

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10042 OF 2010

Shri Bhima Parasram Tuwar
Since deceased, through his LRs

PETITIONER

1. Namdeo Bhimaji Tuwar
Age – 60 years, Occ – Agril
2. Tukaram Bhimaji Tuwar
Age – 58 years, Occ – Agril
Both R/o Shiregaon, Taluka – Newasa
District - Ahmednagar

VERSUS

1. Sau Venubai Eknath Tuwar,
Age – 60 years, Occ – Agril & Household
2. Balasaheb Bhimaji Tuwar
Age – 58 years, Occ – Agril
3. Sakahari Bhimaji Tuwar
Age – 52 years, occ – Agril
4. Sau. Dwarkabai Daulat Hon,
Age – 48 years, Occ – Household

RESPONDENTS

All R/o Shiregaon, Taluka – Newasa
District – Ahmednagar

5. Shiregaon Vividh Karyakari Seva
Sahakari Society Ltd., Shiregaon
Taluka – Newasa, District – Ahmednagar
Through its Secretary

.....
Mr. C. K. Shinde, Advocate for the petitioners
Mr. Z. M. Pathan, Advocate for respondent No.1
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 4th September, 2023
PRONOUNCED ON : 26th September, 2023

ORDER :

1. This petition, filed under Article 226 and 227 of the Constitution of India, takes exception to the orders passed by the learned Civil Judge, Senior Division, Newasa, below Exhibits-45, 48, 70 and 71 in Special Civil Suit No. 53 of 2010.

2. Respondent No.1 – plaintiff filed Special Civil Suit No. 27 of 2008 (New No. 53 of 2010) against the petitioners and respondents No.2 to 5 for recovery of Rs.3,01,750/- along with interest. Original defendant No.1 filed written statement and resisted the claim. After his demise, petitioners No.1 and 2 and respondents No.2 to 4, being his legal heirs, filed written statement. On transfer of Special Civil Suit No. 27 of 2008 from Shrirampur to Newasa, it was renumbered, as Special Civil Suit No. 53 of 2010.

3. Respondent No.1 – plaintiff, filed evidence affidavit of her witness at Exhibit-41 on 10th August, 2010. On 23rd August, 2010, respondent No.1 – plaintiff filed application Exhibit-44, seeking production of some documents, as per list of documents, Exhibit-45. The said production of documents is allowed by the Trial Court, without hearing the defendants.

4. Plaintiff's witness was cross examined by the defendants. After his cross-examination was over, the plaintiff filed application Exhibit-47, seeking production of documents, as per list Exhibit-48. This application is also allowed by the Trial Court, without hearing the defendants.

5. After realizing the fact that the documents produced under lists Exhibits-45 and 48 are not proved and cannot be read in evidence, the plaintiff filed application Exhibit-49 praying to issue witness summons to Dr. Kirane, Medical Officer, Sai Baba Hospital, Shirdi and one Sadashiv Joshi, scribe of the document. This application is rejected by the Trial Court, on the ground that as the documents are already admitted in the evidence, the said witnesses need not be examined to prove the said documents.

6. The Trial Court, by order passed below Exhibits-45 and 48, admitted the documents produced by the plaintiff, in evidence, under the list, without those being referred to the witness. Since the documents are admitted by the Trial Court, the plaintiff submitted evidence closure *pursis* at Exhibit-69.

7. The defendants filed application Exhibit-70 requesting the Trial Court to de-exhibit the documents, as the same are wrongly exhibited and ordered to be read in evidence, without those

being duly proved. The Trial Court has rejected the said application Exhibit-70, holding that those documents are admissible in evidence and admissibility of those documents is already examined while passing order below Exhibits-45 and 48. The petitioners then, filed application Exhibit-71, praying to recall the order dated 2nd September, 2010, passed by the Trial Court, below exhibits-45 and 48, pointing out as to how the admitted documents are inadmissible. The Trial Court rejected the application Exhibit-71, on the ground that there is no provision in Civil Procedure Code to recall the order. The petitioners are, therefore, aggrieved by the orders passed below Exhibits-45, 48, 70 and 71.

8. Heard learned advocate for the petitioners and the learned advocate for respondent No.1 – plaintiff. Perused the memo of writ petition, its annexures, the impugned orders and the citations relied on by the learned advocates.

9. Learned advocate for respondent No.1, in support of his submissions, placed reliance on the following judgments :

- i. “Javer Chand and Others V/s Pukhraj Surana” AIR 1961 SC 1655*
- ii. “Saifuddin Saheblal Vazir V/s Habjabai Mishra Patel and Another” 2003 (2) MH.L.J. 610*
- iii. “Hemendra Rasiklal Ghia V/s Subodh Mody” 2008 (6) ALL MR*

iv “Bipin Jaysukhlal Mehta and Others V/s Jayantibhai Talakchand Shah and Another” 2018 (6) ALL MR 682”

10. It is a matter of record that documents under the lists Exhibits-45 and 48, are filed by the plaintiff during the course of recording of evidence of her witness. Admittedly, the documents are in respect of the medical treatment record of the plaintiff, photo copy of sale deed by which the subject matter of the land was transferred by way of registered sale deed in favour of the plaintiff, letter of Registrar of Co-operative Societies being reply sent to the defendant, copy of letter sent to Sub Divisional Officer, Shrirampur by defendant No.2 and copy of receipt issued by defendant No.2 in the name of defendant No.1. The Trial Court has held that the said documents are referred by the plaintiff's witness in the course of his evidence.

11. Perusal of the evidence of plaintiff's witness does not disclose so. These documents are nowhere referred by the plaintiff's witness in his evidence. Therefore, the said observation of the Trial Court that the said documents are referred by the plaintiff's witness in his evidence, is contrary to the record. However, fact remains that the documents are admitted in evidence, by order passed below Exhibits-45 and 48, without

calling upon the defendants to file say and on this ground also the impugned orders cannot be sustained.

12. Application Exhibit-49 is filed by the plaintiff seeking issuance of witness summons to office bearers of Shiregaon V.K.S.S. and two medical officers of the dispensary, from where the plaintiff has collected certificate of her ailment. Plaintiff also asked to call the scribe of the sale deed, which was executed and registered in respect of the land purchased by the plaintiff from deceased defendant No.1. This application Exhibit-49 is rejected by the Trial Court, holding that the ailment suffered by the plaintiff is confirmed by the evidence of her son and, therefore, the medical record is admitted in evidence and hence, medical officers need not be called as witnesses. The request to call the scribe of sale deed is rejected on the ground that since the sale deed is registered and recitals of it will prevail, subject to the proof to the contrary by the party who has challenged it. So calling the scribe of the document is not necessary because photo copy of the registered sale deed is also admitted in evidence.

13. By application Exhibit-71, defendant No.1 has prayed for recalling of order passed by the Trial Court, below Exhibit-70. The Trial Court has rejected this application observing that mere

admitting the documents on record or exhibiting the said documents does not mean that its correctness is not open for interference or does not liable for scrutiny. Therefore, the Trial Court has rejected the application Exhibit-71, holding that the prayer for recall is not maintainable, in my opinion rightly so.

14. Taking into consideration the peculiar facts of the case, particularly the fact that the documents are not referred to by the witness of the plaintiff in his evidence, still the Trial Court has erroneously proceeded to admit the said documents in evidence and erred in exhibiting the said documents without calling say of the defendants. The said documents are in fact not proved in accordance with the provisions of the Indian Evidence Act. The impugned orders are, therefore, unsustainable in law and facts of the case. Hence, the following order.

ORDER

- A. Writ petition is allowed.
- B. Impugned order dated 2nd September, 2010 passed below Exhibits-45 and 48 in Special Civil Suit No. 53/2010 by the learned Civil Judge, Senior Division, Newasa is hereby quashed and set aside.
- C. Impugned order dated 6th September, 2010 passed

by the learned C. J. S. D., Newasa below Exhibit-70 Special Civil Suit No. 53/2010 is hereby quashed and set aside.

- D. Application Exhibit-70 filed by the petitioners in Special Civil Suit No.53 of 2010 is hereby allowed.
- E. Respondent No.1 – Plaintiff is at liberty to get the said documents proved in accordance with law.

[NITIN B. SURYAWANSHI]
JUDGE