

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

WRIT PETITION NO. 8500 OF 2015

1. Smt. Chandrabhaga Gopinath Aghade,
Age : 83 years, occu. Nil,
R/o Belpimpalgaon, Tq. Newasa, .. Petitioner/
Dist. Ahmednagar .. orig. plaintiff

versus

1. Asaram Dagdu Shinde,
Age : 85 years, Occu. Nil
2. Sau. Kamlbai Asaram Shinde,
Age : 76 years, Occu: Nil
3. Ashok Asaram Shinde,
Age : 51 years, occu. Agril.
4. Sau. Chhaya Ashok Shinde,
Age : 47 years, occu; Agril.
5. Adhinath Dagdu Shinde,
Age : 23 years, occu: Eduction,
6. Navnath Dagdu Shinde,
Age : 19 years, Occu: Eduction
7. Shivnath Dagdu Shinde,
Age : 17 years, Occu: Education,

Respondents no. 5, 6 and 7 through
natural guardian Smt. Nalini Dagdu
Shinde, Age 52 years, occu: Agril.,

All R/o Wadala Mahadeo, .. Respondents/
Tq. Shrirampur, Dist. Ahmednagar Orig.Defendants

Mr Rahul R. Karpe, Advocate for petitioner
Mr Nikhil Ghanwat, Advocate holding for
K. B. Autade, Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.

DATE : 15th January, 2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties by consent finally.

2. Petition has been moved by original plaintiff against order passed by civil judge, junior division, Shrirampur under which there is rejection of application Exhibit - 109 in regular civil suit bearing no. 101 of 2009, seeking examination of plaintiff primarily for that defendant no. 1 has denied relationship of brother and sister between them.

3. Said application has been rejected by trial court under impugned order finding that the plaintiff has instituted suit through son who is her power of attorney holder and his evidence has already been recorded and so is the case of four witnesses examined on behalf of plaintiff. Written statement had been filed in November, 2009 and denial of relationship between defendant no. 1 and plaintiff had been known to the plaintiff since then. It is not the case of the plaintiff that her power of attorney holder has not properly prosecuted the matter or represented the case and as such application came to be rejected.

4. Mr Karpe, learned counsel appearing on behalf of petitioner refers to a decision of supreme court in the case of *Janki Vashdeo Bhojwani vs. Indusind Bank Ltd*, reported in *2004 STPL (LE) 34122 SC = AIR 2005 SC 439*. In said decision, supreme court has considered that power of attorney holder would not be able to depose about the matters or in respect of the facts which are not in his personal knowledge. He submits that, corollary is that the principal shall give evidence in respect of the matters in his personal knowledge and since there is denial of relationship by defendant no.1 between him and the plaintiff, it is a matter which cannot be said to be within personal knowledge of power of attorney holder and as such he cannot depose to in respect of the same.

5. Learned counsel Mr Nikhil Ghanwat holding for Mr K. B. Autade appearing on behalf of defendants submits that the plaintiff has been haphazardly conducting the matter. Suit has been filed in 2009. Written Statement has also been filed in 2009. Issues have been thereafter framed. Suit is kept lingering on since 2009. He particularly refers to that while suit had been filed in 2009, application Exhibit - 109 had been filed in 2015. Power of attorney holder of plaintiff had given evidence in 2011 and four witnesses were examined and

cross-examined. Thereafter, defendants have also adduced their evidence in the matter. In such a case, when the matter had been kept for final arguments, mischievously application Exhibit - 109 has been moved. It cannot be said that denial of relationship of brother and sister between defendant no. 1 and plaintiff had been made to known to plaintiff for the first time in 2015. He submits that pendency of litigation has been wearing out defendants and further procrastination of the same would prejudice them more while the plaintiff - petitioner has no case on merits at all. He submits that power of attorney holder being the son of the plaintiff has been allowed to give evidence. A specious plea is being taken now to examine the plaintiff for the reasons as are contended and it may be used to fill up lacunae in the evidence adduced on behalf the plaintiff while their evidence has been tore open and exposed.

6. Submissions on behalf of the respondents - defendants to quite some extent are attractive. However, looking at broader consideration of justice and to rule out possibility of further procrastination of the proceedings on this technical ground while the plaintiff herself had asked for her examination, the same may be considered to the extent which has caused her to file application Exhibit - 109 since her

application purports to refer to that she wants to examine herself to give evidence about her relationship with defendant no. 1.

7. In the circumstances, it appears to be expedient to consider the application, although the same could have been possibly made earlier, however, for want of proper advice could not be lodged till 2015. The inconvenience in the process faced by the defendants can of course be taken care of by imposition of costs on the plaintiff.

8. As such, application Exhibit - 109 is allowed to the extent of reason for which plaintiff's examination has been sought under the application and no further, subject to payment of costs of ₹ 10000/- to be deposited in the trial court within a period of three weeks from today for onward disbursal to defendants. Further prosecution of the matter be expeditiously done and suit be disposed of within a period of four months from the date of receipt of writ of this order by trial court. In case plaintiff gives evidence pursuant to this order, needless to refer to that it would be open for the defendants to cross examine her.

9. Exhibit - 109 as such is allowed to the extent as aforesaid. In case of failure to deposit costs within stipulated

time, this order would stand recalled and impugned order would stand revived and restored.

10. It is further made clear that observations in this order shall have efficacy only to the extent of this writ petition and shall not influence decision making in the suit on merits.

11. Rule made absolute in aforesaid terms.

12. Writ petition is accordingly disposed of.

SUNIL P. DESHMUKH
JUDGE

pnd/-