

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 463 OF 2017

Shri Rajendra Sahebrao Dhamdhere
And Anr.

...Petitioners

Versus

Master Tejas Shivaji Tupe
(since Minor) Through Shri Shivaji Vithal
Tupe And Ors.

...Respondents

....
Mr.Balasaheb Deshmukh i/b. V.B. Tapkir, Advocate for the
Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 16th JANUARY, 2017

P.C.

1. Not on board. At the request of Mr.Deshmukh, taken up for admission.
2. Heard Mr.Balasaheb Deshmukh, learned Counsel for the petitioners, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants No.1 & 2' have challenged the (1) judgment and order dated

17.10.2016 below Exhibit-90 as also (2) judgment and order dated 14.11.2016 below Exhibit-91 passed by the 2nd Jt. Civil Judge, Senior Division, Pune in Special Civil Suit No.1719/2008.

4. By order dated 17.10.2016 below Exhibit-90, the learned trial Judge rejected the application made by defendants No.1 & 2 for examining two witnesses. By order dated 14.11.2016 below Exhibit-91, the learned trial Judge rejected the application made by defendants No.1 & 2 for appointment of the Court Commissioner for the purpose of bringing on record the location of the staircase.

5. Respondent No.1, hereinafter referred to as the 'plaintiff', has instituted suit claiming compensation of Rs.15 Lakhs together with interest @ 12% per annum from the date of the suit till realization. The plaintiff has contended that on 12.12.2007 at about 5:30 p.m. the plaintiff alongwith his friend was playing near by the house situate in Gat No.595, Baif Road, Wagholi. The plaintiff along with his friend climbed the staircase and approached the terrace of the building where in his playhood attitude came into contact with the hanging electrical wires. He was electrocuted and thereby received burns

to the extent of 46%. He fell down from the terrace. He was heavily injured. The plaintiff was taken to the hospital and was required to take extensive medical treatment. His right hand was amputated above elbow. The building situate in Gat No.595 belongs to defendants No.1 and 2 which has been constructed by them recently. The plaintiff further alleged that said building was unauthorizedly constructed without complying with the requirements of building regulations. High tension electrical wires were hanging over the terrace of the building by which easy electrocution is possible.

6. Defendants No.1 & 2 resisted the suit by filing written statement. Issues were framed and the parties led evidence. It appears that on 5.8.2014, cross-examination of PW-2 Tejas Shivaji Tupe was deferred. On 16.8.2014 as Advocate for defendants No.3 & 4 was absent, the learned trial Judge passed No-Cross order against them. It further appears that defendant No.3 thereafter cross-examined the plaintiff's witness on 21.1.2015. Thereafter on 3.10.2016, defendants No.1 and 2 cross-examined PW-2 as per order below Exhibit-87. In the meantime, evidence of PW-3 was over on 11.3.2015. Evidence of PW-4 was over on 31.3.2015 as 'No Cross' order was passed

against the defendant. Evidence of PW-5 was over on 15.12.2015. Defendants No.1 & 2 filed affidavit of DW-1 on 9.2.2016 and his evidence was over on 15.3.2016. On the same day, purshis was filed at Exhibit-79 closing evidence of defendants No.1 & 2.

7. It is only after cross-examination of the plaintiff's witness was over on 3.10.2016, defendants No.1 & 2 filed application on 3.10.2016 at Exhibit-90 for examining two witnesses. They further filed application Exhibit-91 on 25.10.2016 for appointing Court Commissioner. By the impugned orders, the learned trial Judge has rejected the applications. It is against these orders, defendants No.1 & 2 have instituted present Petition.

8. In support of this petition, Mr.Deshmukh strenuously contended that an opportunity must be given to defendants No.1 & 2 to establish their case. In order to establish the case that the stair-case is not at center of house of defendants No.1 & 2, it is necessary to examine two witnesses. Similarly in order to find out location of the staircase it is necessary to appoint Court Commissioner. He submitted that during the course of evidence

of the plaintiff, it is deposed that the staircase is at the centre of house of defendants No.1 & 2. In fact the staircase is not at the center and this fact is required to be brought on record. It is, therefore, necessary to permit defendants No.1 & 2 to examine two witnesses as also appoint Court Commissioner for bringing the factual position on record. By denying the opportunity to the defendants, grave injustice and prejudice will be caused to defendants No.1 & 2 and it will also lead to multiplicity of proceedings. He, therefore, submitted that the impugned orders deserve to be set aside.

9. I have considered the submissions advanced by Mr.Deshmukh. I have also perused the material on record. As noted earlier, evidence of PW-1 was deferred. In the meantime, the plaintiff examined other witnesses. Defendants No.1 & 2 also led their evidence and in fact closed their evidence by filing purshis dated 15.3.2016 at Exhibit-79. The question whether the staircase is situate at the center of the house of defendants No.1 & 2 or not could have been brought on record even before commencement of the plaintiff's witness by applying for appointment of the Court Commissioner. That opportunity was not availed by defendants No.1 & 2. That apart, nothing

prevented defendants No.1 & 2 from examining any witness to bring on record the location of the staircase in their evidence. It is also material to note that no explanation is coming forward for not making application by defendants No.1 & 2 before filing evidence close purshis on 15.3.2016. It is only after evidence of PW-1 was over on 3.10.2016, applications were filed by defendants No.1 & 2. In my opinion, the learned trial Judge was fully justified in rejecting the applications. The learned trial Judge observed that the defendants were aware and should have lead evidence. Same was not done and at the fag end, the application is moved. The matter is of the year 2008 and more than ample opportunity was given to both the parties to lead their evidence. In such circumstances, where the staircase is located cannot be a new ground for leading evidence. I do not find any fault with the approach of the learned trial Judge. While dismissing the application Exhibit-90, the learned trial Judge observed that defendants No.1 & 2 were given opportunity to cross-examine the witness and the application does not give fresh ground for the defendants to examine the witnesses. Equally, I do not find any fault with the learned trial Judge in dismissing application Exhibit-91. In view of the same, no case

is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

10. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)