

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4041 OF 2014***

Shri Lalasaheb Krishna More & Anr.

...Petitioners

Versus

Shri Kedari Rau Desai

Deceased through Lrs.

1) Sau Shakuntala Dattatraya Jagtap & Ors. ...Respondents

Mr. Girish R. Agrawal, for the petitioners.

Mr. Pratap Patil, for the respondent Nos. 1 to 4.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 21st November, 2017.

P.C. :

1. Heard. Rule. Rule made returnable forthwith with consent of the parties.

2. The petitioners herein impugn the order dated 3.3.2014 passed by the District Judge-1, Karad, in Regular Civil Appeal No. 540 of 2000. In a nutshell, the facts of the case are as follows :-

One Kedari Rau Desai had filed Regular Civil Suit No. 169 of 1988 in the Court of Civil Judge, Junior Division at Karad. The original defendant was Lalasaheb Krishna More i.e. the present petitioner No. 1, who

happens to be the son-in-law of Kedari Rau Desai. The plaintiff was seeking possession of the properties mentioned at paragraphs 1A and 1B of the plaint. The second prayer was for mesne profits. It was contended in the plaint that due to old age, the plaintiff could not cultivate his land and therefore, his son-in-law was cultivating the lands. It was stated that the suit properties mentioned in the plaint are self-acquired and ancestral properties. It was contended that the son-in-law i.e. the defendant had been managing the affairs of the plaintiff. It was further contended that on 25.10.1983, the defendant had fraudulently obtained the signatures of the plaintiff on a stamp paper. They were not permitted to read the said documents. They had signed the said document before the Sub-Registrar assuming that it pertained to managing the affairs of the plaintiff. It was also contended that the defendant had mutated his name in the Revenue records on the basis of a gift deed. That the plaintiff had specifically contended that they had been cheated and their signatures were obtained on a gift deed. The cause of action was stated as on 3.3.1988 when the plaintiff had learnt that the plaintiff has been cheated by the original defendant. It is pertinent to note that there was no specific prayer clause regarding seeking a declaration that the gift deed be declared as null and

void or that the gift deed executed in favour of the defendant shall stand cancelled. The plaintiff had only claimed possession from the defendant and the mesne profits.

3. That the suit was dismissed by a judgment and order dated 5.1.1995. It is pertinent to note that after institution of the suit, the plaintiff had expired and hence his other three daughters and his wife were brought on record as legal heirs. Being aggrieved by the said judgment and order, the original plaintiff had filed Regular Civil Appeal No.540 of 2000.

4. That on 8.8.2003, the plaintiffs had filed an application seeking amendment of the plaint under Order VI Rule 17 of C.P.C. It was contended by the plaintiffs that they wish to clarify as to the nature of ownership of the original plaintiff since it was not specifically stated in the plaint as to which are the self-acquired properties and which are the ancestral properties of the plaintiff. The next contention was that all the properties of the plaintiffs are ancestral properties and not self-acquired properties as was contended in the original plaint and, therefore, there was a prayer for partition and possession. They had also prayed for mesne profits and it was contended that since it was the case of the defendant that he had spent Rs.60,000/- to build the house, the plaintiffs were ready to repay

Rs.60,000/- and they were seeking possession of the said residential property. They had also prayed for setting aside the gift deed and had given the valuation of the other properties. It appears that initially, the said application was rejected by the Addl. District Judge, Karad.

5. The said order was impugned by filing Writ Petition No.2716 of 2004. In the beginning, there was interim relief in favour of the petitioners. On 21.8.2013 in W.P.No.2716 of 2004, this Court (Coram: Ravi K. Deshpande, J.) had observed that there was no finding recorded as to whether amendment changes the nature of the suit or whether amendment is necessary for deciding the limited issue involved in the matter and hence the matter was remitted back to the appellate Court to decide the application below Exhibit 31 afresh in accordance with law.

6. Pursuant to the said order, the learned District Judge heard the said application and had allowed the said application by an order dated 3.3.2014.

7. This Court cannot be oblivious of the fact that although an appeal is the continuation of the suit, the judgment and order is being challenged in the appeal and the same is being heard after almost 17 years.

8. The learned counsel for the petitioners has rightly submitted that in

the original plaint, there was no prayer for a declaration that the gift deed executed in favour of the original defendant to be declared as null and void and therefore the said prayer cannot be made in an appeal.

9. The learned counsel for the respondents has drawn attention of this Court to the issues that were framed in the suit and has submitted that although there was no prayer clause, the learned trial Court has framed the issue such as :

“Does plaintiff prove that gift deed dt. 25.10.83 is illegal, bogus, false and got executed by practising fraud on him by defendants ? “

The finding is in the negative. The learned counsel for the respondents submits that the issues are framed on the basis of the contentions in the plaint and not on the basis of the prayer clauses and hence the appellate Court would be seized with the issue as to whether the gift deed dated 25.10.1983 is illegal, bogus and false. There is no dispute about this issue. Hence, there was no reason to deny the amendment sought to that extent. As issue was already framed and decided, amendment was of formal nature. It is also not changing the complexion of the suit.

10. It is pertinent to note that in the plaint, the plaintiff had not demarcated the self-acquired properties from his ancestral property and it is only averred that he is the owner of all the suit properties. As on today, by way of amendment, the original plaintiffs are raising the claim that all the properties are ancestral properties and that they are entitled to partition and possession of the ancestral properties being the legal heirs of the original plaintiff. It is not known as to what had restrained the plaintiffs from raising this issue from 1988 to 2003. In any case, what has to be seen is that this issue was within the special knowledge of the plaintiff who happens to be the father of the present respondents as to which of the properties were self-acquired properties or that of ancestral properties and in any case, the respondents herein could not have their claim or their share in the self-acquired properties unless it is so ascertained. The trial Court had recorded a specific finding that the petitioner herein was cultivating the said land 7 years prior to filing of the suit. It was also observed that none of the plaintiffs had entered into the witness box and has ascertained the issues involved in the plaint. In any case, the gift deed was executed on 25.10.1983. The suit is filed in the year 1988 and in the year 2003, the original plaintiffs are seeking amendment to the plaint.

11. It is pertinent to note that the plaintiff has also vaguely averred in the plaint that on 3.3.1988, the plaintiffs had learnt about the purported gift deed and hence the suit was filed on 30.4.1988. It can be seen that no cause of action or the source of information is stated in the plaint. The original plaintiffs have attempted to enlarge the scope of the suit at the appellate stage which is specifically barred by law. Moreover, in the plaint, there was no reference to the residential house or the expenses incurred by the defendants, no issue was framed in respect of the same. Despite that the plaintiffs claim that they were willing and prepared to pay Rs.60,000/- in order to seek restoration of possession of the house property. Reference to the residential house and expenss incurred therefor was made in the written statement. The plaintiff had expired almost six months after the institution of the suit i.e. on 16.10.1988 and soon thereafter the respondents herein were brought on record as legal heirs. It is apparent on the face of the record that by allowing amendment at the appellate stage, the appellate Court would not only be enlarging the scope of the suit but has changed the very nature of the suit presuming that the averment by the original plaintiff is true and genuine that all properties are ancestral properties. In a suit for

partition and possession, it would be incumbent upon the claimants to prove that the suit properties are the ancestral properties or that they were jointly owned by the claimants and that they were purchased from the nucleus of the joint family properties. None of the issues are raised in the amendment and in view of this, the order dated 3.3.2014 deserves to be quashed and set aside. It is pertinent to note that on the earlier occasion, the said application was rejected. By that time, another Judge allowing the application including the amendment would amount to reviewing the order passed on the earlier occasions. This Court cannot be oblivious of the fact that the matter was remitted to the trial Court only for assigning reasons as to why the application was rejected. It cannot be taken to understand that the order passed by this Court contemplated review of the earlier order.

12. It is an admitted position that the matter was remitted back to the trial Court to decide the application afresh in accordance with law and, therefore, it cannot be held to be review of the earlier order. This Court has directed the trial Court to decide the application afresh in accordance with law. However, the Court was at liberty to take a different view if permissible, justified and in accordance with law.

13. In view of the abovementioned reasons, the order dated

3.3.2014 passed in Regular Civil Appeal No.540 of 2000 by the District Judge, Karad, is hereby quashed and set aside. The appellate Court shall decide the appeal on the basis of the issues that were framed in the trial Court in consonance with the findings recorded by the trial Court by a Judgment and Order dated 5.1.1995. The Petition stands disposed of. Rule is made absolute in the above terms.

(SMT. SADHANA S.JADHAV, J.)