

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.12163 OF 2018**

Gurubachan Singh Kaura	]	Petitioner
Vs.		
Mikhdad Kurbanhussain Khambati	]	Respondent
.....		
Mr. Khan Javed Akhtar, for Petitioner.		
.....		

CORAM : R.G. KETKAR, J.

DATE : 24th OCTOBER, 2018.

P.C.

Heard Mr. Khan, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petition, hereinafter referred to as 'defendant No.1' has challenged the judgment and order dated 10th September, 2018 passed below Exhibit 43 in R.A.E. Suit No.943/1513 of 2012. By that order, the learned trial Judge rejected the application made by defendant No.1 for framing additional issue; “as to whether plaintiff is co-owner of the suit premises”.

3. In support of this Petition, Mr. Khan invited my attention to cross-examination of P.W.1-Mikhdad Kurbanhussein Khambatti and in particular following portion;

“I am aware of the fact that R.A.E Suit No.93/210 of 1995 was filed by all the landlords. It is not true to say that at the time of filing of the said suit, I was not the landlord. Witness volunteers that previous suit was filed by the previous landlord and thereafter we purchased the property and thereafter we became plaintiff therein. At present none of previous landlord is co-

owner of the suit property. It is correct to say that I have not mentioned the names of other co-owner of suit premises. It is not true to say that as the other co-owner have not given consent for filing the present suit I have not mentioned their names. It is not true to say that previous suit was having same cause of action. I am aware of the fact that pursuant to the consent terms filed between the parties, the defendant No.1 herein had given undertaking that he will not part with the possession of the suit premises.

He submitted that the consent terms were filed in R.A.E. Suit No.93/210 of 1995 in the year 2003. Defendant No.1 was party to this proceeding. He submitted that the plaintiff was also party in that suit. He submitted that during the course of cross-examination, P.W.1 denied that he was landlord at the time of filing of previous suit in the year 1995. Witness volunteered that previous suit was filed by the previous landlord and thereafter the plaintiff and others purchased the property. He submitted that defendant No.1 has taken search and did not come across conveyance deed in favour of the present plaintiff. He, therefore, submitted that it is necessary to frame additional issue;

“as to whether plaintiff is co-owner of the suit premises”.

as prayed for.

4. I have considered submissions advanced by Mr. Khan. I have also peruse the material on record. A perusal of the plaint and in particular paragraph 1 shows that the plaintiff specifically asserted that he is co-owner and landlord of the building. In the written statement, defendant No.1 contended that he is not aware that the plaintiff is one of the co-owner and landlord of the building.

5. A perusal of the cross-examination extracted hereinabove shows that the plaintiff deposed that at the time of filing of the suit in the year 1995 he was not the landlord. The suit was instituted by the previous landlord and

thereafter the plaintiff and others have purchased the property. The plaintiff and others thereafter filed consent terms in the year 2003 in the suit of 1995. Defendant No.1 has not produced any material on record to substantiate that status of the plaintiff herein who was plaintiff No.2 in that suit was challenged in the previous suit.

6. In view thereof as also for the reasons recorded in paragraph 3 of the impugned order, I do not find that any case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

7. 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 memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]