

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1277 OF 2017

Asha Hirachand Pagariya and others ... Petitioners
Vs.
Kulkarni Constructions Pvt. Ltd. and another ... Respondents

Mr. Subhash Jha i/b. Law Global for Petitioners.
Mr. D. B. Lonkar for Respondent No.1.
Mr. Sachin Kankal, AGP for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 24, 2017

P.C. :

Heard Mr. Jha, learned Counsel for petitioners, Mr. Lonkar, learned Counsel for respondent No.1 and Mr. Kankal, learned AGP for respondent No.2, at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants No.3-1A to 3-1D', have challenged the judgment and order dated 12.04.2016 passed by the learned 5th Joint Civil Judge, Senior Division, Pune below exhibit-176 in Special Civil Suit No.31 of 2004. By that order, the learned trial Judge rejected the application made by these defendants for recasting issue No.1. Issue No.1, which was re-casted on 11.06.2015, reads thus:

“1] Whether defendant No.3 (1A to 1D) have no inherited any property from their father due to which they are not liable to pay the plaintiff?”

3. In support of this Petition, Mr. Jha submitted that respondent No.1, hereinafter referred to as 'plaintiff', has instituted Special Civil Suit No.39 of 2004 against defendant No.1 - M/s. Atreya Promoters Builders, defendant No.2 - M/s. Pagariya Associates and defendant No.3 - Hirachand Raichand Pagariya inter alia contending that defendants No.1 and 2 are proprietary concerns and defendant No.3 is the sole

proprietor of defendants No.1 and 2. Defendant No.3 died during the pendency of the Suit and defendants No.3-1A to 3-1D, being the legal representatives of defendant No.3, were brought on record by carrying out amendment on 20.06.2014. Mr. Jha submitted that Suit is instituted for recovery of Rs.95,00,657/- against the defendants. The very fact that defendants No.3-1A to 3-1D are brought on record after the death of the defendant No.3 impliedly shows that these defendants have inherited property left behind by defendant No.3. The burden is, therefore, on the plaintiff to establish the fact that these defendants have inherited properties left behind by the defendant No.3. He invited my attention to Sections 101, 102 and 103 of the Indian Evidence Act, 1872 (for short 'Act') to contend that as the plaintiff has asserted these facts, burden is on the plaintiff to establish the said fact. He also relied upon the decision of the Karnataka High Court in the case of ***Khanderao Subbarao Nadagir Vs. Hulagawa***, AIR 2003 Karnataka 354, and in particular paragraph 13 thereof.

4. On the other hand, Mr. Lonkar invited my attention to paragraph 4 of the written statement, which is extracted in the reply filed by the plaintiff, which is to the following effect:

“The Defendant submits that, no immovable or movable property was in the name of Defendant No.3 when he died, the present Defendant have not inherited either movable or immovable property of deceased Defendant No.3 and therefore they are not responsible to pay the suit amount to the plaintiff.”

5. He submitted that defendants No.3-1A to 3-1D have specifically contended that no immovable or movable property was in the name of the defendant No.3 when he died. These defendants have not inherited either movable or immovable property of the deceased defendant No.3, and therefore, they are not liable to pay the amount to the plaintiff. He submitted that as these facts are asserted by the defendants, burden is on them to establish the said case, and therefore, no case is made out for

interfering with the impugned order.

6. In paragraph 13 of **Khanderao Subbarao Nadagir** (*supra*), the learned Single Judge of Karnataka High Court has observed thus,

13. The aspect of burden of proof in the present case and on the ratio laid down by the Supreme Court in AIR 9169 SC 1076 (*supra*) is not applicable to the facts of this inasmuch as it was the pleading of the plaintiff in his plaint that not only the suit schedule property was the self-acquired property of deceased Fakirappa, but he had executed this agreement for the purpose of meeting the family necessities. While the former plea is negatived on the ground that it is not a joint family property, the latter plea indicates that late Fakirappa had to incur expenses in connection with the family. These have been denied by the defendants. It is elementary that in the circumstances it was for the plaintiff to have proved his case as pleaded in the plaint. The Trial Court had framed issues on this aspect and they have been answered against the plaintiff. The Lower Appellate Court did not find any occasion to interfere with the same. The suit was dismissed as the plaintiff did not establish his case.”

7. Perusal of the plaint in the present case, does not indicate that plaintiff asserted that after the death of defendant No.3, movable or immovable properties were inherited by defendants No.3-1A to 3-1D. In fact that is the defence set up by the defendants No.3-1A to 3-1D in paragraph 4 of the written statement. As these facts were asserted by defendants No.3-1A to 3-1D and it is within their special knowledge, the learned trial Judge was justified in holding that the burden is on these defendants to establish that they are not liable to pay the amount after the death of the defendant No.3. Hence, Petition fails and the same is dismissed. It is, however, made clear that where a decree is challenged by the petitioner, 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. Order accordingly.

(R. G. KETKAR, J.)