
(2010) 04 BOM CK 0166

In the Bombay High Court

Case No : Writ Petition No. 5838 of 2008

Dattatray Namdeo Patil

APPELLANT

Vs

Ram Namdeo Patil and Others

RESPONDENT

Date of Decision : 20-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 1, Order 18 Rule 2

Citation : (2010) 04 BOM CK 0166

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : P.S. Dani, for the Appellant; Machhindra Patil, for Respondents 1, 3, 4, 5, 7, 8 and 10, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—Rule, returnable forthwith. Heard finally.

2. The petitioner, who is original defendant No. 4, has challenged the impugned order, below Exhibit 90, dated 22nd July, 2008 passed by the learned Joint Civil Judge, Junior Division, Panvel thereby allowing the Application filed by the plaintiff directed the defendants to begin the evidence in a Suit for partition and separate possession of ancestral property between the parties, referring to Rule 1 of Order XVIII of CPC (CPC) by observing that defendant No. 4 has to begin the evidence.

3. Admittedly, no such Application to begin the evidence was filed by the petitioner/defendant No. 4. The Application was filed by the plaintiff. In the Suit, the defendants admit that the suit property is an ancestral property; and the plaintiff was separated from 1979; and he is not entitled for partition and the reliefs. This cannot be treated as admitted facts by overlooking the whole pleading of the parties. This itself is not sufficient to grant such application of the plaintiffs. The Court cannot compel and/or direct the defendants to lead evidence first. Rules 1 & 2 of Order XVIII of CPC entitle the defendant, who admits the

facts, to begin the case first. It is an enabling provision. It is not mandatory. Such defendant, if apply and make such request and/or claim such right, the Court may pass such order. The Court cannot direct the defendant to begin the case in such fashion.

4. The learned Judge of this Court (Abhay S. Oka, J.) while considering such aspect in Bhagirath Shankar Somani and Smt. Kamlabai Bhagirath Somani Vs. Rameshchandra Daulal Soni and Onkar Builders, a Firm, , has, after considering various Judgments, observed as under:

16. If the defendant decides to lead the evidence, the plaintiff can always lead evidence in rebuttal. As held by this Court, the Court has no power to issue a direction to the defendant compelling him to lead his evidence before the plaintiff adduces his evidence. Only when the defendant claims right to begin under Rule 1 and the plaintiff disputes existence of such a right, the Court will have to decide the question whether the defendant has acquired a right to begin.

5. The right of the defendant to begin the case cannot be treated as right of the plaintiff?s to insist/compel such defendant to begin first. The learned Judge needs to consider overall view of the matter read with the provisions so referred above while passing such order, before compelling the defendant to begin the case or lead evidence first. In view of above facts, I am not dealing with the aspects of specific pleas/defence and respective burden of proof. The order so passed by the trial Court, in the present facts and circumstances of the case, is quashed and set aside. In the result, the Application filed by the plaintiff is rejected. The Court to proceed with the matter in accordance with law. The Petition is allowed in terms of prayer (a) and Rule made absolute accordingly. No order as to costs.