

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST.) NO.7378 OF 2024

Dr. Medha Balasaheb Jadhav

.. Petitioner

Versus

Rajaram Vithal Shinde and Ors.

.. Respondents

-
- Mr. Dhananjayrao D. Rananaware, Advocate for Petitioner.

.....

CORAM : MILIND N. JADHAV, J.

DATE : MAY 06, 2024

P.C.:

- 1.** Mentioned. Not on Board. Taken on Board.
- 2.** Heard Mr. Rananaware, learned Advocate for Petitioner.
- 3.** Perused the praecipe dated 06.05.2024 and the Writ Petition.
- 4.** The present Writ Petition takes exception to the twin orders which are passed in separate proceedings. Order dated 23.02.2022 passed in Special Civil Suit No.98 of 2011 by learned Trial Court forecloses witness action, rather opportunity of the Plaintiff to lead evidence in view of the delay caused by Plaintiff leading evidence. Suit is filed in the year 2011 for seeking partition and separate possession of the suit property.
- 5.** The second order dated 11.04.2023 passed below Exhibit-175 in Special Civil Suit No.98 of 2011 by the learned Trial Court rejects the application filed by Plaintiff under Order VI Rule 17 of the Civil Procedure Code, 1908 (for short '**CPC**') seeking amendment to

the suit plaint.

6. I propose to deal with both the applications and aforesaid twin orders separately.

7. In so far as application seeking amendment is concerned, it is contended by Plaintiff that in the suit plaint apart from seeking decree for partition and separate possession, Plaintiff has alternatively sought relief seeking exercise of pre-emptive rights to purchase the suit property.

8. Mr. Rananaware would submit that by virtue of amendment application, Plaintiff desires to remove the alternative relief and seek the same relief as a substantive relief in addition to the relief of partition and separate possession. The learned Trial Court after considering the application has rejected the Application on the premise that allowing such an application would change the cause of action and nature of the suit proceedings.

9. *Prima facie*, I am of the clear opinion that finding returned by the learned Trial Court while rejecting the above application under Order VI Rule 17 of CPC has been correctly passed. Though it is argued by Mr. Rananaware that the word “alternative” as appearing in prayer clause (b) of the suit plaint ought to be considered as a typographical mistake as it is mentioned twice therein, on reading of the suit plaint as also the reliefs stated therein, I do not find any such

ambiguity whatsoever so as to allow the Petitioner – Plaintiff to amend the Suit Plaint. Hence order dated 11.04.2023 stands sustained and upheld.

10. In so far as order dated 23.02.2022 is concerned, by virtue of the said order, substantive right to lead evidence of the Plaintiff has been foreclosed due to delay caused by the Plaintiff. Reasons advanced by Plaintiff are that Plaintiff is an old lady, 68 years of age and residing in Satara whereas the suit proceedings are instituted in Kolhapur in respect of the suit property which belonged to the Plaintiff's father.

11. He would submit that apart, Plaintiff's husband is also old and both of them are senior citizens, they do not keep well and in that view of the matter, he would submit that order dated 23.02.2022 if allowed to be sustained, substantive right of the Plaintiff to seek partition and separate possession will be defeated.

12. In a suit for partition and separate possession, though parties may be nomenclatured as Plaintiffs and Defendants, essentially all parties are in the shoes of Plaintiffs since partition is sought of property which belongs to their predecessor. Further in view of the grounds mentioned in the present Writ Petition for setting aside of the order dated 23.02.2023, I am inclined to accept the same as I do not wish to disbelieve the same. Plaintiff's substantive right of leading

evidence cannot be curtailed once the Plaintiff has realised the same.

13. Nevertheless, setting aside of the order dated 23.02.2022 shall not be unconditional considering the long hiatus of more than 13 years that has now lapsed after institution of the suit.

14. In that view of the matter, Writ Petitioner who is Plaintiff is directed to pay costs of Rs.3,000/- each to the nine Defendants. Subject to payment of aforesaid costs, the order dated 23.02.2022 shall stand quashed and set aside entitling the Plaintiff to file Plaintiff's Affidavit-in-lieu of examination-in-chief of her witnesses. Considering the delay that is involved, list of Plaintiff's witnesses alongwith Affidavits-in-lieu of examination-in-chief of her witnesses shall be filed together before the Trial Court within a period of six weeks from today.

15. Trial Court shall ensure that subject to payment of costs to the Defendants within four weeks from today and the same being acknowledged by the Defendants, order dated 23.02.2022 shall stand quashed and set aside resultantly allowing Plaintiff to file Affidavit-in-lieu of examination-in-chief to lead her evidence and prosecute the suit which shall be strictly done in accordance with law and on its merits.

16. It is clarified that this Court has not opined on merits of the matter and all contentions of both sides are expressly kept open.

17. With the above directions, Writ Petition stands partly allowed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

HARSHADA
HANUMANT
SAWANT

Digitally signed by
HARSHADA
HANUMANT
SAWANT
Date: 2024.05.06
18:13:31 +0530