

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

CIVIL WRIT PETITION NO. 15013 OF 2022

Suman Vitthal Gaikwad & Anr.

..Petitioners

Versus

Madan Vitthalrao Jagtap & Ors.

..Respondents

**WITH
CIVIL WRIT PETITION NO. 2486 OF 2022**

Madan Vitthalrao Jagtap

..Petitioner

Versus

Kaveribai Vitthal Jagtap (Deceased)
through legal heirs.

..Respondents

Ms. Rekha Musale i/b. Nitin L. Rajguru for Petitioners in
WP/15013/2022.

Mr. Prasad P. Kulkarni for Petitioner in WP/2486/2022 and for
Respondent No.1 in WP/15013/2022.

**CORAM : SARANG V. KOTWAL, J.
DATE : 10 APRIL 2023**

PC :

1. Both these petitions are decided by this common order because the issues raised in these petitions are similar. The Writ Petition No.15013 of 2022 is preferred by the original Defendant Nos.2 and 5 in Regular Civil Suit No.207 of 2007 on the file of

Civil Judge, J. D. Indapur. The Respondent No.1 in this petition is the original plaintiff in R.C.S.No.207 of 2007. In this petition, the Petitioners i.e. original Defendant Nos.2 and 5 have challenged the order dated 05/03/2022 passed below Exhibit-164 in the said suit by the trial Court, as well as, the order dated 05/08/2022 passed below Exhibit-166 in the said suit. Both these orders are consequential orders to the order passed below Exhibit 153 in the said suit.

2. In Writ Petition No.2486 of 2022, the Petitioner is the original Plaintiff and Respondent Nos.2 and 5 are the original Defendant Nos.2 and 5. In this petition, the order dated 27/11/2021 passed below Exhibit-153 in the said suit is challenged. Therefore, both these petitions are decided by this common order. For the sake of convenience, the parties are referred to by their original status in the said suit.

3. Originally, the suit was filed for partition by the Plaintiff against Kaveribai. After Kaveribai's death, the Defendant Nos.2 and 5 along with others were brought on record as legal

representatives of Kaveribai. The Defendant Nos.2 and 5 are the Plaintiff's sisters and Kaveribai's daughters. The plaint was also amended and amended plaint included a prayer for declaration that, Kaveribai had executed a Will dated 26/03/2003 and that the Plaintiff was the sole owner of the suit property.

4. The Defendant Nos.2 and 5 preferred an application vide Exhibit-153 through their Power of Attorney holder Shri. Dnyandev Shingte, in which, it was mentioned that the evidence was closed on behalf of the Plaintiff, as well as, on behalf of the Defendants and a pursis was given by both the sides. However, while the suit was pending, the purported Will executed by Kaveribai was produced on record at Exhibit-101. The said Will was scribed by Prakash Gena Bhosale as per the version of the Plaintiff. Therefore, the Defendant Nos.2 and 5 wanted to examine Prakash Gena Bhosale as a witness. According to them, he was a material witness. It was their contention that, if his evidence is recorded, no prejudice would be caused to the Plaintiff. This application was filed on 30/08/2021. The said application below Exhibit-153 was allowed vide order dated 27/11/2021. After

giving his reasons, learned Trial Judge allowed that application, however, he also observed that, there was delay and the suit was pending since long. He also observed that, the Defendants had an opportunity to examine the witness, during the recording of the evidence, or at least soon after the evidence was closed. Observing thus, the application was allowed subject to payment of cost of Rs.3000/-. The said witness was summoned on payment of witness bhatta.

5. Thereafter, the evidence of the said witness was taken on record, but it was realized by the learned trial Judge that the Defendant Nos.2 and 5 had not paid the cost and, therefore, he passed a separate order on 05/03/2022 below Exhibit-164 discarding the evidence of witness Prakash Gena Bhosale. Learned trial Judge observed that, on the ground of non compliance, affidavit of the witness Prakash Gena Bhosale needed to be discarded.

6. The Defendant Nos.2 and 5 preferred an application vide Exhibit-165 for allowing the Defendants to pay the cost and also

preferred an application vide Exhibit-166 for setting aside the order passed below Exhibit-164 discarding the evidence of Prakash Gena Bhosale. The said application was rejected by the impugned order dated 05/08/2022 passed below Exhibit-166. It was observed that, conduct of these defendants showed that, their intention was to prolong the proceeding. The suit was 15 years old and, therefore, it needed to be disposed of expeditiously. On this ground, the said application was rejected, which is the subject matter of the Writ Petition No.15013 of 2022.

7. On the other hand, the original Plaintiff has preferred Writ Petition No. 2486 of 2022 challenging the order dated 27/11/2021, passed below Exhibit-153 whereby the Trial Court allowed examination of Prakash Gena Bhosale on payment of cost of Rs.3000/-.

8. Learned counsel for the original Plaintiff submitted that the Plaintiff himself had cited Prakash Gena Bhosale as his witness and had sought summons to be served on him. The summons was in fact served on him, but he did not turn up in the Court and,

therefore, his evidence was not taken on behalf of the Plaintiff. He submitted that, after his evidence was closed, it was not proper to permit the Defendant Nos.2 and 5 to examine the said witness. He submitted that, name of the said witness Prakash Bhosale was never submitted by the defendants during the course of the suit and, therefore, under O.16 of C.P.C. it was not permissible to examine him.

9. On the other hand, learned counsel for the Defendant Nos.2 and 5 submitted that, O. 16 of the C.P.C. gives discretion to the Court. For the reasons to be recorded, it can permit the party to call any other witness whose name did not appear in the list of witnesses. She further submitted that, at the first instance, the Trial Court had permitted examination of Prakash Gena Bhosale on behalf of the Defendant Nos.2 and 5 on payment of cost, however, only because of inadvertence, the cost could not be paid and, therefore, though the affidavit of this witness was taken on record, it was discarded. She submitted that, the Defendant Nos.2 and 5 did not have any intention to prolong the matter. On the very next day when the suit is kept for further stage, the Defendant Nos.2

and 5 shall deposit the cost and in fact are willing to deposit enhanced cost, if any, to prove their bonafides.

10. Learned counsel for the Plaintiff submitted that, heavy cost be awarded against the Defendant Nos.2 and 5.

11. Since the Trial Court, at the first instance, had permitted examination of Prakash Gena Bhosale on behalf of the Defendant Nos.2 and 5 on payment of cost, the said order can be continued by enhancing the cost awarded because of the time which has lapsed because of non payment of cost and since the subsequent orders had to be passed. Therefore, in my opinion, in the interest of justice, the cost can be imposed and the Defendant Nos.2 and 5 can be directed to pay cost on the very next day in the suit and only on that condition, they can be permitted to examine Prakash Gena Bhosale as their witness.

12. Hence, the following order:

ORDER

- i) The impugned orders in the W.P.No.15013 of 2022
i.e. order dated 05/03/2022 passed below

Exhibit-164 and order dated 05/08/2022 passed below Exhibit-166 in Regular Civil Suit No.207 of 2007 before the Civil Judge, J. D. Indapur, are set aside.

ii) The Petitioners in W.P.No.15013 of 2022 shall deposit cost of Rs.15000/- before the Trial Court on the next day kept for hearing of the suit before the Trial Court and only on such deposit, the order passed below Exhibit 153 in the said suit shall be revived.

iii) In view of the above operative part, nothing survives in the W.P.No.2486 of 2022 and it is accordingly dismissed.

iv) With these observations, both the petitions are disposed of.

(SARANG V. KOTWAL, J.)