

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

WRIT PETITION NO.188 OF 2022

Sanjay @ Kulbhushan Shivnarayan Jaiswal

Age- 51 years, Occupation- Business,

R/o – Gurudatta Plastic House,

M.H. No.4-4-4, CTS No. 4215,

Kumbharwada, Aurangabad.

... Petitioner

Versus

- 1) Lalitabai w/o Shivaprakash Rodiye,
Age- 58 years, Occupation- Household,
R/o – 6-1-178, Padmarao Nagar,
Secunderabad, (A.P.)
- 2) Sunitabai w/o Sanjay Bithiriya,
Age- 53 years, Occupation- Household,
R/o Madan Tel Centre,
Dayaram Road, Latur.
- 3) Sangeeta w/o Ravi Bansile,
Age 48 years, Occupation- Household,
R/o – Deulgaon Raja,
District – Buldhana.
- 4) Sanjay Shankarlal Makriye,
Age- 52 years, Occupation- Business,
R/o- Moti Karanja, Aurangabad.
- 5) Rajendra Shankarlal Makriye,
Age- 50 years, Occupation- Business,
R/o – Moti Karanja, Aurangabad.

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Advocate for Petitioner : Mr. Milind Madhukar Patil

Advocate for Respondent Nos. 1 to 3 : Mr. A. P. Bhandari

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 30TH MARCH, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.

2. The petitioner is aggrieved by order dated 23-11-2021, passed by the learned 3rd Joint Civil Judge Senior Division, Aurangabad, below Exhibit-61 in Special Civil Suit No.283/2013, thereby allowing the application filed by respondent Nos. 1 to 3 – original plaintiffs under Order XVIII Rule 3A of the Code of Civil Procedure and granting permission to the plaintiffs to examine themselves or either of them as a witness.

3. The petitioner herein has filed R.C.S. No.840/2014 seeking specific performance of contract against the respondents. The respondent Nos. 1 to 3 herein have filed Special Civil Suit No.283/2013 against the petitioner and others for decree of partition and separate possession in respect of the property described in the plaint along with other reliefs. Both the suits are clubbed together. After the evidence of witnesses of plaintiffs in Special Civil Suit No.283/2013 was over, the plaintiffs filed application Exhibit-61 contending that they are ladies and are residing with their respective husbands at different places which are at long distances. The suit is filed by them through General Power of

Attorney holder (GPA) i.e. husband of plaintiff No.3 who is well acquainted with the facts of the case. The GPA is examined on behalf of the plaintiffs and two other witnesses are also examined. During the trial the plaintiffs came to know that defendant Nos. 1 to 3 applied for grant of heirship certificate bearing MARJI No.939/2008 by excluding the plaintiffs and obtained heirship certificate. The plaintiffs were not made party in the proceedings filed for the said heirship certificate and fraud was played by defendant Nos. 1 to 3 by showing that only they are the legal heirs. Though the defendant Nos. 1 to 3 admitted the relation of plaintiffs in their written statement but the plaintiffs were kept away from the proceedings of heirship certificate. The plaintiffs, therefore, claimed that to have full and complete effective adjudication of the matter they may be permitted to examine themselves in the suit after the witnesses of the plaintiffs are examined.

4. The said application was resisted by the petitioner – defendant on the ground that it is filed at belated stage and the same is filed only to fill up the lacuna and loopholes in the evidence of the plaintiffs. The trial Court allowed the application subject to cost of Rs.1500/- and permitted the plaintiffs to examine themselves or either of them on the point to prove that they are the legal heirs of the deceased Shankarlal Makriye and will deed was executed by their father

in their favour. The petitioner is aggrieved by this order.

5. Heard Mr. M. M. Patil, learned advocate for petitioner and Mr. A. P. Bhandari, learned advocate for respondent Nos. 1 to 3.

6. The learned advocate for petitioner assailed the impugned order on the ground that the plaintiffs have led evidence which is contrary to their pleadings. Now, by this application the plaintiffs are trying to fill up the lacuna and loopholes in their evidence. He further submitted that the plaintiffs were admittedly not present when the will deed was executed, therefore, they are not entitled to prove the will deed. By relying on *Anju Toshniwal and Others Vs. Expat Properties India Ltd. [2019 (5) AIR BomR 726]*, *Sanjay Narayanrao Barde & another Vs. Sau Vimal Keshao Bairaam and Others [2000 AIR(Bom.) 384]*, *Devkabei Chudaman Patil and Another Vs. Santosh Supadu Patil and Another [2013 (3) Mh.L.J. 945]*, *Vijaysingh Gordhandas and others Vs. Dwarkadas Mulji [2001 (4) Mh.L.J. 735]*, *Nagorao Nilkanthrao Deshmukh and Another Vs. Keshao Govind Patil [1979 Mh.L.J. 809]*, he submitted that qualitative assessment as mentioned in the above citations is absent in the present case. Since the application Exhibit-61 is filed for filling up the lacuna and is an attempt to protract the trial, the trial Court ought to have rejected the same.

7. The learned advocate for respondent Nos. 1 to 3 on the other hand contended that the petitioner – defendant is an outsider and not a member of the family of plaintiffs. According to him, the contentions of the petitioner are considered by the trial Court in proper perspective and in the facts of the present case the trial Court was justified in allowing the application Exhibit-61. He submits that on 06-01-2022 plaintiff No.3 has filed affidavit in lieu of examination-in-chief. The defendants shall have opportunity to cross examine plaintiff No.3. He submits that only plaintiff No.3 will be examined in the trial. The trial can be made time bound and there will not be any attempt on the part of the respondents plaintiffs to protract the trial. He submits that the trial Court has rightly exercised discretion which may not be interfered in extraordinary writ jurisdiction.

8. Taking into consideration the fact that during the trial it has come to the knowledge of the plaintiffs that defendant Nos. 1 to 3 applied and have got heirship certificate without impleading plaintiffs as a party to the same, for effective adjudication of the controversy before the trial Court, in my opinion, the trial Court was right in granting permission to the plaintiffs to examine themselves after the evidence of their witnesses is over.

Reasonable and fair opportunity needs to be given to the plaintiffs to prove their case on merits. In that view of the matter also the discretion exercised by the trial Court cannot be faulted with. The permission granted by the trial Court is qualified to the effect that the plaintiffs are permitted to lead evidence only to prove that they are the legal heirs of deceased Shankarlal Makriye and that the will deed was executed in their favour by their father. In that view of the matter also, I am not inclined to accept the contention of the learned advocate for petitioner that the plaintiffs are trying to fill up the lacuna in the present case and therefore, the trial Court ought to have rejected the application. The apprehension of the petitioner about prolonging of the trial can be taken care of by directing the trial Court to conclude the trial of both the suits within stipulated time.

9. In *Anju Toshniwal and Others* (supra) Co-ordinate Bench of this Court has held that permission should not be granted to a party who has deliberately withheld himself to be examined as witness at a later stage after examination of other witnesses, with a view to fill up the lacuna in the evidence. There cannot be any dispute about this principle laid down in the above citation. However, in the facts of the present case, it is observed that during the course of trial since the plaintiffs came to know about heirship certificate obtained by defendant Nos. 1 to

3, they were justified in applying for permission to examine themselves, under Order XVIII Rule 3A. In that view of the matter, this citation would not help the petitioner's case. The ratio in the other citations relied on by the learned advocate for petitioner is same wherein, in addition, it is held that provision of Order XVIII Rule 3A is directory and not mandatory and the same should not be utilised in favour of the party to fill up the lacuna in the evidence.

10. For the aforestated reasons, in the peculiar facts of the present case this Court is not inclined to exercise its extraordinary writ jurisdiction in favour of the petitioner. The writ petition being devoid of merits is dismissed.

11. Taking into consideration the fact that the suits are pending since 2013 and 2014, the trial Court shall conclude the hearing of both the suits and deliver judgment within a period of six months from today.

12. Rule is discharged accordingly. No costs.

(NITIN B. SURYAWANSHI, J.)