



ORDER BELOW EXH. 55

01. This is an application under Order XLI Rule 25 of the Code of Civil Procedure, 1908 filed by the appellants for alteration/amendment of issues.

02. The respondent has contested the said application by filing his say at Exh.56.

03. Perused the application and say. Heard both sides.

04. Ld. Advocate for the appellants submitted that present appeal is preferred against judgment and decree dated 27/09/2011 passed by Ld. Civil Judge, J.D. Karjat, in Regular Civil Suit No. 16/2006. The appellants are the original plaintiffs in the RCS No. 16/2006. The suit is for declaration and injunction in respect of S.No. 16 and 12/1 situated at village Chinchavali, Tal. Karjat, District Raigad. The Ld. Trial Court did not frame proper issue. The issues were required to be framed considering the pleading of the defendant. The defendant was required to prove the genuineness of the Will as a propounder. However, Ld. Trial Court shifted negative burden upon the plaintiffs.

05. Per contra, Ld. Advocate for the respondent submitted that after considering pleading of the parties, the Ld. Trial Court properly framed the issues at Exh.34. At the time of framing of those issues the plaintiffs had not raised any objection in Ld. Trial Court. After prolonged delay the

plaintiffs have filed this application for framing the proposed issues. The application is not maintainable.

06. On perusal of record of the case it appears that the plaintiffs had filed Reg. Civil Suit No.16/2006 for declaration that suit property bearing Survey No.16/0 and 12/1 are jointly owned and possessed by the plaintiffs and defendant, and Will deed dated 16/10/1993 executed in favour of the defendant is wrong and not binding on the plaintiffs and also prayed for injunction. It is pleading of the plaintiffs that, plaintiffs No.1 to 4 and defendant are brother and plaintiffs No.5 to 7 are the sisters of the plaintiffs and defendant. After demise of their father Nana Govind Bhagat, names of plaintiffs and defendant were recorded to ancestral properties vide mutation entry No.450. However, suit property remained in the name of defendant. On 08/02/1991 arbitrators were appointed to resolve the dispute between plaintiffs and defendant about the ancestral properties. Arbitrators had passed award for partition of the properties. On 05/03/1999 there was *Vatappatra* between the plaintiff and defendant about the suit properties. However, the defendant is not acting as per the *Vatappatra* for effecting partition between them. The defendant had obtained false Will deed dated 16/10/1993 from father Nana Govind Bhagat.

07. On the contrary it is the pleading of the defendant that the suit properties are self acquired properties of father Nana Govind Bhagat. He bequeathed the suit properties to the defendant by Will deed dated 16/10/1993.

08. It appears that, considering the rival pleading of the parties the Ld. Trial Court framed issues at Exh.34. On

perusal of these issues it appears that, issue of status of the property, partition award dated 08/02/1991, genuineness of the Will, maintainability of the suit, pecuniary jurisdiction of the Court are covered. Now the plaintiff has filed this application for shifting burden on the defendant to prove the suit properties are self acquired properties of Nana Govind Bhagat, whether there was a previous partition, whether Will dated 16/10/1993 was executed by free will, whether plaintiff No.1 got arbitral award in his favour by making false signature of the defendant and whether the Court has no jurisdiction to try and entertain the suit.

09. As per Section 102 of the Indian Evidence Act the burden of proof in suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Therefore, in case of suit based upon fraud of document the burden of proof lies with the party alleging fraud. If one party claims that the Court can hear his case he must establish that the Court has authority to hear his case. Once the plaintiff establishes his case then the burden shifts upon the defendant to refute the allegations. Therefore, the initial burden lies with the plaintiff to substantiate his claim with sufficient pleading and evidence. The suit of the plaintiff is based upon fraud of Will deed dated 16/10/1993. The plaintiff is also relying upon arbitral award and *Vatappatra*. Therefore, considering rival pleading of the parties I find that the burden of proof lies on the plaintiff to prove his case.

10. As per Order XLI Rule 25 of CPC where the Court from whose decree the appeal is preferred has omitted to frame or try any issue or to determine any question of fact,

which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required. However, in present case the Ld. Trial Court has not omitted to try the points covered under the proposed issues. The proposed issues were already covered in issues framed at Exh.34 by the Ld. Trial Court. Therefore, there is no need of alteration or framing of issues suggested by the plaintiffs. With this I pass following order.

ORDER

The application (Exh. 55) is rejected.

Panvel.
Date 19/11/2024

(Santosh R. Chavan)
District Judge- 4,
Panvel – Raigad.