

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 514 OF 2017

MAJID SHAH S/O ARMAN SHAH BANDWALE AND OTHERS
VERSUS
HAMIDABANU W/O HARANBHAI MEMON AND OTHERS

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Mr. S. V. Natu, Advocate for the Petitioners.
Mr. A. S. Bajaj, Advocate for the Respondents.

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CORAM : V. K. JADHAV, J.
RESERVED ON : 24th APRIL, 2018
PRONOUNCED ON : 3rd MAY, 2018

ORDER :-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the orders dated 24.11.2016 passed by the learned District Judge-2, Nandurbar below Exhibits 18 and 22 in R.C.A. No. 34 of 2012, the petitioners/original plaintiffs have preferred this Writ Petition under Articles 226 and 227 of the Constitution of India.
3. Brief facts giving rise to this Writ Petition are as follows:
 - a) The petitioners/original plaintiffs have instituted Special Civil Suit No. 30 of 1995 for specific performance of contract in

respect of house property situated at CTS No. 2293, Sutar Mohalla, Nandurbar. The respondents/defendants have strongly resisted the suit by filing written statement alongwith counterclaim. They denied the contention of the petitioners that they agreed to re-convey the suit property to the petitioners. The respondents further sought decree for recovery of possession of the suit house property as well as mesne profits. After considering the pleadings and evidence of the parties, learned Civil Judge, Senior Division, Nandurbar, by judgment and decree dated 13.12.1999, decreed the suit by directing the petitioners to deposit the balance amount of Rs.60,000/- within one month and further granted injunction in favour of the petitioners.

b) Being aggrieved, the respondents/defendants preferred First Appeal No. 53 of 2000 before this Court. However, due to change in pecuniary jurisdiction, the said appeal was transferred to District Court, Nandurbar and registered as R.C.A. No. 34 of 2012. During pendency of appeal, the petitioners filed application Exhibit 18 under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (CPC) for producing additional evidence and to produce documents and also filed an application Exhibit

22 under Order 7 Rule 11 of CPC for rejection of plaint on the ground of non payment of court fee stamp. The learned District Judge-2, Nandurbar, by separate orders dated 24.11.2016, rejected both the applications Exhibits 18 and 22. Hence this Writ Petition.

4. The learned counsel for the petitioners/plaintiffs submits that the lower appellate court erred in rejecting the application Exhibit 18 filed for producing additional evidence on the ground that the documents sought to be produced are not relevant. The lower appellate court ought to have allowed the application and thereafter considered the same, instead of considering their relevance at the time of hearing the application for producing additional evidence. The learned counsel submits that the lower appellate court failed to appreciate that the counter claim filed by the respondents is not pertaining to the marital dispute and relates to the relief of specific performance of contract and re-conveyance. The learned counsel submits that the suit house property is owned by the respondents/defendant nos. 1 to 3. The claim of suit is Rs.4,02,000/- and no court fees has been paid. He further submits that the respondents/defendant nos. 1 to 3, even

though they are woman litigants, will not be exempted from paying the court fees, as the matter is not of matrimonial nature. The lower appellate court failed to consider the citations referred by the petitioners wherein, in similar circumstances, this Court directed the plaintiffs to pay the court fees. The learned counsel for the petitioners submits that both the orders impugned in this Writ Petition are contrary to the provisions of law as well as facts on record and therefore, deserves to be quashed and set aside.

5. The learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the following cases:

1. *Girish Kanaiyalal Munshi vs Sudha Girish Munshi & Anr.*, Reported in **2008 (4) All M.R. 306**,
2. *Subai Mura Rabari vs Paras Devraj Gundecha & Ors.*, reported in **2011 (4) All M.R. 111** and
3. *Writ Petition No. 27319 of 2004* with connected Writ Petitions (*Wellworth Electronics & Ors. vs. The Union of india and Ors.*) decided by the Madras High Court on 01.08.2005.

6. The learned counsel for the respondents/defendants submits that as per the provisions of Order 41 Rule 27 of CPC, generally the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. Only on certain reasonable grounds, if the appellate court thinks it to be necessary for just decision, it may allow production of additional evidence. The learned counsel submits that the documents sought to be adduced by the petitioners/plaintiffs are the documents of court proceedings in Spl. Darkhast No.10/2000 between both the parties. The said Spl. Darkhast No. 10/2000 is filed by the petitioners/plaintiffs under Order 21 Rule 34 of CPC for execution of the documents as per judgment and order passed in Spl. Civil Suit No.30/1995. Considering the same, the lower appellate court has rightly rejected the application Exhibit 18.

7. The learned counsel for the respondents/defendants further submits that the respondents/defendants being women and agitating in the dispute about the property by way of specific performance, are covered under Article 7 of the First Schedule of the Maharashtra Court Fees Act, 1959 (for short, "Act of 1959").

The lower appellate court, considering the Notifications dated 01.10.1994 and 23.03.2000, has rightly held that the women litigants i.e. the defendant nos. 1 to 3 are exempted from paying the court fees, and accordingly rejected the application Exhibit 22. The learned counsel submits that no interference is required and the Writ Petition is liable to be dismissed.

8. The learned counsel for the respondents/defendants, in order to substantiate his contentions, placed reliance on the following cases:

1. *Mrs. Jyoti S. Doshi vs M/s. Hindustan Hosiery Mills*, reported in *AIR 2000 Bombay 474*,
2. *Deepa Shasikant Godambe vs State of Maharashtra*, reported in *1996 (1) Mh.L.J. 74* and
3. *Writ Petition No. 5981 of 2014 (Smt. Meenakshi Prabhakar Saurkar & Ors. Vs Sharad Ramkrushna Shete & Ors.)* decided by this Court at Nagpur (Coram : R. K. Deshpande, J.) on 23.02.2016.

9. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, I have perused the pleadings, grounds taken in the petition and the annexures thereto.

10. So far as the order passed by the learned District Judge below Exhibit 18 is concerned, I do not find any fault in it. The documents sought to be produced as additional evidence are the documents of Special Darkhast No. 10 of 2000 filed by the respondents under Order 21 Rule 34 for execution of the documents as per the order passed in the impugned judgment and decree dated 13.12.1998. The learned District Judge has therefore rightly observed that the proposed documents will not determine the appeal, neither it will be necessary to consider them while deciding the appeal.

11. So far as rejection of the application Exhibit 22 is concerned, though the learned District Judge has observed that the judgment delivered by the Division Bench of this Court in the case of *Girish Kanaiyalal Munshi vs Sudha Girish Munshi & Anr.* (supra) is of grave importance, further observed that as per

the Notification dated 01.10.1994, the women litigants are exempted from paying court fees. The learned District Judge has ignored the ratio laid down by the Division Bench in the aforesaid case and further failed to consider the ratio laid down by this Court in the case of ***Subai Mura Rabari vs Paras Devraj Gundecha & Ors.*** (supra).

12. In the case of ***Girish Kanaiyalal Munshi vs Sudha Girish Munshi & Anr.*** (supra), the Division Bench of this Court has considered the following question, being referred in view of the various conflicting decisions of a number of Single Judges, “whether a woman litigant, who files a petition for grant of Probate of Will is exempted from payment of court fees as per the Government Notification dated 1st October, 1994 duly amended by an explanatory notification dated 23rd March, 2000? The Division Bench has referred various conflicting decisions of number of Single Judges including the case of ***Mrs. Jyoti S. Doshi vs M/s. Hindustan Hosiery Mills*** (supra) reported in ***AIR 2000 Bombay 474***. In para nos. 26 and 27 of the judgment, the Division Bench of this Court has made the following observations:

“26. After hearing the learned Senior Counsel Dr. Tulzapurkar and the learned Advocate General and in light of the extensive arguments forwarded on behalf of the Petitioner and the State, the various judgments of this Court regarding the exemption from payment of court fees by women litigants and several other relevant judgments of this Court and the Hon'ble Supreme Court, the following issues can be clearly outlined.

A) The intention of the Government behind issuing the 2nd Notification 23rd March,2000.

a) The Notification dated 23/03/2000, which qualified 'property disputes' as disputes arising out of and concerning matrimonial matters, was issued as a consequence of various judgments of this Court wherein the term 'property disputes' was given a wide interpretation.

b) The Notification dated 23/03/2000 is in the form of an amendment Notification. In view of this, it is pertinent to note the reference made by Deshmukh J. in his judgment of 4/06/2007, to the judgment of the Privy Council in the case of D. R. Fraser & Co. Ltd v. The Minister of National Revenue AIR 1949 P.C. 36, wherein the Privy Council has observed that, 'When an amending act alters the language of the principal statute, the alteration must be taken to have been made deliberately'.

c) The 2nd Notification was issued with the intention of changing the then existing situation and if despite the amendment the situation continues to be the same, the amendment would be an exercise in futility.

d) Hence the intention of the Government behind issuing the 2nd Notification is amply clear from plain simple interpretation of the words of the Notification themselves, that the term 'property disputes' would be restricted to only those concerning or arising out of matrimonial matters and would hence exclude petitions filed for probate of Wills.

B) Interpreting it widely would go beyond the intent of the Government

a) Notwithstanding the fact that the Notification exempting a certain class of women from payment of court fees is a beneficial piece of legislation, an extended meaning to the words 'property disputes', would tantamount to indulging in exercise of legislation Page 1539 in the garb of interpretation. A similar view was taken by Palkar J. in his judgment in the case of Smt Ashabai w/o Shivaji Shiral and Anr v. The Executive Engineer, MSEB 1999(2) Bom CR 194.

b) A petition for probate of a Will is neither a petition in relation to any 'property dispute' nor does it 'arise out of or concern a matrimonial matter.'

c) A petition for probate of a Will is never a petition in relation to any dispute concerning any property but is in relation to the validity or otherwise of a Will. The judgment of the Supreme Court in the case of Delhi Development Authority v. Mrs. Vijaya Gurshaney and Anr. AIR 2003 SC 3669, which Deshmukh J. referred to in his judgment of 4/06/2007 clearly brings to light the aforementioned view, wherein it was held that a testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will and grant of a probate or Letters of Administration does not confer title to property.

d) As rightly contended by the Learned Advocate General, Mr.Ravi Kadam, on behalf of the state, testamentary cases do not arise out of matrimonial matters but rather arise out of 'death'.

C) Furthermore it is pertinent to differentiate between matrimonial matters and matrimonial relationship as the two terms are not synonymous and hence the term 'matrimonial matters' arising in the Notification of 23/03/2000 cannot be replaced by 'matrimonial

relationship' so as to bring a petition filed by a widow for probate of her deceased husband's Will, within the ambit of the Notification.

D) Lastly, the words 'property dispute arising out of or concerning matrimonial matters' should be given their plain and simple meaning, that is, a dispute arising between parties to a marriage, (attention may be brought to the reference made by Deshmukh. J. to the Family Courts Act Sub-section (1) Section 7, to elucidate the meaning of the term 'matrimonial matters') and should therefore exclude testamentary petitions wherein not only is there an absence of a dispute, other than in cases when somebody files a caveat, it is not a matter between two parties to a marriage.

27. Hence, we answer that a woman litigant who files a Petition for grant of Probate of a Will is not exempted from payment of Court Fees, as per Government Notification dated 1st October, 1994, duly amended by an explanatory Notification dated 23rd March, 2000."

13. In the case of ***Subai Mura Rabari vs Paras Devraj Gundecha & Ors.*** (supra), reported in ***2011 (4) All M.R. 111***, in para nos. 11 and 14, this Court has made the following observations:

“11. In so far as the instant matter is concerned, Clauses (A)(c) and (d) and Clause (B)(a) are relevant. What can be culled out from Clauses (c) and (d)(A) is that the terms property disputes would be restricted to those concerning or arising out of the matrimonial matters and would hence exclude petitions for probate of Wills. By Clauses (B)(a) what has been laid down is that interpreting the words property disputes by giving an extended meaning would tantamount to indulgence in exercise of legislation in the garb of interpretation. Hence, the Division Bench in terms has laid down that the property disputes would be restricted only those concerning or arising out of matrimonial matters.

In the instant case as mentioned herein above, the plaintiff has filed the suit challenging the consent terms and for setting aside all the agreements. They cannot by any stretch of imagination be said to be connected to matters pertaining to matrimony. In view of the judgment of the Division Bench in Girish Munshi's case (supra) in my view the efficacy, the judgment in Jyoti Doshi's case (supra) stands denuded. As rightly submitted by the learned Counsel for the Applicant that Jyoti Doshi's case was decided to take care of the fall out of the explanatory Notification dated 23-3-2000, as between 1-10-1994 and 23-3-2000 large number of suits came to be filed and entertained and wherein orders came to be passed.

However, the Division Bench in Girish Munshi's case has laid the matter to rest.

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14. *In my view, in the light of the clear exposition of the Division Bench in Girish Munshi's case (supra) the plaintiff is not entitled to exemption from payment of Court Fees. The Notice of Motion would therefore, have to be allowed and is accordingly allowed in terms of prayer Clauses (a) and (b). However, the same would come into force after a period of 8 weeks within which the plaintiff is directed to pay the Court fees which she is liable to pay on the basis of the subject-matter of the Suit and its valuation. Notice of Motion allowed."*

14. In the instant case, by any stretch of imagination, it cannot be said that the matters pertain to matrimony. The case of ***Jyoti S. Doshi vs M/s. Hindustan Hosiery Mills*** (supra) was decided to take care of the fall out of the explanatory notification dated 23.03.2000, as between 01.10.1994 to 23.03.2000 large number of suits came to be filed and entertained and wherein orders came to be passed. However, the Division Bench in the case of ***Girish Kanaiyalal Munshi vs Sudha Girish Munshi & Anr*** has

laid the matter to rest. The judgment of this Court in the case of *Deepa Shasikant Godambe vs State of Maharashtra* (supra) reported in *1996 (1) Mh.L.J. 74*, is of no help to the respondents as it was prior to the explanatory notification dated 23.03.2000. Further, the judgment passed by the learned Single Judge of this Court at Nagpur in **Writ Petition 5981 of 2014 (Smt. Meenakshi Prabhakar Saurkar & Anr. Vs Sharad Ramkrushna Shete deceased through LRs. & Ors.)** (supra) relying upon *Jyoti S. Doshi's* case is also not helpful to the respondents without referring the Division Bench judgment in the case of *Girish Kanaiyalal Munshi*.

15. The learned District Judge has committed an error while concluding the issue in para 21 of the impugned order by observing that even otherwise, the rights of the appellants/defendant nos. 1 to 3 in the suit property are being infringed by their husbands and hence it may also fall under matrimonial dispute though not directly.

16. In view of the above discussion and in the light of the clear exposition of the Division Bench of this Court in the case of

Girish Kanaiyalal Munshi (supra) and the decision of learned Single Judge in the case of *Subai Mura Rabari*, the respondents are not entitled to exemption from payment of court fees. The application Exhibit 22 deserves to be allowed in terms of its prayer clause. However, the respondents are directed to pay the court fees which they are liable to pay on the basis of the subject matter of the suit and its valuation within the period of eight weeks from the date of this order. Hence the following order:

ORDER

- I. The Writ Petition is hereby partly allowed. No costs.
- II. The order below Exhibit 22 dated 24.11.2016 passed by District Judge-2, Nandurbar in R.C.A. No. 34 of 2012 is hereby quashed and set aside.
- III. The application Exhibit 22 is hereby allowed in terms of its prayer clause.
- IV. The respondents/appellants in First Appeal 53 of 2000 (R.C.A. 34/2012) are hereby directed to pay the court fees on the basis of the subject matter of the suit and its valuation within a period of eight weeks from the date of this order.

V. The impugned order below Exhibit 18 dated 24.11.2016, passed by District Judge-2, Nandurbar in R.C.A. No. 34 of 2012 stands confirmed.

VI. The Writ Petition is hereby dismissed to that extent.

VII. The Writ Petition is accordingly disposed of.

(V. K. JADHAV, J.)

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