

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

CIVIL APPLICATION (CAC) NO.14 OF 2016

IN

CIVIL REVISION APPLICATION ST. NO.4487 OF 2016

(PARASRAM PANDHARI KULLARKAR & OTH...VS..MADHUKAR PANDHARI KULLARKAR.)

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

Court's or Judge's orders

CORAM : Z.A.HAQ, J.

DATED : SEPTEMBER 26, 2016.

By the order dated 29th April, 2016 this Court permitted the applicants to serve the non-applicant through advocate representing him before the trial Court. The advocate for the applicants has filed pursis dated 14th September, 2016 stating that the copies of the present application and civil revision application are served on Shri S.P. Kshirsagar, advocate who is representing the non-applicant before the trial Court. Another pursis dated 23rd September, 2016 is filed to the same effect.

Today, Shri S.R. Chakravarti, advocate appeared for the non-applicant and submitted that the non-applicant has not given any instructions.

Since the non-applicant is served, the matter is taken up.

Accepting the reasons stated in the application, which are not controverted, the delay of 22 days in filing the civil revision application is condoned.

The civil application is allowed.

C.R.A. ST. NO. 4487/2016.

As the non-applicant has chosen to remain absent inspite of the knowledge about pendency of this revision application and inspite of service of copies on the advocate who is representing him before the trial Court, the matter is taken up for disposal.

Heard Shri S.S.Sharma, advocate for the applicants/ original defendants.

The order passed by the trial Court rejecting application (Exh.25) filed by the applicants under Order VII Rule 11(d) of the Code of Civil Procedure is challenged.

The applicants/ defendants prayed that the plaint be rejected as the claim of the non-applicant/ plaintiff for decree for declaration that the Will dated 13th August, 1996 is illegal, is barred by limitation.

The non-applicant /plaintiff has prayed for the following reliefs :

“(i) Declare that the alleged Will dated 13-8-1996 and oral partition of 1977 is not sustainable in law in view of the fact that the suit properties are the ancestral properties and Late Smt. Jankubai Kullarkar had no legal right to make such Will and partition of the year 1977 being made without any consent, knowledge of the plaintiff and it came to the knowledge of the plaintiff in the year 2008, depriving the legal right of the plaintiff, therefore, declare that the plaintiff is entitled to the half share in the suit properties as per the Hindu Succession Act and that may be separated and the plaintiff be given separate possession thereof.

(ii) *decree of partition may be granted and half share in the house bearing No.37, at Wadegaon, Tahsil : Kuhi, District : Nagpur be given to the plaintiff by separating the same by metes and bounds and its separate possession be given to the plaintiff in accordance with law.*

(iii) *By decree of permanent injunction, the defendants be restrained from interfering in the peaceful possession of the plaintiff on the land at Khasra No.153(old) 74(new), admeasuring 1.40 Hectares of Mouza – Khalasana and they be restrained from alienation or transfer, creating any charge by any mode of conveyance including mortgage of the suit properties, in the interests of justice.*

(iv) *Enquiry into mesne profits may be ordered and mesne profits be directed to be paid to the plaintiff by the defendants under Order 20 Rule 12 of the Civil Procedure Code.*

(v) *Saddle the costs of this suit on the defendants.*

(vi) *Grant any other relief which this Hon'ble Court deems fit in the facts and circumstances of the case, in the interest of justice."*

The learned advocate for the applicant has argued that the substantive relief sought by the plaintiff is as per prayer clause (i) and the other reliefs are ancillary and if the claim of the plaintiff, as made in the prayer clause (i) cannot be granted, other reliefs cannot be granted and therefore, the plaint is liable to be rejected.

The learned trial Judge framed preliminary issue on the point whether the claim for declaration is within the prescribed period of limitation. The preliminary issue is

decided by the learned trial Judge without recording evidence. Considering the nature of the claim of the plaintiff, in my view, the plaint cannot be rejected at the threshold under Order VII Rule 11(d) of the Code of Civil Procedure and the trial Court will have to decide all the issues simultaneously after giving parties an opportunity to prove their contentions.

The learned trial Judge has committed an error in taking up the preliminary issue for adjudication and deciding it without giving the parties an opportunity to lead evidence to substantiate their contentions.

Hence, the following order :

- i) The impugned order is set aside.
- ii) The learned trial Judge shall decide the preliminary issue as framed by him, along with other issues after giving parties an opportunity to prove their contentions.
- iii) The observations and findings recorded in the impugned order shall not have any effect on the adjudication on the issues including the preliminary issue, on merits.

With the above observations, the civil revision application is disposed. In the circumstances, the parties to bear their own costs.

JUDGE

CERTIFICATE

I certify that this order uploaded is a true and correct copy of original signed order.

Uploaded by : R.B. Raut, PS

Uploaded on : 28/09/2016.