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wp4165.15

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4165 OF 2015

Sakharam Tanhaji Naikwadi, **...PETITIONER**
Age-73 years, Occu-Agriculture,
At & Tq. Akole, Dist. Ahmednagar

VERSUS

1. Sanjay Sakharam Naikwadi, **...RESPONDENTS**
Age-41 years, Occu-Agri & Business,
R/o. At & Tq. Akole, Dist. Ahmednagar
2. Rajendra Sakharam Naikwadi,
Age-36 years, Occu- Agri & Business,
R/o. At & Tq. Akole, Dist. Ahmednagar
3. Mayur Sanjay Naikwadi,
Age-16 years, Occu-Student
4. Vaibhav Sanjay Naikwadi,
Age-16 years, Occu-Student,
Representing through respondent No.1 father
5. Aaditya Rajendra Naikwadi,
Age-12 years, Occu- Student,
Representing through Respondent No.2 father
6. Ranjana Bhausahab Kadlag,
Age-51 years, Occu- Household,
R/o. Shivju Nagar, Dhumal Wadi,
PO & Dist. Akole, Dist. Ahmednagar
7. Anita Dattatraya Gadakh,
Age-41 years, Occu-Household,
R/o. Opp. Krishna Oil Mill,

PO & Tal, Akole, Dist. Ahmednagar

Mr. V. Y. Bhidie, Advocate for the petitioner

Mr. Ankush N. Nagargoje, Advocate for the respondent No.2

CORAM : KISHORE C. SANT, J.

RESERVED ON : 13th FEBRUARY, 2025

PRONOUNCED ON : 18th MARCH, 2025

P. C.

1. This petition is against the order passed below Exh.67 by the learned Civil Judge Junior Division, Akole dated 12-03-2015 allowing the application of the respondents-defendants re-calling for petitioner for cross-examination.

2. The petitioner is plaintiff in Suit RCS No. 03/2009 for partition and injunction not to alienate the properties which are sought to be partition against respondent original defendant Nos. 1 and 2. In the suit respondent Nos. 2 to 5 filed written statement. It is the case of the said respondents that partition has already taken place long back on 17-12-2002. Pursuant to that application was filed under Section 85 of the Maharashtra

Land Revenue Code before the learned Tahasildar. The mutation entries have also taken place and it is prayed for dismissal of the suit. The suit proceeded further. Issues were framed. The plaintiff filed pursis Exh.50 on 27-02-2014 specifically stating that the defendants have pleaded a case of prior partition and in view of that plaintiff did not wish to lead any oral evidence. Right of rebuttal was reserved. Defendant No.2 filed an application stating that the plaintiff has already filed an affidavit of evidence by way of Exh.37. He prayed that plaintiff be called for cross-examination. This application Exh.60 was opposed by the petitioner. In the say it is stated that he has already not pressed the affidavit of evidence exh. 37. Already documents are on record. It is for the plaintiff to decide as to whether he needs to give evidence or not.

3. The learned CJJD, Akole by order dated 03-07-2014 rejected the application of defendant No.2 requesting to call the plaintiff for cross-examination. The said order was assailed abefore this court by defendant No. 2. This court disposed off

the writ petition holding that no case is made out calling for interference. It was observed that the learned trial court is at liberty to proceed with the suit in accordance with law. Thus, the petition No.10292/2014 came to be dismissed by order dated 01-12-2014.

4. The defendant thereafter again filed an application on 25-02-2015 stating that this High Court has not refused right of cross-examination. The petition was disposed off only in view of the facts of the case and filed another application and prayed that plaintiff be called for cross-examination. It is the say of the petitioner that earlier order passed on exh-60 has already attained finality. Said question thereafter cannot be reopened. The learned trial judge on this application Exh.67 passed the order directing the present petitioner to appear for cross-examination in view of filing affidavit of evidence Exh.37. Thus, the petitioner is before this court.

5. The learned advocate for the petitioner Mr. Bhide

vehemently argued the petition. He submits that though the petitioner had filed earlier affidavit of the evidence Exh.37 it was not pressed immediately by filing pursis Exh.38. Specifically evidence closed pursis was also filed. The defendants application was filed for cross-examination. Same came to be rejected. Said order was challenged in the writ petition which also came to be disposed off without any order. Under such circumstances, it was not open for the defendants again to make similar prayer before the same court. The court has committed irregularity by allowing the application. He, thus, prays for allowing the petition.

6. The learned advocate Mr. Nagargoje for respondent No.2 vehemently opposed the petition. He submits that though the petitioner later on did not press evidence affidavit but the fact remains that there is evidence on record. It is valuable right of the defendants to cross-examine the plaintiff. The assistance is necessary for the court to come to a proper conclusion. In any case, fair trial requires that defendants be allowed to cross-

examine the plaintiff. He supports the order passed by the learned trial Judge and prays for rejection of the petition.

7. After hearing the parties and going through the petition and annexures only question that appears for consideration is whether trial court was justified in allowing the application and directing the plaintiff-petitioners to appear for cross-examination. It is trite law that no party can be forced or compelled to give evidence. At the most if party refuses to step into witness box and avoids the cross-examination, it is always open for the court to draw an adverse inference. In the earlier order passed by the learned court at Exh.50, the trial court has already observed the same. Thus, no case is made out justifying filing of another application that too when earlier order had attained finality.

8. From reading the order passed by this court dated 01-12-2014 in WP/10292/2014 it is clear that this court has disposed off the petition holding that no interference is required.

No liberty was granted by the court. When the plaintiff has not pressed the evidence affidavit there was no question of calling such person for cross-examination. Once the court formed the opinion that cross examination is not necessary, it was not proper that same court to entertain similar application to pass contrary order. This court finds that no case is made out calling for interference at the hands of this court. The impugned order is certainly against the propriety and deserves to be quashed and set aside. The impugned order dated 12-03-2015 is thus quashed and set aside. The petition stands allowed in terms of prayer clause-B.

9. Since the suit is of 2009, the trial court is expected to dispose it off as early as possible and preferably within one year from today.

10. With this, the writ petition stands disposed off.

[KISHORE C. SANT, J.]