

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10329 OF 2014

SHAIKH HUSSEN YASIN
VERSUS
BEBITAI JAVJE HUSSEN @ SAYYAD BEBI AND ANOTHER

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Advocate for Petitioner : Shri Kakde Yuvraj V.
Advocate for Respondent 2 : Shri Jaju Nikhil S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: December 07, 2017

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PER COURT :-

1. While issuing notice on 3.12.2014, this Court had recorded the submissions of the petitioner as under:-

"1. The petitioner submits that respondent No.1 is his erstwhile wife and both have separated on account of *Talaq*. While separating, a settlement dated 26.12.1986 was arrived at between the parties and the petitioner had handed over a portion of his land to her, which is self acquired. The condition was that the said land would be utilized by the 1st respondent only for her sustenance and after the respondent, the said land would go back to the petitioner. Similarly, the 1st respondent shall have no right to create any third party interest or encumbrances upon the said portion of the land.

2. The petitioner submits that the respondent has got re-married to Syed Latif.

3. Since the petitioner gathered information that the respondent was likely to create a third party interest in the said property, he preferred RCS No.165 of 2011 for declaration and injunction against the respondent. Issues have been cast on 19.7.2013 and the petitioner had led his oral evidence by filing an affidavit in lieu of examination-in-chief.

4. Thereafter, a third person, namely, Ayub Hussen Shaikh - respondent No.2 herein, preferred an application Exhibit 51, claiming to be the son of the petitioner and respondent No.1. By the impugned order dated 1.10.2014, the said application Exhibit 51 is allowed and respondent No.2 is directed to be impleaded as the defendant. Contention is that when the suit is merely for declaration and injunction as against respondent No.1, respondent No.2 has no role to play."

2. Learned counsel appearing on behalf of respondent No.2, who is the second defendant added pursuant to the impugned order dated 1.10.2014, submits that he is the biological son of the petitioner / plaintiff and defendant No.1. He has been put in possession of the property at issue for cultivation purposes pursuant to the settlement deed dated 26.12.1986, between the plaintiff and defendant No.1.

3. The trial Court has specifically recorded in paragraph No.8 of the impugned order that respondent No.2, who had moved the application Exhibit 51 for being added as a party, is the real son of the plaintiff and defendant No.1. It is, therefore, contended that as the plaintiff desires to dispossess defendant No.1 from the property, which was assigned to her share by the settlement deed, eventually, respondent No.2 herein would be affected as he would be actually losing the possession if his mother was to suffer an adverse judgment and decree in the suit.

4. Learned counsel for the petitioner solemnly submits, on instructions, that the added defendant was born in 1988. The plaintiff and defendant No.1 have separated in 1986 and there are no marital relations between the two. The added defendant, therefore, is not the biological son of the petitioner / plaintiff and if that be so, the said defendant is not a necessary defendant in RCS No.165 of 2011.

5. Upon considering the submissions of the learned Advocates for the respective sides, I find that the trial Court has made an observation in paragraph No.8 that the applicant is the real son of the plaintiff and defendant and hence he needs to be arrayed as defendant No.2 under Order I Rule 10(2) of the CPC.

6. I find from these proceedings and the submissions of the learned Advocates that there is a serious dispute about the paternity of the added defendant. Hence, the observations made by the trial Court in paragraph No.8 cannot be sustained at this stage, since the added defendant, who seeks to contest the suit, has based his claim on the foundation that he is the biological son of the plaintiff and the defendant, which is strenuously disputed by the petitioner. Consequentially, the issue as to whether the added defendant is the biological son of the plaintiff and defendant No.1 needs to be kept open for adjudication.

7. If the added defendant is prevented from participating in the proceedings (if the impugned order is to be set aside), it is likely to cause prejudice to him in the event he is actually the biological son of the petitioner and the original defendant.

8. Considering the above, this petition is partly allowed, only to the extent of setting aside the observations of the trial Court in paragraph No.8 of the impugned order dated 1.10.2013, to the extent of the conclusion that he is the real son of the plaintiff and the defendant.

9. I, therefore, direct the trial Court to frame a specific issue as issue No.3-A, which shall read as under:-

" Whether defendant No.2 Ayub Hussen Shaikh proves that he is the biological son of the plaintiff and defendant No.1 Bebitai Javje Hussen @ Sayyad Bebi Sayyad Latif ?"

10. Needless to state, if defendant No.2 is unable to establish that he is the biological son of the plaintiff and the original defendant, it would be open to the trial Court to impose costs on defendant No.2.

(RAVINDRA V. GHUGE, J.)

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