

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.13084 OF 2016

Dashrath Kondiba Shinde (decd) through LRs
Chandrabai Dashrath Shinde and others ... Petitioners
Vs.
Gulab Papabhai Mulani (decd) through LRs
Jaitul Karim Pathan and others ... Respondents

Mr. Rahul S. Kadam for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 23, 2017

P.C. :

Heard Mr. Kadam, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants No.2 and 3', have challenged the - (i) order dated 09.01.2006 by which the learned trial Judge passed no cross order in respect of P.W.1 Ramjan Papabhai Mulani, who was examined at exhibit-29; and (ii) judgment and order dated 16.06.2015 passed by the learned 2nd Joint Civil Judge Junior Division, Indapur below exhibit-68 in Regular Civil Suit No.93 of 2003. By that order, the learned trial Judge rejected the application made by defendants No.2 and 3 for setting aside the no cross order dated 09.01.2006. Defendants No.2 and 3 have also challenged order dated 01.08.2016 passed by the learned trial Judge below exhibit-74. By that order, the learned trial Judge rejected the application made by defendants No.2 and 3 to cross-examine legal representatives of plaintiff No.1 and 2, who were brought on record.

3. Regular Civil Suit No.93 of 2003 is instituted by Gulab Papabhai

Mulani and Ramjan Papabhai Mulani against the respondents and defendants No.2 and 3 for declaration that defendants No.2 to 4 have no right, title and interest in the suit property and that plaintiffs and defendants No.1, 5 and 6 are tenants in common in the suit property; for partition and separate possession of plaintiffs' share in the suit property.

4. Defendants No.2, 3 and 4 filed written statement at exhibit-22 on 12.12.2003 resisting the Suit. P.W.1 Ramjan Papabhai Mulani (plaintiff No.2) filed affidavit of examination-in-chief at exhibit-29 on 19.10.2005. The matter was fixed before the trial Court on 09.01.2006 for cross-examination of P.W.1. Despite repeatedly calling, neither defendants No.2 to 4 nor their Advocate were present. No application for adjournment was made. The learned trial Judge, therefore, passed no cross order on 09.01.2006. Defendants No.2 and 3 filed application at exhibit-68 on 03.03.2015 for setting aside no cross order against P.W.1. By order dated 16.06.2015, the learned trial Judge rejected the application. While rejecting the application, the learned trial Judge observed that P.W.1 died on 22.09.2007 and the present application is filed on 03.03.2015. No satisfactory explanation is given by defendants No.2 and 3 for belatedly filing application for setting aside no cross order. The application is filed after a period of 9 years from passing of the no cross order.

5. Defendants No.2 and 3 thereafter filed application exhibit-74 for cross-examining legal representatives of plaintiffs No.1 and 2 on the ground that both the plaintiffs have died. P.W.1 had filed affidavit of examination-in-chief. Defendants No.2 and 3 however, could not cross-examine him. As legal representatives of plaintiffs No.1 and 2 are already brought on record, defendants are ready and willing to cross examine them. If defendants are not permitted to cross-examine legal

representatives of plaintiffs No.1 and 2, it will cause irreparable loss and prejudice which cannot be compensated in terms of money. By order dated 01.08.2016, the learned trial Judge rejected the application on the ground that legal representatives of plaintiffs No.1 and 2 have not filed affidavit of examination-in-chief and consequently, they cannot be compelled to face the cross-examination.

6. In support of this Petition, Mr. Kadam submitted that defendants No.2 and 3 were not aware of passing of no cross order on 09.01.2006. He submitted that on 18.02.2015, P.W.2 - Jaywant Nathu Chavan filed affidavit of examination-in-chief. It is only at that time, defendants realized passing of no cross order against them in 2006. He submitted that if defendants No.2 and 3 are not permitted to cross-examine legal representatives of plaintiffs No.1 and 2, irreparable prejudice will be caused to them. He further submitted that delay in filing the application for setting aside no cross order is explained. He submitted that on 23.01.2007, plaintiff No.1 died. Plaintiff No.2 died on 22.09.2007. In the year 2009, defendant No.2 died. In 2010, son of defendant No.2 also died. He submitted that because of these intervening circumstances, defendants No.2 and 3 could not file application for setting aside no cross order.

7. I have considered the submissions advanced by Mr. Kadam. I have also perused the material on record. As noted earlier, P.W.1 has filed affidavit of examination-in-chief at exhibit-29 on 19.10.2005. No cross order was passed against defendants No.2 to 4 on 09.01.2006. On 23.01.2007, plaintiff No.1 expired. It is material to note that P.W.1 is plaintiff No.2 and not plaintiff No.1. P.W.1 (plaintiff No.2) died on 22.09.2007. It appears that defendant No.2 died in the year 2009. Son of defendant No.2 died in the year 2010. However, the application

exhibit-68 for setting aside no cross order dated 09.01.2006 was made on 03.03.2015. In the first place, P.W.1 (plaintiff No.2) died on 22.09.2007 and consequently, he cannot be called for facing cross-examination. Secondly, application exhibit-68 is made on 03.03.2015. While rejecting the application, the learned trial Judge observed that no ground is made out for condoning the delay for setting aside no cross order. Thirdly, whatever developments relied by Mr. Kadam, took place between 2007 and 2010. However, there is no explanation between 2010 and 2015. In view thereof, no fault can be found with order dated 16.06.2015 below exhibit-68.

8. As far as the challenge to the order dated 01.08.2016 below exhibit-74 is concerned, defendants No.2 and 3 moved that application for cross-examining legal representatives of plaintiffs No.1 and 2. The learned trial Judge rejected that application by observing that legal representatives of plaintiffs No.1 and 2 have not filed affidavit of examination-in-chief and consequently, they cannot be compelled to face the cross-examination. In view thereof, I do not find that learned trial Judge has committed any error in passing the impugned orders. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)