

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 5712/2018

KAMLA KAR S/O ANTUJI MAUNDEKAR
VS
JITENDRA S/O ANTUJI MAUNDEKAR AND OTHERS

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. B.D. Pandit, Advocate for the petitioner
Mr. K.D. Shukla, Advocate for LR's of respondent nos. 1 and 3
The respondent nos. 2, 4 to 7 are served

CORAM : A. S. KILOR, J.

DATED : 26/06/2023

Heard.

2. The order below Exh. 107 dated 16.07.2018 passed by the learned 7th Joint Civil Judge Senior Division, Nagpur in Regular Civil Suit No. 2874/2012 allowing an application filed under Order XVIII Rule 17 r/w. Section 151 of the Code of Civil Procedure, 1908 (for short the "CPC"), is under challenge in this writ petition.

3. Mr. Pandit, learned Counsel for the petitioner submits that the suit is for partition and separate possession filed on the basis of a Will which was opposed by the defendants on alleging the fraud played by the plaintiff as regards the Will. The matter was then proceeded and fixed for argument and at that stage, an additional issue as regards fraud was framed at the instance of the plaintiff. Thereafter,

the plaintiff filed a pursis closing his evidence.

4. Thereupon, the defendant nos. 1 and 2 filed an application Exh. 107 under Order XVIII Rule 17 r/w. Section 151 of the CPC for recalling the plaintiff's witnesses for cross-examination on the additional issue framed by the learned trial Court. The said application came to be allowed, vide impugned order.

5. Mr. Pandit, the learned Counsel for the petitioner submits that in cross-examination of the plaintiff's witnesses the defendants gave suggestion as regards fraud in respect of the Will and, therefore, there is no need to recall the witnesses of the plaintiff for cross-examination.

6. It is submitted that once the suggestion as regards the execution of the Will and the fraud committed in execution of the same has been put to the witnesses of the plaintiff further cross-examination would amount to filling of lacunae in the evidence. It is submitted that the Hon'ble Supreme Court of India, in the case of ***Vadiraj Naggappa Vernekar Vs. Sharadchandra Prabhakar Gogate***¹, has held that the power to recall any witness under Order XVIII Rule 17 of the CPC cannot be exercised by the Court to fill up the lacunae in the evidence of the witness which has already been recorded but, such power should be invoked to clear any ambiguity that may have arisen during the course of examination. Accordingly, the learned Counsel for the

1 (2009) 4 SCC 410

petitioner, therefore, submits that the order impugned is erroneous and liable to be set aside.

7. On the other hand, the learned Counsel for the LR's of respondent nos. 1 and 3 supports the impugned order and prays for the dismissal of the present writ petition.

8. In the light of the rival contentions of the parties, I have perused the record and the impugned order. The learned trial Court while allowing the application Exh. 107 filed by the defendant nos. 1 and 2 has recorded its findings in paragraph no. 3, which reads thus:

“03. I have considered submissions of both the learned counsel, gone through the case laws and find that when there is judgment of Apex Court which says that the Court may at any stage used the discretionary power U/sec 151 of CPC to achieve the ends of justice or to prevent the abuse of process of law. Therefore, the case law referred and relied by the plaintiff are not that much important. In these case laws, the contingency regarding framing of additional issue is not dealt with like the present case. Even otherwise also, they have only perception value it has no binding force on this Court. I find that initially the burden was on the shoulder of the plaintiff to prove the execution of valid Will. Ofcourse, it is the defence of these defendants that the fraud is being played while procuring Will, even certain suggestions to that effect were given to the plaintiff and his witnesses. However, I find that, at that time the defendants were aware that they have to only create the suspicious circumstances regarding execution of Will and probably from that point of view, the suggestions were given, even the defence

taken by the defendants was put to the witnesses, it does not mean that the defendants are now precluded from proving their defence because now specific issue to prove the case of fraud. I find very much substance in the submissions of learned counsel for the defendants that at this stage he cannot disclose which suggestions he would going to give to the witnesses, it is the skill of the advocate to get extracted the truth from the witnesses and earlier the defendants were relax because they were knowing that burden is not on their shoulder. In view of this position, I find that the plaintiff himself moved application and got framed additional issue, though he does not want to examine any new witness pursis to that effect is place on record today itself. However, I find that it is the right of defendants to recall the witnesses for further cross examination in view of framing of additional issue by which burden is cast on their shoulder to prove the case of fraud. I find that no prejudice would cause to the plaintiff otherwise it may cause injustice to these defendants and therefore, I find substance in the application. It is made clear that matter is old one, already it has reached to the stage of judgment and as assured by the learned counsel for the defendants he shall take cross examination of the plaintiff and his witnesses relating to the Will only to the extent of fraud and he should restrict his cross to that extent only and no adjournment shall be entertained at the instance of either side. With this observation I pass the following order.”

9. No doubt the learned trial Court has observed in what circumstances the some suggestions as regards the fraud committed while executing the Will were put to the witnesses of the plaintiff, however, the petitioner has not

filed the copy of the cross-examination on record to show and satisfy the Court that sufficient cross-examination on the point of fraud has already been made by the defendants and no further cross-examination is required even though the additional issue on the point of fraud has been framed by the Court.

10. Though, this Court repeatedly asked the learned Counsel for the petitioner to show what suggestions were given to the witnesses of the plaintiff by the defendants in cross-examination, to get satisfied that the sufficient suggestions on fraud were given by the defendants to the plaintiff's witnesses and no further cross-examination is necessary, as argued by the learned Counsel for the petitioner, the petitioner failed to show the same.

11. Thus, in the absence of any document, more particularly, cross-examination filed on record showing that there is no need of further cross-examination on the point of fraud and if further examination is allowed, it would amount to filling of lacunae, I do not find any perversity in the findings recorded by the learned trial Court while allowing the application.

12. Accordingly, the writ petition is **dismissed** with no order as to costs.

JUDGE