

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1177 OF 2017

Shilwant Narayan Bambale .Petitioner

Vs.

Soma Ganu Gade & ors. .Respondents

Mr.Uday B. Nighot, Advocate, for the Petitioner

CORAM : R.G.KETKAR, J.

DATE : 08.03.2017

P.C.

. Not on board. At the request of Mr. Nighot, taken up in the production board.

2. Heard Mr. Nighot, learned counsel for the Petitioner.

3. By this Petition under Article 227 of the constitution of India, the Petitioner, hereinafter referred to as 'Plaintiff' has challenged the Judgment and Order dated 29.08.2016 passed by the learned Jt.CJ.J.D., Junnar below Exh.93 in R.C.S.No.37 of 2008. By that order, the learned trial Judge partly allowed the Application Exh.93 made by the Plaintiff for re-casting the issues and framing additional issue.

4. In support of this Petition, Mr. Nighot invited my attention to issues framed at Exh.80 on 05.11.2011. The Defendants, thereafter, filed an Application Exh.85 on 25.08.2013. By Order dated 14.06.2014, the learned trial Judge framed two additional issues at Sr.Nos.6 & 7. The Plaintiff took out the Application Exh.93 for framing the following additional issues :

(i) Whether the Defendant No.1 proves that the Plaintiff is carrying out money lending transaction ?

(ii) Whether the Defendant No.1 proves that he has obtained a loan of Rs.20,000/- from the Plaintiff and as security for repayment of that amount, he has executed Agreement of Sale in favour of the Plaintiff ?

(iii) Whether the Defendant No.1 has repaid Rs.20,000/- by repaying at the rate of Rs.4,000/- alongwith interest and still the Plaintiff did not cancel the Agreement of Sale ?

5. He submitted that by the impugned Order, the learned trial Judge allowed the Application and framed Issue No.(iii). However, declined to frame Issues No.(i) & (ii) suggested by the Plaintiff. He submitted that as the Defendants specifically contended in the Written Statement that the Plaintiff is carrying on money lending business. It is necessary to frame Issue No.(i) as suggested by the Plaintiff so that

burden will be upon the Defendant No.1 to prove the case pleaded by him. As far as Issue No.(ii) suggested by the Plaintiff is concerned, in view of the pleadings of the Defendant No.1 that he had taken a loan of Rs.20,000/- and as a security for repayment, Agreement of Sale was executed, it is necessary to frame this issue so that burden is upon the Defendant No.1 to establish the said contention. However, without considering the Written Statement of the Defendant No.1 as also reasons given by the Plaintiff in the Application Exh.93 for framing additional Issues, the learned trial Judge rejected the Application. He, therefore, submitted that the Petition requires consideration and the impugned Order needs to be set aside.

6. I have considered submissions advanced by Mr. Nighot. I have also perused the material on record.

7. As noted earlier, by Order dated 05.11.2011, the learned trial Judge has framed Issues at Exh.80. Issues No.(i), (ii) & (iii) are to the following effect :

- (i) Does the Plaintiff prove that Defendant executed an agreement and agreed to sale suit property ?

(ii) Does the Plaintiff prove that he is always ready and willing to perform his part of contract ?

(iii) Does the Plaintiff prove that he is entitled for specific performance ?

8. Subsequently, the learned trial Judge has framed two more issues on 14.06.2014. It is also material to note that the Plaintiff has instituted the suit for specific performance of Agreement dated 09.03.1993. By the Application Exh.93, the Plaintiff has proposed three additional Issues extracted hereinabove. In paragraph 5, the learned trial Judge observed that the dispute between the parties is essentially as regards the nature of the documents. The learned trial Judge was of the opinion that in view of the nature of the Agreement, it is not necessary to frame Issue No.(i), it is not necessary to frame Issue No.(ii) as the original Issue No.1 and the proposed Issue No.(ii) will be contrary to each other.

9. In my opinion, Issue No.1 covers the contention raised by the Defendant No.1 as regards the nature of the documents. Therefore, it is not necessary to frame Issue No.(i) proposed by the Plaintiff. As far as the proposed Issue No.(ii) is concerned, the learned trial Judge

observed that it will be contrary to the original Issue No.1 extracted hereinabove.

10. In view thereof, 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. However, it is made clear that where a decree is challenged 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 the proceedings as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)