

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3910 OF 2016

Allan Sebastian D'Souza and another ... Petitioners
Vs.
G. B. Narqutta and another ... Respondents

Ms Jyoti Chavan for Petitioners.
Mr. R. M. Haridas for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : JULY 8, 2016

P.C. :

Heard Ms Chavan, learned Counsel for petitioners and Mr. Haridas, learned Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 14.11.2014 passed by the appellate Bench of the Small Causes Court at Mumbai below exhibit-8 in 5b(i) Marji Application No.376 of 2014 in Appeal (St.) No.2750 of 2014 as also the judgment and order dated 21.10.2015 passed by the appellate Bench of the Small Causes Court at Mumbai below exhibit-9. By order dated 14.11.2014, application exhibit-8 taken out by the petitioners, hereinafter referred to as plaintiffs, for effecting service on respondent No.1 by way of substituted service was rejected by observing that respondent No.1 appears to have died and therefore, no substituted service can be directed against the dead person. Plaintiffs filed review application at exhibit-9, which was rejected on 21.10.2015.

3. Ms Chavan submitted that plaintiffs do not admit that defendant No.1 has died on 13.07.1989. She invited my attention to the additional issues 1 to 4. The additional issues 1 to 4 and the findings recorded

against them read thus,

Additional Issues

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|---|---|------------|
| 1 | Whether plaintiff prove that defendant No.1 naming Mr. G. B. Narqutta is different person rather the father of defendant No.2 namely Ghurpatri Baijnath Gupta? | Not proved |
| 2 | Whether plaintiff proves that defendant No.2 since inducted in the suit premises does not have any kind of blood relationship to the said person namely G. B. Narqutta? | Not proved |
| 3 | Whether defendant No.2 proves that the person namely G. B. Gupta named as G. B. Narqutta in the title of plaint was his real father who died in the year 1989 at his native place during his relationship as tenant of plaintiff? | Proved |
| 4 | Whether defendant No.2 proves that he alongwith his brothers and sisters are surviving legal representatives of his late father? | Proved. |

4. Ms Chavan submitted that the learned trial Judge rejected the plaint against defendant No.1 on the ground that at the time of filing of the Suit, defendant No.1 was not alive and dismissed the Suit against the defendant No.2. The learned trial Judge rejected the plaint against defendant No.1 on the ground that it was proved that defendant No.1 died in the year 1989. She submits that plaintiffs are disputing the death of defendant No.1 and have preferred substantive appeal before the appellate Court. She submitted that while deciding the Appeal, the appellate Court may be influenced by the observations made in the impugned order dated 14.11.2014 below exhibit-8. She, therefore, submitted that it may be clarified that while deciding the appeal, the appellate Court will decide the same on the basis of the evidence of record, uninfluenced by the observations made in the order dated 14.11.2014 below exhibit-8.

5. After hearing the learned Counsel appearing for the parties, I find that the request made by Ms Chavan is reasonable. Apart from that, the impugned orders are interlocutory. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. While deciding the appeal, the appellate Court will consider the evidence on record and more particularly, about the death of the defendant No.1 on 13.07.1989 as claimed by defendant No.2 or not and shall decide the appeal uninfluenced by the observations made in the order dated 14.11.2014 below exhibit-8 and the order dated 21.10.2015 below exhibit-9.

6. It is expressly made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105 (1) of C.P.C.

(R. G. KETKAR, J.)

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