



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

Writ Petition No.6810/2024
Balkisan V Pushpadevi and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. S.S. Sharma, Adv. for petitioner.
Mr. K.J. Rawandhe, Advocate for respondent nos. 1 to 4, 5 and 7.

CORAM : R.M. Joshi, J.
DATE : 04-07-2025.

This petition takes exception to order passed below Exhibits-55 and 57, whereby the applications filed for recasting of the issue and direction to the defendants to lead evidence came to be rejected.

2. There is no dispute about the fact that the petitioner is plaintiff in Special Civil Suit No.266/2022. The suit is filed for partition and separate possession on the specific plea that the suit properties are ancestral properties.

3. The defendants/respondents appeared in the said suit and challenged the contention of the petitioner about the properties being ancestral. It is a case of the defendants that the properties are self acquired properties of the concerned persons. It is further claimed that those persons by Will Deed as well as Gift Deed have assigned the said properties to the respective

defendants. In the context of these pleadings, issues came to be framed by the trial Court, the same as under :-

Issues

- 1] *Whether suit property is ancestral property of plaintiff*
- 2] *Whether suit property is self acquired property of late Rukhminidevi Ramniwas Sharma ?*
- 3] *Whether Rukhminidevi Sharma has executed a Will dated 27.07.2007 and bequeath the property to Ramprakash Sharma, Krushnakumar Sharma and Smt. Latadevi Sharma ?*
- 4] *Whether defendant Nos. 1 to 5 and 7 prove that defendant Nos.5, 7 and late Ramprakash Sharma were absolute owners of the suit property ?*
- 5] *Whether the defendants prove that Gift Deed executed on 23.12.2019 in favour of Niraj Sharma ?*
- 6] *Whether suit is bad for non joinder of necessary parties ?*
- 7] *Whether defendants prove that suit is not maintainable, frivolous, vexatious, hence, liable to be dismissed with costs ?*
- 8] *Whether plaintiff is entitled for 1/8th share in the suit property ?*
- 9] *Whether plaintiff is possession of the suit property ?*
- 10] *Whether plaintiff proves that defendants are dispossessing and illegally evicting the plaintiff from the suit property ?*

11] Whether plaintiff is entitled for relief of partition, declaration and permanent injunction, as prayed ?

12] What order and decree ?

4. The petitioner/plaintiff is aggrieved by framing of these issues and sought modification/recasting thereof. It is sought to be argued on behalf of the petitioner that in respect of issue nos.1 and 2 the burden is not cast upon any party to prove the said issues. Insofar as issue no.3 is concerned, it is contended that it is for the preponder of the Will Deed to prove the execution thereof and therefore the burden ought to have been placed on the defendants to prove the execution of Will Deed by Rukhminidevi Sharma dated 27-07-2007. It is his further submission that since the plaintiff has challenged the legality of the Gift Deed executed on 23-12-2019, additional issue is required to be framed, as to whether the plaintiff proves that the executor of the Gift Deed was not competent to execute the Gift Deed dated 23-12-2019. He has also sought additional issues to be framed.

5. Insofar as the additional issues sought to be framed as recorded in paragraph 6 of the application, perusal of the same

indicates that the said issues are irrelevant for the decision of the suit. Hence, rejection of additional issues by the trial Court needs to be accepted.

6. Insofar as issues no.1 and 2 are concerned, the trial Court ought to have cast burden on the plaintiff to prove issue no.1 and defendants to prove issue no.2. Similarly, burden ought to have been placed on the defendants to prove the execution of Will Deed in question. These issues therefore require modification. Accordingly, they are modified as under :-

- (1) Whether the plaintiff proves that the suit property is ancestral property ?
- (2) Whether the defendants proves that the suit property is self acquired property of Rukhminidevi Sharma ?
- (3) Whether the defendants prove that Rukhminidevi Sharma executed Will dated 27-07-2007 and bequeath the property to Ramprakash Sharma, Krushnakumar Sharma and Smt. Latadevi Sharma ?

Additional issue is also framed 5(a) "as to whether the plaintiff proves that the executor of the Gift Deed dated 23-12-2019 was not competent to execute the same."

7. The application Exhibit-55, therefore deserves to be allowed in above terms. The issues no.1, 2 and 3 stand modified and additional issue no. 5(a) is framed. The other issues framed by the trial Court are not interfered with.

8. As far as the application Exhibit-57 is concerned, plaintiff seeks direction to the defendants to lead evidence first. To support the submissions, learned Counsel for the petitioner/ plaintiff has relied upon the following case laws :-

- (i) **Capt. Kunal Khajuria and another vs Major General Sudhir Mohan (Retd.) and others, reported in 2024 SCC OnLine Del 1957.**
- (ii) **Yeshwant Rambhau Chondhe and others vs Vilas Bapurao Shinde, reported in 2007 SCC OnLine Bom 564.**

9. Learned Counsel for the respondents opposed the said contention by submitting that having regard to the issue involved in the plaint the initial burden would be on plaintiff to prove that the suit property is ancestral property and hence it is for the plaintiff to lead evidence first. Perusal of the judgments cited supra, indicate that they are not relevant for the decision of the issue involved in this case. Here in this case admittedly suit is filed for partition with specific case of the petitioner that the

property is ancestral property. Needless to say that the decision of the entire suit would depend upon the proof of fact by the petitioner/plaintiff that the suit property is ancestral property. Apart from this, there is no presumption of jointness of the property and the same will have to be proved by leading evidence. The burden would be on the person to prove a fact, if no evidence is led, the suit would fail. If the evidence is not led by plaintiff to discharge the initial burden, suit would fail. Hence, this is a case wherein evidence must be led first by plaintiff. Moreover, this is not the case wherein any counterclaim is filed by the defendants in order to call upon them to substantiate their case/defence first.

10. In view of this, there is no error committed by the trial Court in rejecting the application Exhibit-57.

11. Petition stands partly allowed in the aforestated terms.

(R.M. Joshi, J.)