



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 1585 OF 2019

Pandurang s/o Raghoba Khond,
Age about 45 years, Occ. – Agriculturist,
R/o Village – Gaur, Tq. – Hinganghat,
District – Wardha.

.... **PETITIONER**

VERSUS

- 1) Amrut s/o Raghoba Khond,
Age about 51 years, Occ. – Service,
R/o Ambulkar Layout, Behind Doctor
Colony, Warud (Sevagram), Tahsil -
Wardha.
- 2) Maroti s/o Raghoba Khond,
Age about 47 years, Occ.- Agriculturist,
- 3) Rama s/o Raghoba Khond,
Age about 49 years, Occ.- Cultivation,

Both R/o Sant Chokhaba Ward,
Ambedkar Society, Nagpur Road,
Hinganghat, District - Wardha.

.... **RESPONDENTS**

Mr. Abdul Subhan, Counsel for the petitioner,
None for respondent No.1,
Mr. M.P. Kariya, Counsel for respondent Nos. 2 and 3.

CORAM : ABHAY J. MANTRI, J.
DATE : 23rd SEPTEMBER, 2024

ORAL JUDGMENT :

Rule. Rule is made returnable forthwith and heard finally
by consent of the learned Counsel for the parties.

2. The petitioner is aggrieved by the order dated 30-10-2018 passed by the learned 4th Joint Civil Judge, Jr. Dn., Hinganghat (for short- "*the learned Judge*") below Exhibit 41 in Regular Civil Suit No.43/2012, thereby rejected the application for permitting the petitioner to call respondent No.1 as his witness.

3. Heard the learned Counsel for the parties. Perused the impugned order and record, as well as the judgment cited by the learned Counsel for the petitioner in the case of *Atul Kumar Singh v. Nitish Kumar and Others, 2019 DGLS (Del.) 774*.

4. Mr. Abdul Subhan, learned Counsel for the petitioner, has vehemently contended that the petitioner, the original plaintiff, has filed the suit for declaration, partition and separate possession of the suit properties against the respondents/defendants. During the pendency of the suit, he had moved an application to call defendant No.1 as his witness to prove the registered Partition deed dated 29-01-2004. However, the trial Court has rejected the same holding that "*the plaintiff has to prove his case on its own footing and by not taking the assistance of the defendants/respondents*". Therefore, he submitted that the findings given by the trial Court are contrary to the provisions of law and are liable to be set aside. Hence, he urges for allowing the petition.

5. As against Mr. M.P. Kariya, learned Counsel for respondents Nos.2 and 3, has resisted the petition on the ground that the petitioner is not entitled to call respondent No.1 as his witness. However, if required, the petitioner has ample opportunity to ask the respondents questions during his cross-examination. Thus, passing of the impugned order is just and proper, and no interference is required in writ jurisdiction.

6. At the outset, the petitioner and respondents seem to be real brothers. The petitioner has filed the suit for declaration, partition and separate possession of the suit properties. It is the petitioner's specific case that the respondents had partitioned the suit properties by making a registered Partition deed dated 29-01-2004 bearing registration No.381/2004. However, the petitioner was not a party to the deed, and it was executed by the respondents inter se; therefore, to prove the registered Partition deed dated 29-01-2004, the petitioner had filed an application to call respondent No.1 as his witness.

7. However, the said application was rejected on three counts :

(a) The petitioner has to prove his case on its own footing and by not taking the assistance of the respondents;

(b) The petitioner has ample opportunity to ask the questions to respondent No. 1 in cross-examination, and

(c) The petitioner has not mentioned '*under which provision he has filed the said application*'.

8. It is pertinent to note that the petitioner can call any person as his witness. *Moreover*, no embargo under the Civil Procedure Code exists to examine the defendant as the plaintiff's witness.

9. As per Order XVI of the Civil Procedure Code, the plaintiff is entitled to summons *any person* as a witness. There is no embargo to call the defendant as a witness. Therefore, the finding given by the trial Court under which provision the plaintiff has moved the application or the plaintiff has to prove his case on its own footing appears contrary to the provisions of law.

10. It further appears that the petitioner has specifically averred that on 29-01-2004, the respondents had executed a Partition deed amongst themselves, and the petitioner was not a party to the same. Therefore, respondent No.1 is the proper witness to prove the said document. The finding of the trial Court that the petitioner has an

ample opportunity to put and ask the questions to the respondents in cross-examination is incorrect if respondent No. 1 does not enter into the witness box in support of their defence; in that case, the petitioner would not get an opportunity to cross-examine them. Also, the petitioner would fail to prove the said Partition deed. Therefore, in my view, the findings recorded by the trial Court are incorrect and contrary to the provisions of law. As against, the petitioner has a right to issue summons to any person as a witness to prove the document on record.

11. *Besides*, if the summons is issued to respondent No.1 to prove the document, in that case, it would not cause prejudice to the respondents, but it would help to determine the fact in issue or to prove the document in question. Therefore, in my view, the trial Court has erred in rejecting the application. Based on the said findings, the order impugned cannot be sustained in the eyes of the law. Hence, the same is liable to be set aside.

12. As a result, the writ petition stands allowed. The impugned order dated 30-10-2018 passed by the learned 4th Joint Civil Judge, Jr.Dn., Hinganghat, below Exhibit 41 in Regular Civil Suit No.43/2012, is hereby quashed and set aside. The application Exhibit 41 filed by the petitioner is allowed, as prayed.

Inform the trial Court accordingly.

13. Rule is made absolute in the above terms.

(ABHAY J. MANTRI, J.)

adgokar