

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 222 OF 2018

BAPURAO BANDERAO SHETE THROUGH POWER OF ATTORNEY
HOLDER MANMATH BAPURAO SHETE
VERSUS
PRABHUAPPA BAPURAO KHAWDE DIED LRS BAPURAO PRABHUAPPA
KHAWDE AND OTHERS

...
Advocate for the Petitioners : Shri Gangakhedkar Shailendra S.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 09th January, 2018

Per Court:

1 The Petitioner/ original Plaintiff is aggrieved by two orders passed by the Appellate Court, dated 09.10.2017 below applications Exhibits-32 and 34 in Regular Civil Appeal No.18/2015.

2 I have considered the strenuous submissions of the learned Advocate for the Petitioner and have gone through the petition paper book with his assistance.

3 The Petitioner has moved the application Exhibit-32 seeking leave to amend the appeal memo so as to bring on record the contentions set out in the proposed paragraphs 3A and 3B. The proposed paragraphs deal with the Will executed by Prayagbai and who has affixed her thumb impression on the same in the presence of two witnesses. The purpose of

the amendment through Exhibit-32 was to ensure that the factum of the Will is proved before the Appellate Court.

4 By the order dated 09.10.2017, the Appellate Court has specifically observed in paragraph 9 that when the Will is said to have been subjected to legal proceedings and has been proved in such legal proceedings bearing RCS No.216/1986, the Appellant/ Plaintiff can merely produce the certified copies of the proceedings wherein, the execution of the Will was proved.

5 The grievance of the Petitioner is that the original Will is subjected to another litigation involving the Petitioner herein and as such, it may take time to produce the copy of the Will before the Appellate Court. I do not find that this reason could be sufficient to allow an amendment for the reason that the Will is said to have been proved in a legal proceeding and the Appellate Court has rightly noted that the Appellant can produce the certified copy of the decision in the said proceedings, which would assist the Appellate Court in considering the evidenciary value of the said Will.

6 In this backdrop, the impugned order dated 09.10.2017 rejecting the application Exhibit-32 with leave to the Petitioner/ Appellant to file the certified copies of the proceedings, cannot be termed as being perverse or erroneous.

7 The Petitioner submits that vide the application Exhibit-34, it

was urged before the Appellate Court that the following issue was not framed by the Trial Court and therefore, is required to be framed by the Appellate Court:-

"Does the Defendants prove that they become owner of the suit property on the basis of the tenancy rights?"

8 By the impugned order dated 09.10.2017, the Appellate Court has rejected the application Exhibit-34 for the reason that on the basis of vague pleadings, such prayer need not be entertained.

9 The learned Advocate for the Petitioner has strenuously criticized the impugned order contending that when the Defendants have come forward with the case that they have tenancy rights, the Trial Court should have framed the said issue. Having failed to do so, leaves the Petitioner with no other option, but to pray for framing of the issue in the appeal proceedings since there is possibility that the matter can be remitted to the Trial Court for considering the said issue.

10 I do not find that the above said contention of the Petitioner could be said to be a bonafide contention. Special Civil Suit No.85/2011 filed by the Petitioner/ Plaintiff has been dismissed. The endeavour of the Petitioner is to seek a remand of the proceedings so that the said suit can be reopened. Had it been the contention of the Petitioner/ Plaintiff as regards the tenancy rights and if that issue was not framed, the contention of the Plaintiff could have been appreciated.

11 The fact remains that it was the Defendants, who have raised the plea of tenancy rights and the suit filed by the Petitioner herein has not been dismissed on the ground that the Defendants have established the right of tenancy without the issue being cast. In fact, the Trial Court has ignored the said contentions of the Defendants and the suit has been dismissed not because the Defendants established a right of tenancy, but for different reasons which are sub-judice before the Appellate Court.

12 As such, if no issue of tenancy was framed at the behest of the Defendants, the Petitioner/ Plaintiff cannot be said to be an aggrieved party. The impugned order refusing to frame the said issue, therefore, can neither be termed as being perverse nor erroneous.

13 This Writ Petition being devoid of merit is, therefore, dismissed.