

DDR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7271 OF 2017

Anusayabai Dinkar Bansode

..Petitioner

vs.

Lata Dashrath Gunjal & ors.

..Respondents

....

Shri P.R. Kalantri i/b. Shri H.E. Palve for petitioner.

None for respondents.

....

CORAM : M.S.KARNIK, J.

DATE : 16th SEPTEMBER, 2019

P.C. :

Heard learned counsel for the petitioner.

2. None appears for the respondents though they are duly served in terms of the order passed by this Court on 3rd September, 2019 and the affidavit of service to that effect is filed by the petitioner is taken on record and marked as 'X' for the purpose of identification.

3. The petitioner is the original defendant No.5. Respondent Nos. 1 to 3 – original plaintiffs had filed the suit for

partition and separate possession. Defendant No.5 filed her written statement on 22nd April, 2015. Defendant No.5 had prior thereto executed the Power of Attorney on 10th April 2015 in favour of her son Rajendra Dinkar Bansode. The affidavit of examination-in-chief of General Power of Attorney of defendant No.5 was filed.

4. An application was filed by original plaintiffs that the affidavit of examination-in-chief of the Power of Attorney filed at Exhibit 117 be discarded as even after the Power of Attorney was executed in his favour, defendant No.5 had filed written statement on 22nd April, 2015. According to the plaintiffs, it is only defendant No.5 who can depose in the proceedings as the Power of Attorney can be said to have knowledge of the subsequent events as the power is only in respect of 'acts' done by the Power of Attorney holder in exercise of power granted by the instrument. The trial Judge was of the opinion that the term 'acts' would not include deposing in place and instead of the principal.

5. Learned counsel for the petitioner invited my attention to the written statement filed by defendant No.5 wherein she stated that she is not keeping good health. Her son who is the part of the joint family is having complete knowledge of the suit and the suit properties.

6. None appeared on behalf of the respondents to controvert this position.

7. Considering the averments made in the written statement and the reasons why defendant No.5 was not in position to depose, in my opinion, the application filed by the plaintiffs for discarding the affidavit of examination-in-chief of defendant No.5 needs to be reconsidered by the trial Court.

8. The impugned order is set aside.

9. The trial Court to reconsider the application made by the plaintiffs for discarding the affidavit of the examination-in-

chief of defendant No.5 in the light of the materials on record afresh without being influenced by the observations made in the impugned order.

10. Writ Petition is partly allowed with no order as to costs.

(M.S.KARNIK, J.)

Diksha
Rane

Digitally
signed by
Diksha
Rane
Date:
2019.09.16
18:54:40
+0530