



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7300 OF 2023

Sudam Sitaram Dagade & Ors.

.. Petitioners

Versus

Uttamrao Sitaram Dagade

.. Respondent

.....

- Mr. Abhijit P. Kulkarni a/w Ms. Sweta Shah, Advocates for Petitioners.
- Mr. S.C. Wakankar a/w. Ms. Aishwarya Bapat, Advocates for Respondent.

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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 02, 2025

JUDGMENT:

1. This Writ Petition takes exception to the order dated 25.01.2023 passed by the 6th Joint Civil Judge Senior Division, Pune, allowing the Application of Plaintiff filed below Exhibit "91" to recast the issues framed below Exhibit "26" in the suit proceedings and frame an additional issue.

2. Parties are referred to as "Plaintiff" and "Defendants" for convenience.

3. At the outset, it needs to be noted that cross-examination of the Plaintiff on the issues framed in the Suit has been completed. Thereafter Application below Exhibit "91" is filed by Plaintiff on 17.11.2022 under Order XIV Rule 5 of CPC, when the Suit is part-heard.

4. In the above facts certain dates and events are required to be delineated for proper appreciation of the issue before me. Plaintiff has filed Special Suit No. 419 of 2007 for declaration, partition and for perpetual injunction wherein challenge is maintained to the Will dated 09.02.2004 alleged to be executed by one Mr. Gayaram Piraji Dagade in favour of the Original Defendant No.2.

5. Pleadings were completed by the parties and issues were framed below Exhibit "26" in 2010. Evidence of the Plaintiff was filed in the year 2010 thereafter and the Impugned Order records that cross-examination of the Plaintiff is now concluded in the year 2022.

6. In the above background, on 17.11.2022, Plaintiff filed Application below Exhibit "91". It is stated in the Application that the matter is part-heard, that Plaintiff began his evidence in the year 2010 and Defendants have completed cross-examination of the Plaintiff, that thereafter while perusing the issues framed by the Court, it is found by Plaintiff that certain issues are required to be added or replaced.

7. Hence the Plaintiff's case is that an additional issue be framed as under :-

“Do the defendants prove that the Will, dated 09.02.2004 executed by late Mr. Gayaram Piraji Dagade is proper, legal, without any influence and beyond any suspicion?”

8. The ground on which such an additional issue is to be framed as stated in the Application is that Defendant Nos. 1 to 4 have asserted in their written statement that the Will dated 09.02.2004 is proper and genuine.

9. It is seen from the pleadings placed before me that before the trial began, issues were framed on two (2) occasions, firstly on 13.07.2010 issues were framed below Exhibit "26" as under:-

“(1) Does Plaintiff prove that, the Will allegedly executed by deceased Gayaram in favour of Defendant No. 2 is forged and fraudulent?”

(2) Does he prove that he has half share in the suit lands?

(3) Is he entitled to the relief sought?

(4) What order and decree?”

10. After the above issues were framed an additional issue namely issue No. 5 was framed at the behest of Plaintiff's Application below Exhibit "35" on 02.11.2011 as under :-

“(5) Whether suit is barred by any law?”

11. The witness action of Plaintiff is thereafter held on 09.12.2021, 01.10.2022 and 05.11.2022 and is completed. Thereafter on 17.11.2022, Plaintiff filed Application below Exhibit "91". Perusal of the Impugned Order reveals that the Application below Exhibit "91" is allowed and the only reason stated by the Court below in allowing the Application is that it is in the interest of justice.

12. Mr. Kulkarni, learned Advocate appearing for Petitioners (Original Defendants) would submit that two (2) specific pleadings i.e. in paragraph No. 3 in the Suit plaint and Plaintiff's cross-examination recorded on 01.10.2022, would not entitle the Plaintiff to seek framing of or recasting of the alleged additional issue as it may amount to improving the Plaintiff's case after his witness action. The Suit plaint is appended at Exhibit "A" to the Application. Paragraph No. 3 in the Suit plaint refers to Mr. Gayaram Piraji Dagade who is the original holder of the Suit property. It is stated that Plaintiff and Defendant No. 1's father namely Mr. Sitaram Rama Dagade was having *kul* (कुळ) in the Suit property.

12.1. It is further stated that Mr. Sitaram Rama Dagade, expired on 12.01.1995 thus leaving behind Plaintiff and Defendant No.1 as the only legal heirs. It is further stated that father of Defendant No.1 had obtained / purchased rights in the Suit property under the Tenancy Act and lands were never in possession of Mr. Gayaram Piraji Dagade.

13. Reference to the Suit property is not a singular property but there are eleven (11) properties as mentioned in paragraph No. 1 of the Suit plaint. In paragraph No. 6 of the Suit plaint reference is to the Will of Mr. Gayaram Piraji Dagade dated 09.02.2004. The averments made in paragraph Nos. 6 and 7 are to the effect that the Will dated 09.02.2004 is not genuine and is bogus. Substantial

averments are made in paragraph Nos. 6 and 7 to that effect. According to prayer clause "a" which is the principal prayer, it seeks a declaration that the said Will of Mr. Gayaram Piraji Dagade be declared as bogus and illegal.

14. Resultantly, the principal issue below Exhibit "26" namely issue No.1 is accordingly framed. From the above it is clearly seen that if the Plaintiff succeeds in proving his case below issue No.1, he cannot have any impediment whatsoever in getting his principal relief in the Suit plaint qua the Will in question. In that case, framing of additional issue as contemplated and allowed by the Court is not at all necessary. It is seen that substantial cross-examination of the Plaintiff has been undertaken on the above Issue No.1. Plaintiff has after his cross-examination being completed filed the Application below Exhibit "91".

15. I am of the clear opinion that if the Plaintiff succeeds in proving his principal issue namely issue No. 1 there is absolutely no need and necessity for framing of the additional issue which has been sought to be framed after the trial has commenced and after Plaintiff's evidence and witness action is over. Plaintiff's Application below Exhibit "91" is filed as a complete afterthought. The Plaintiff has analysed and scrutinised his own evidence which is completed in all aspects / respects. Nothing prevented the Plaintiff from seeking framing of the additional issue earlier. In any event framing of

additional issue sought by the Plaintiff is completely irrelevant, if the Plaintiff has to succeed in proving the issue No. 1 which has already been framed.

16. Mr. Wakankar, learned Advocate appearing for the Respondent - Original Plaintiff, would submit that the decisions of the Supreme Court in the case of *(i) Smt. Indu Bala Bose & Ors. Vs. Manindra Chandra Bose & Anr.*¹, *(ii) Rajkumar & Ors. Vs. Surinder Pal Sharma*² and the decision of this court in the case of *(iii) Shonali Kedar Dighe Vs. Ashita Tha, & Ors*³ be considered by the Court. The decisions are cited before me in the context of requirements to be proved under section 63 of Indian Succession Act, 1925.

16.1. Mr. Wakankar, would submit that the Will of Mr. Gayaram Piraji Dagade in favour of Defendants will have to be proved by them. He would submit that it is necessary to remove all suspicious circumstances surrounding the execution of the Will and therefore this Court should uphold the Impugned Order in the interest of justice. With his able assistance, I have perused the Supreme Court judgments in the cases of *Smt. Indu Bala Bose & Ors. (1st supra)* and *Rajkumar & Ors. (2nd supra)* and judgment of this Court in the case of *Shonali Kedar Dighe (3rd supra)* which is authored by me.

1 AIR 1982 SC 133

2 Judgment dated 17.12.2013 in Civil Appeal No. 9683 of 2019

3 Judgment dated 28.11.2023 in Testamentary Suit No. 14 of 2004

17. The facts of the aforesaid three (3) cases are entirely different and in a completely different context. In the aforesaid three (3) cases cited before me, the dispute between the parties was on account of the Will wherein the parties were all relatives of each other and claiming share in the property of the deceased. The proceedings were Testamentary proceedings in the said cases. In so far as the present Suit proceedings are concerned averments made in paragraph Nos. 6,7 and 8 of the Suit plaint and the principal relief claimed in the Suit is clearly a declaratory relief to declare the Will of Mr. Gayaram Piraji Dagade as bogus and illegal. Once this is the case then the onus is on the Plaintiff to prove his case as per Issue No.1 which has been framed.

18. It appears that the Plaintiff is not confident about his own case and therefore Application is filed below Exhibit "91" for framing the additional issue. The fact that it is filed after the entire witness action of Plaintiff is concluded militates against the Plaintiff. The facts in the present case are clearly distinguishable from the facts in the three (3) cases cited / placed before me. Suit is filed in the year 2007 and by the year 2022 Plaintiff's cross-examination is over. The Plaintiff has merely taken a chance on the strength of his cross-examination in filing the Application below Exhibit "91". Such an action is

impermissible. The Impugned Order merely states that the additional issue should be framed in the interest of justice.

19. I am of the opinion that if the Plaintiff succeeds in proving Issue No.1 in the affirmative, there is no need for framing of any additional issue much less the proposed issue. In view of my above observation and findings, impugned order calls for interference.

20. The reason given in paragraph No. 4 is not sustainable because in the Suit plaint itself in paragraph No. 6, it is Plaintiff's case that the Will has been fraudulently obtained by Defendants and it is an illegal Will. Once the principal relief is for a declaratory relief to prove the Will as bogus and illegal, the Application below Exhibit "91" after completion of witness action is nothing but an afterthought on the part of the Plaintiff. Hence, the impugned order dated 25.01.2023 is quashed and set aside.

21. The learned Trial Court is directed by this Court to dispose of pending Special Civil Suit No.419 of 2007 within a period of one (1) year from today.

22. All contentions of both parties are expressly kept open.

23. Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

24. After this judgment is pronounced, Mr. Wakankar seeks stay of the judgment. Considering the issue involved in the present matter, the request is granted. The judgment stands stayed for a period of eight (8) weeks from today to enable the Respondent to approach the Superior Court.

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[MILIND N. JADHAV, J.]

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