in respect of house property bearing No. Survey No. 239. Venubai, mother of the parties was owner of this property. It is not disputed that petitioners are all the defendants and successors of the defendants. They have only contended that the plaintiff had taken his share in 1986 under one document and he had separated from the family of Venubai and the defendants and so, he is not entitled to claim partition in the property left behind by Venubai.*

3. *Some record like copy of mutation and zerox copy of so called agreement is available. The mutation, however, shows that there was sale deed produced for effecting mutation and it was made for consideration of Rs. 15,000/-. If there is no sale deed in existence then it can be presumed that the entire property of Venubai is available for partition. But, if the sale deed is available, such presumption is not possible.*

4. *Both the sides are expected to take instructions from their respective clients to ascertain as to whether Venubai has executed registered sale deed in favour of wife of Ashok.*

5. *Stand over to 22.8.2016 in urgent category. High on board."*

7. The copy of the sale deed of the year 1986, executed by Venubai was placed on record. This Court, therefore, passed the following order on 22.8.2016:-

“1) Today learned counsel for the respondent produced copy of sale deed of the year 1986 executed by Venubai. It is taken on record. Learned counsel for the petitioner seeks time to show position of Hindu Law with regard to nature of property which comes in the hands of successors of a Hindu woman. Stand over to 29th August 2016.”

8. Issue is that on the one hand the petitioners have lost the opportunity of cross-examining the plaintiff on account of their laxity and negligence and on the other hand, for the same reasons, they have not led oral evidence. I have rejected the prayer of the petitioners to the extent of the order dated 13.6.2016, as observed above.

9. Considering that an immovable property is the subject matter of the suit, if the petitioners are not permitted to lead oral evidence, they might suffer irreparable harm and the suit would be adjudicated upon practically without any challenge.

10. Keeping the above facts situation in view, I find that the impugned order dated 1.10.2015 refusing the petitioners leave to lead evidence, would be erroneous, harsh and difficult to sustain.

11. This petition is, therefore, partly allowed. The impugned order dated 1.10.2016 is quashed and set aside. The petitioners shall

submit a list of witnesses before the trial Court within three weeks from today.

12. The respondent / plaintiff is permitted to withdraw the amount of Rs.5,000/- deposited in this Court along with interest, without conditions. The petitioners shall further deposit an amount of Rs.5,000/- towards costs, within three weeks from today, failing which the right to lead evidence granted by this Court will stand forfeited. If the costs are deposited, the respondent / plaintiff shall receive the said costs without any condition.

13. After the list of witnesses is submitted as directed, the petitioners shall lead evidence and shall refrain from seeking adjournments on unreasonable and frivolous grounds. If need be, the trial Court may impose costs on the petitioners / defendants if they seek such type of adjournments.

(RAVINDRA V. GHUGE, J.)

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