

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8040 OF 2016

SUBHASH PANDURANG NAGRE AND OTHERS
VERSUS
GAJANAN @ RAHUL DNYANESHWAR NAGRE
AND ANOTHER

Advocate for Petitioners : Shri A.S. Bajaj.
Advocate for Respondent No. 1 : Shri V.V. Bhavthankar.
Advocate for Respondent No. 2 : Shri S.S. Shinde.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 22nd June, 2017

PER COURT :-

1. The petitioners are aggrieved by the order dated 22/03/2016, by which, the learned Appellate Court has allowed application Exhibit 23 filed by respondent No. 1 / Gajanan in Regular Civil Appeal No. 83/2008 and he has been permitted to repudiate the suit. The suit was partly decreed.

2. I have considered the submissions of the learned advocates for the respective sides and with their assistance, I have gone through the petition paper book.

3. Respondent No. 1 / Gajanan @ Rahul was plaintiff No. 1, along with his mother Indubai who was plaintiff No. 2. At the time of the institution of the suit No. 209/2005, Gajanan was 12 years old and was represented by his biological mother / plaintiff No. 2 as his guardian. Partition and separate possession was the issue in the suit with regard to the ancestral property. The suit was decreed by judgment dated 22/02/2000, and the shares of Gajanan and his mother were determined by the Trial Court.

4. The plaintiffs upon being aggrieved by the decree, by which, the suit was partly allowed and because all the properties at issue were not considered, preferred Regular Civil Appeal No. 83/2008, before the learned District Judge-2, Hingoli. On 01/01/2013, Gajanan moved an application Exhibit 23, claiming that he has now become an adult, considering his date of birth as 19/12/1992. Vide Exhibit 23, Gajanan has put forth two grounds in paragraph Nos. 2 and 4 as under :

(A) All his legal rights to the shares in the property

were not properly canvassed by his mother before the Trial Court.

(B) Since, the suit was not properly conducted by his mother, he desires to repudiate the said suit.

5. By the impugned order dated 23/03/2016, the Appellate Court allowed Exhibit 23 and Gajanan has accordingly filed a fresh suit which has been registered as SCS No. 12/2016, before the learned Civil Judge Senior Division, Hingoli.

6. I find from Exhibit No. 23, that the said application is a vague and ambiguous application. The first aspect would be as to which provision of law has been invoked by Gajanan in application Exhibit No. 23. The entire application is silent about it. The learned counsel for Gajanan has strenuously contended that Order XXXII Rule 13 of C.P.C. would be applicable in this matter. Rule 13 reads as under :

“Where minor co-plaintiff attaining majority desires to repudiate suit :-

(1) Where a minor co-plaintiff on attaining majority

desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.”

7. The issue, therefore, is as to whether, in these peculiar facts of the case, where the suit is decreed and appeal is pending at the behest of the plaintiff and since the minor plaintiff has become an adult, he could seek repudiation of the suit which is already decreed, and can further seek the nullification of the decree and claim a right to file the separate suit. Clause 1 under Rule 13, prima facie, does not permit a litigant to repudiate the suit which has already been decreed and appeal is pending. Clause 1, would permit a minor plaintiff to apply for striking off his name from the array of plaintiffs.

Under Clause 4, if the applicant is a necessary party to the suit, the Court may direct him to be added as a defendant.

8. The learned advocates representing the litigating sides, after seeking time so as to look up to available case law, submitted today that they have not been able to lay hands on such judicial pronouncements whereby Order XXXII Rule 13 (1) would permit a co-plaintiff to nullify a decree and repudiate the suit after it has been decreed and then create a right to file a new suit. Learned counsel are also unable to point out any provision under the Civil Procedure Code or in any other enactment under which this could be done.

9. Even if it is presumed for the sake of arguments that Order XXXII Rule 13 can be invoked, I find it imperative that the applicant who has put forth such an application must point out how the decree is founded or based upon a claim having being put forth in a wrong manner and as to how the right of the applicant is decided though the Trial Court has decreed the suit after considering the oral and documentary evidence and the

law applicable.

10. As recorded above, Exhibit 23 is devoid of pleading and does not contain any such details which would convince the Court to order a repudiation of the suit and then to nullify the decree passed earlier by a judgment. These aspects have not been looked into by the Appellate Court. I find that the Appellate Court has not even considered as to whether Exhibit 23 would generate confidence to pass an order of repudiating the earlier suit. First plead and then prove is the law applicable.

11. At this juncture, learned counsel for the respondent Nos. 1 and 2, jointly submit that they may be granted liberty to prefer a proper application setting forth all the details as may be germane for establishing the case for repudiation of suit. Learned counsel for the petitioners submits that the basis would be as to which provision would be invoked by Gajanan and whether order XXXII Rule 13 would be applicable to this case.

12. Considering the above, this petition is partly allowed. The impugned order dated 22/03/2016, is quashed and set aside and application Exhibit 23 is disposed of. Consequently, the Special Civil Suit No. 12/2016, instituted by respondent No. 1 / Gajanan stands disposed of. Liberty is granted to respondent No. 1 / Gajanan to prefer an application in R.C.A. No. 83/2008, by specifically mentioning the provisions of law sought to be invoked, for catering to his prayer of repudiation of the suit. The application would contain details to support the grounds for making such a prayer. Needless to state, the Appellate Court should decide whether such application in this peculiar case is maintainable and shall assign reasons while deciding such an application. All the contentions of the litigating sides are kept open.

(RAVINDRA V. GHUGE, J.)