

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9536 OF 2015

Suresh S/o Asruba Ghige
Age : 46 years, Occu : Agriculturist
R/o Songaon, Po. Pargaon (Siras),
Tq. and Dist. Beed

.. Petitioner
(Original Defendant no.1)

Versus

- 1) Pandurang S/o Asruba Ghige,
Age : 59 years, Occu.: Agriculturist
R/o Songaon, Po. Pargaon (Siras),
Tq. and Dist. Beed
- 2) Bankat S/o Asruba Ghige,
Age : 56 years, Occu : Agriculturist,
R/o Songaon, Po. Pargaon (Siras),
Tq. and Dist. Beed
- 3) Ashok S/o Asruba Ghige
Age : 49 years, Occu.: Agriculturist
R/o Songaon, Po. Pargaon (Siras),
Tq. and Dist. Beed (Orig. Plaintiffs)
- 4) Asruba S/o Bhaguji Ghige
Age : 81 years, Occu. : Agriculturist,
R/o Songaon, Po. Pargaon (Siras),
Tq. and Dist. Beed (Orig. Deft. No.2) .. Respondents

...
Mr. H.V. Tungar, Advocate for petitioner
Mr. K.R. Doke, Advocate for respondents
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 09-01-2019

ORAL JUDGMENT :

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

2. Respondents no. 1 to 3 have instituted regular civil suit bearing no. 99 of 2014 seeking declaration of ownership in respect of land survey no. 29 in the disputed property and for injunction in respect of same as also for declaration that sale deed dated 15-03-2004 executed by defendant no.2 in favour of defendant no. 1 to be not binding on them. The plaintiffs have averred in paragraphs no. 9 and 10 of plaint as under,

" ९. असे की, वादी नं. २ ने लगेच संपूर्ण चौकशी करून, प्रतिवादी नं. १ ने घेतलेल्या जमिनीची रजिस्ट्रीची नक्कल दि. १५-०१-२०१४ रोजी हस्तगत केली. ती पाहता लक्षात आले की, प्रतिवादी नं. १ ने प्रतिवादी नं. २ कडून सर्वे नं. २९ मधील २९ गुंठेचे रजिस्टर खरेदीखत विना मोबदला करून घेतलेली आहे.

१०. असे की, वादी नं. २ हा दि. १६-०१-२०१४ रोजी प्रतिवादी नं. २ कडे गेला व विचारपूस केली तर प्रतिवादी नं. २ ने स्पष्ट सांगितले की, 'मी जमीन प्रतिवादी नं. १ ला विकली नाही, मला औषधपाणी करायचे म्हणून दवाखान्यासाठी बीडला नेले व तेथे काय-काय केले, हे मला कसलीही माहिती न देता रजिस्टरी करून घेतली. प्रतिवादी नं. १ ने फसवून रजिस्टरी करून घेतलेली आहे.' त्यावर वादी नं. २ म्हणाला की, 'तुम्हास कांही पैसे दिले काय?' त्यावर प्रतिवादी नं. २ म्हणाले की, 'एक पैसाही प्रतिवादी नं. १ ने मला दिलेला नाही'. "

The same have been responded to by corresponding averments in paragraphs no. 9 and 10 of written statement filed by defendant no.1 - present petitioner, reading thus,

" ९. असे की, दाव्याचे परिच्छेद क्र. ९ मधील मजकूर की, वादी नं. २ ने संपूर्ण चौकशी करून प्रतिवादी क्र. १ ने घेतलेल्या जमिनीची रजिस्ट्रीची नक्कल दि. १५-०१-२०१४ रोजी हस्तगत केली. ती पहिल्या नंतर लक्षात आले की, प्रतिवादी क्र. १ ने प्रतिवादी क्र. २ कडून सर्वे नं. २९ मधील ०-२९ गुंठे चे रजि. खरेदीखत विनामोबदला करून घेतले आहे. हा संपूर्ण मजकूर *मनघडंत* असल्यामुळे या प्रतिवादीला मान्य व काबुल नाही.

१०. असे की, परिच्छेद क्र. १० मधील मजकूर, वादी नं. २ हा १६-०१-२०१४ रोजी प्रतिवादी क्र. २ कडे गेला, त्याला विचारपूस केली, त्याने स्पष्ट सांगितले की, मी जमीन प्रतिवादी क्र. १ ला विक्री केली नाही. मला औषधपाणी करायचे म्हणून दवाखान्यासाठी बीडला नेले व तेथे काय काय केले? याची मला कसलीही माहिती न देता रजिस्ट्री करून घेतली. त्यावर वादी क्र. २ म्हणाला की, तुम्हांस काही पैसे दिले काय? त्यावर प्रतिवादी क्र. २ म्हणाला की, एक पैसाही प्रतिवादी क्र. १ ने मला दिलेला नाही, हा संपूर्ण मजकूर खोटा, *मनघडंत*, काल्पानिक व बनावटी असल्याने, या प्रतिवादीस मान्य व कबुल नाही. "

3. The trial court had framed issues as under,

"

ISSUES

(1) Whether plaintiff's prove that the deft No. 2 partitioned the suit properties & allotted the share to the plaintiffs & deft. No.1 as stated by the plaint in plaint Para no.1 ?

(2) Whether deft No.1 prove that suit house property no. 13 was allotted to him in partition carried out by the deft. No.2 between plaintiffs & deft No.1 ?

(3) Whether plaintiff prove that they are the owners of suit properties ?

(4) Whether plaintiff are entitled to the declaration as prayed by them in plaint para no. 4 ?

(5) What order & decree ?"

4. As suit progressed, application - exhibit - 22 has been moved by defendant no. 2 seeking framing of additional issues as under,

" 2. It is further contended by the defendant no.1 that in his written statement he has averred that, the house property no. 87 and 88 which are standing in the names of plaintiffs have not been impleaded in this suit. Therefore issue in that respect is required to be framed. By relying on above mentioned contentions the defendant no.1 has prayed for framing of following additional issues.

(A) Do the plaintiffs prove that, the defendant no.1 by playing fraud has got executed sale deed dated 15-03-2004 bearing registration No. 825/14 from defendant no.2 ?

(B) Do the plaintiffs prove that, the aforesaid sale deed has been executed without any consideration ?

(C) Whether suit is bad for non-joinder of necessary properties ?"

5. Learned counsel for petitioner, on instructions states that he would not insist upon framing of issue, as referred to under clause (C).

6. The trial court had decided said application under its order dated 04-08-2015 and had rejected the same observing thus,

" 7. On the basis of these pleadings I framed issues at Exh. 17. Issue no. 1 is in respect of allocation of allocation of shares to the plaintiffs and defendant no. 1 as stated in plaint para no. 1. Issues no. 2 is in respect of allocation of house property no. 13 to the defendant no. 1 in a partition carried out by defendant no.2. The issues no. 3 is in respect of ownership of the plaintiffs over the suit properties and issues no. 4 is in respect of declaration in respect of sale deed dated 15-03-2004.

8. Defendant no. 1 wants that issue should be framed in respect of alleged fraud played by the defendant no.1 on defendant no.2 while execution of sale deed dated 15-03-2004. Defendant no.1 also wants that, issue should be framed in respect of non payment of consideration in while execution of the aforementioned sale deed. However, in my considered opinion, these issues are not required to be framed. If the plaintiffs succeeds in proving that in a oral partition they were allotted the shares which are described on page no.2 of the plaint out of survey no. 2 then automatically they became owners of these shares. In that case even if defendant no.2 executed the sale deed of the property comprising of these shares of the plaintiffs then to that extent the said sale deed is not binding on the plaintiffs. If existing issue no. 1 is answered affirmatively then plaintiffs become owners of the properties which are show to be allotted to their shares out of Survey No. 29. This suit is based on the theory of previous partition which was carried out before the execution of sale deed dated 15-03-2004. Therefore, if theory of partition is succeeded then issue regarding execution of the sale deed dated 15-03-2004 by means of fraud does not arise for consideration. Even if these coincidently these issues arises for consideration then that can be done while giving finding on present issues no.1. Therefore, the additional issues nos. A and B sought to be framed by defendant no.1 are not required to be framed.

9. This is a suit not for partition. The plaintiffs have averred that, the house property no. 13 has been allotted to their share in a oral partition. On the basis of this pleading, the plaintiffs have sought declaration in respect of ownership over the said house property. Therefore, issue in respect of non-joinder of other house properties which were allotted to the plaintiffs need not be framed. Burden is on the plaintiffs to show that, the house property no. 13 was allotted to them. If the defendant no.1 takes defence that, this house property is allotted to him in partition then issues in respect of other house properties is not required to be framed. Allocation of house property no. 13 is in question. Allocation of other house properties is not in question. "

7. Learned counsel for petitioner states that issues as have been referred at clauses (A) and (B) do arise from the pleadings and having regard to order XIV rule 1 of the code of civil procedure, the issues are required to be framed. He submits that the burden will have to be discharged by the plaintiff in respect of the same. He submits that the trial court has cursorily rejected application referring to framing of issue in respect of sale deed as observed under paragraph no. 8. It is contended by him that the reasons given are rather too round about and the court considered that by implication, the issues are covered. He submits that while the pleadings give rise to issues those ought to be framed, an opportunity will be lost by the petitioner, if no such issue is specifically framed to rebut the case raised by the respondents having regard to the peculiar fact that plaintiffs and defendant no. 2 are in collusion. He, therefore, urges to consider the request under writ petition and allow application in respect of framing of additional issues.

8. Learned counsel Mr. Doke appearing for respondents contends that reasons given by court under paragraphs no. 8 and 9 would show that issues as are sought to be framed by petitioner are covered by issue no. 4 and the same has been aptly considered by the court.

9. While the arguments are so advanced on behalf of the parties, perusal of the impugned order would show that the court , in paragraph no.8 has observed as under,

"

...

Even if these coincidently these issues arises for consideration then that can be done while giving finding on present issues no.1. Therefore, the additional issues nos. A and B sought to be framed by defendant no.1 are not required to be framed. "

It could be noted that the court has not taken into account the requirements under order XIV of the code of civil procedure while framing the issues, in order to avoid further procrastination of those aspects, it appears to be expedient that while the pleadings would give rise to such issues those be properly taken on record instead of going round about as contended by respondents and appreciated by the court while the petitioner does not insist upon issue as referred to under clause (C).

10. In view of the same, writ petition partly succeeds. Application exhibit - 22 is allowed to the extent of framing of issues at clauses (A) and (B).

11. Writ petition accordingly is disposed of.
12. Trial court to proceed with the suit as expeditiously as possible.
13. Rule made absolute accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/