

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14280 OF 2016

Shri. Raju Shivram Damale
And Anr.

...Petitioners

Versus

Shri. Shivram Ravji Damale
And Ors.

...Respondents

....

Mr. Girish R. Agrawal, Advocate for the Petitioners.

Ms. Smita R. Gaidhani, Advocate for Respondents No.1, 2, 4 to 10.

....

CORAM : R. G. KETKAR, J.

DATE : 07th MARCH, 2017

P.C.

1. Heard Mr. Girish Agrawal, learned Counsel for the petitioners and Ms. Smita Gaidhani, learned Counsel for respondents No.1, 2 and 4 to 10, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the order dated 27.1.2016 passed by the learned Civil Judge, Junior Division, Dindori below Exhibit-1 in R.C.S. No.62/2010. By that order, the learned trial Judge discarded the affidavit of examination-in-chief filed by PW-1 at Exhibit-80.

3. In support of this Petition Mr. Agrawal invited my

attention to the affidavit in examination-in-chief of PW-1 Raj u Damale and in particular paragraph-2 thereof. In paragraph-2, PW-1 stated that though the suit is instituted by plaintiffs No.1 to 3, affidavit of evidence is filed on behalf of himself and plaintiff No.2. In the cross-examination, PW-1 stated that plaintiff No.2 Sahebrao Shivram Damle has not given power of attorney to depose on his behalf. The plaintiffs, therefore, filed affidavit of examination-in-chief of plaintiff No.2 at Exhibit-80. However, by the impugned order, the learned trial Judge has discarded that affidavit. He submitted that in view of the cross-examination of PW-1, it is necessary to file additional affidavit of evidence of plaintiff No.2.

4. On the other hand, Ms.Gaidhani submitted that as in paragraph-2 of the affidavit at Exhibit-77, the plaintiff asserted that he has filed affidavit on behalf of himself and plaintiff No.2 and his cross-examination is over, he cannot be permitted to file his examination-in-chief vide Exhibit-80.

5. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, PW-1 filed affidavit of examination-in-chief on 15.7.2014 at Exhibit-77. His cross-

examination was also conducted. During the course of cross-examination, he deposed that plaintiff No.2 did not give him power of attorney. PW-1, therefore, filed affidavit of examination-in-chief of plaintiff No.2 at Exhibit-80. Perusal of Exhibit-80 also shows that plaintiff No.2 Sahebrao Shivram Damale has filed affidavit in examination-in-chief on behalf of plaintiffs No.1 & 2.

6. As PW-1 has already filed affidavit on behalf of the plaintiffs No.1 & 2 as also his cross-examination was over, plaintiff No.2 could not have filed affidavit of examination-in-chief at Exhibit-80. The learned trial Judge was, therefore, justified in discarding that affidavit. Hence, no case is made out for invocation of powers under Article 227 of Constitution of India. Petition fails and the same is dismissed.

7. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)