

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1374 OF 2024

Bebi Dhondiba Tanpure

.. Petitioner

Versus

Vitthal Sawale Jambhulkar

(since deceased through legal heirs)

Arun Vitthal Jambhulkar and Ors.

.. Respondents

-
- Ms. Sharmishtha D. Patil a/w. Mr. Kishor Ajetrao and Mr. Rishi Bhatt, Advocates for Petitioner.
 - Mr. Ranjit Thorat, Senior Advocate i./by Mr. Rohan Barge, Advocate for Respondent Nos.2 to 6.
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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 21, 2024

P.C.:

- 1.** Heard Ms. Patil, learned Advocate for Petitioner and Mr. Thorat, learned Senior Advocate for Respondent Nos.2 to 6.
- 2.** On 05.02.2024, after hearing learned Advocate for the Petitioner following order was passed:-

“1. Mentioned out of turn.

2. Heard Ms. Patil, learned Advocate for Petitioner.

3. This Writ Petition challenges two orders i.e. both are dated 31.07.2023 passed by learned 2nd Addl. Small Causes Court and Joint Civil Judge Senior Division, Pune below Exh. 257 and Exh. 258 & 258A in Special Civil Suit No. 881 of 2012. Application below Exh. 257 was made by Defendant Nos. 4 and 5 seeking permission to produce a document recently found by them in the suit proceedings. Suit is filed in the year 2012. Ms. Patil would submit that witness action in the Suit has already been complete. She would submit that cross-examination of Defendant No. 2 is over.

4. Principal grievance of the Petitioner is that the Application filed below Exh. 258 & 258A was filed by Defendant Nos. 4 and 5 seeking permission to amend their written statements after completion of

witness action. She would submit that such an amendment ought not to have been allowed as it is against the tenets of the provisions of O. VI, R. 17 of the CPC as allowing such an amendment at a belated stage after recording of evidence would amount to filling up the lacunae in the evidence of the Defendants. She has drawn my attention to the impugned order and would submit that the Suit is filed for partition, declaration and injunction in respect of three substantive properties situated at Hinjewadi, Pune. She would submit that the document which has now been purported to be brought on record by Defendant Nos. 4 and 5 by virtue of the amendment which is allowed by the learned Trial Court is an alleged Will dated 07.04.1992 of late Mr. Vitthal Sawala Jambhulkar. All that has been considered by learned Trial Court while allowing such an amendment is the Application of Defendant Nos. 4 and 5 that they had taken extensive search and only after such search, the said document was unearthed. This however would completely defy the case of Defendants when the said document which is a Will of 1992 ought to have been produced by the Defendants in the suit proceedings which was instituted in the year 2012. Learned Trial Court has opined that allowing the alleged Will to be produced on record is not going to change the nature of the defence raised by Defendants. This finding is also falacious on the face of record because if the suit property is found to be the subject matter of the Will, then reliance on it would alter the case of concerned Defendant Nos. 4 and 5. Merely by observing that the Plaintiffs can be compensated by imposing heavy costs on Defendant Nos. 4 and 5 cannot be an answer to the present case. Prima facie, an arguable case has been made out by Ms. Patil for issuance of notice and stay to any further proceedings in the Suit before the learned Trial Court.

5. Hence, issue notice to the Respondents made returnable on 21.02.2021 Humdast permitted. In addition to Court's notice, Petitioner is directed to serve copy of the Petition along with copy of this order on the Respondents and inform them about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof on or before the next date. After receiving the notice, Respondents to file affidavit-in- reply on or before the next date, if so desired with an advance copy to the Advocate for Petitioner. Respondents will undoubtedly be herad.

6. Respondents are directed to remain present either themselves or through their Advocate on the next adjourned date. It is made clear that if Respondents remain absent despite service on the next adjourned date, this Writ Petition shall be heard and disposed of at the stage of admission in the absence of Respondents.

7. Stand over to **21st February, 2024 at 2:30 p.m.** In the meanwhile, there shall be stay to any further proceedings before the learned Trial Court as also to both impugned orders dated 31.07.2023.”

3. In response to that Mr. Thorat, learned Senior Advocate for

original Defendant Nos.4 and 5 who have filed the amendment Application under Order VI Rule 17 of the Code of Civil Procedure Code, 1908 (for short '**CPC**') and which has been granted by the impugned order would draw my attention to the Written Statement filed by Defendants which is at Exhibit-B, page No.31 of the Writ Petition.

4. He would submit that in paragraph No.17 there is specific reference to the partition carried out in the year 1994 between the Defendants as also the fact that pursuant to the said partition and despite revenue proceedings been adopted there were no objections whatsoever registered by any of the parties. Next he has drawn my attention to paragraph No.20 of the Written Statement wherein reference is made to date of demise of Defendant No.1 on 28.11.2014 and the fact that prior to his demise Defendant No.1 had prepared his Will. The delineation of property by virtue of said Will is what is now contended to be placed by virtue of the amendment on the ground that the Will is now enearthed and discovered but only after the evidence of the Plaintiff is completed. The copy of the Will is sought to be brought on record by Defendants.

5. By virtue of the amendment Application which is at page No.53 filed on 10.03.2023, for the first time copy of the Will of 1992 is sought to be placed on record. As observed by this Court in the

previous order, the said amendment Application is filed only in the year 2023 i.e. almost 13 years after institution of the suit.

6. Be that as it may, Mr. Thorat would in his usual fairness would submit that allowing Defendants to elaborate the averments made in their Written Statement and more specifically in paragraph Nos.17 and 20 would not prejudice the rights of the Plaintiff whatsoever considering the fact that Defendants' evidence is not yet completed and Defendants witnesses are presently under witness action. He would submit that the amendment should be allowed reserving right of Plaintiff to cross-examine Defendants' witnesses on the said amendment also. I have perused the amendment sought. After perusing the amendment, it is clear that the said amendment contained in the Application at page No.53, *prima facie*, is a substantive amendment.

7. By substantive amendment what I mean is that averments made in the opening part of paragraph Nos.17 and 20 are now sought to be interpreted and explained in terms of delineation of property and shares in the property on the basis of the Will which are incidentally the suit properties. What is crucial and to be noted is the fact that the evidence of the Plaintiff is completed in its entirety and only thereafter the Application dated 10.03.2023 is filed and that is precisely the reason as to why the discretionary opinion and more

specifically application of the proviso to Order VI Rule 17 of the CPC cannot and should not come to the aid of Defendant Nos.4 and 5 in the above facts.

8. Learned Trial Court incidentally has not considered the stage at which the amendment has been made and more specifically applicability of the proviso to Order VI Rule 17 of the CPC and observed that by imposing heavy costs, the Plaintiff can be compensated. The reason as observed by Trial Court therefore cannot be accepted for allowing the amendment.

9. In view of the above, allowing such an amendment by virtue of Application dated 10.03.2023 delineating the shares and division of the property in substantive detail as appearing in the amendment application cannot be permitted. Considering that the trial has progressed in the matter and after completion of Plaintiff's evidence, such an amendment is complete afterthought and nothing but an attempt to fortify the evidence on the part of Defendants. Hence, both impugned orders dated 31.07.2023, passed below Exhibit-257 and 258 & 258A do not stand to test and are quashed and set aside.

10. Needless to state that Trial Court shall not be influenced by any observations herein as they are *prima facie* and more specifically in view of the fact that it shall be always be open to Defendants to agitate their submissions to elaborate their pleadings strictly in

accordance with the averments made in their Written Statement and lead appropriate evidence in rebuttal.

11. With the above observations and findings, Writ Petition is allowed. In view of the fact that suit is of the year 2012, learned Trial Court is directed to dispose of the Suit as expeditiously as possible and preferably within a period of six months from today. Parties to the Suit are directed by this Court not to seek adjournments and the learned Trial Court shall not give unnecessary adjournments to the parties unless absolutely necessary.

12. With the above directions, Writ Petition stands allowed and is disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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