

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO.20672 OF 2018

Abdul Kader Ali Mohammed and Company ... Petitioners
Vs.
Khudadad Irani and others ... Respondents

Mr. Rajendra K. Yadav for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : JULY 20, 2018

P.C. :

Not on Board. At the request of Mr. Yadav, learned Counsel for the petitioners, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'plaintiffs', have challenged the judgment and order dated 20.06.2018 passed by the learned Judge, Court Room No.15 of the small Causes Court at Mumbai below exhibit-93 in Marji Application No.274 of 2016. By that order, the learned trial Judge allowed the application exhibit-93 filed by the defendants for taking on record original copy of the death certificate dated 29.06.1974 of Mr. Khodadad Irani.

3. In support of this Petition, Mr. Yadav strenuously contended that the learned trial Judge ought not to have allowed the application. He submitted that death certificate tried to be produced on record for the first time, was not part of the application filed by the defendants for setting aside ex-parte decree. The defendants' examination in chief was over. During the course of cross-examination, defendants have filed application seeking to produce original death certificate issued by the Municipal Corporation of Greater Mumbai (for short 'Corporation'). He

submitted that the learned trial Judge has not properly interpreted provisions of Order VII, Rule 14(3) of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). He submitted that along with the application under Order IX, Rule 13, defendants have produced a copy of the death certificate issued by Parsi Panchayat Funds and Properties. By order dated 18.04.2018, the learned trial Judge has not admitted the said death certificate in evidence. He invited my attention to the application exhibit-93 filed by the defendants and in particular paragraph 5 thereof, and the reply filed by the plaintiffs and in particular paragraph 3 thereof. In paragraph 3, plaintiffs have denied the contentions raised in the application exhibit-93. For all these reasons, he submitted that the impugned order deserves to be set aside.

4. I have considered the submissions advanced by Mr. Yadav. I have also perused the material on record. It appears that the Suit instituted by the plaintiffs was decreed ex-parte on 08.07.2013. On 31.08.2016, the legal representatives of the original defendant - Khodadad Irani filed Marji Application No.274 of 2016 under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree inter alia on the ground that the original defendant had died on 29.06.1974, and as such, decree was passed against the dead person. Along with the application, they filed photocopy of the death certificate of original defendant - Khodadad Irani issued by Parsi Panchayat Funds and Properties (for short 'Panchayat'). Defendants, therefore, applied to the Corporation for issuing death certificate. Accordingly, Corporation had issued death certificate on 05.05.2018. A perusal of this death certificate shows that Mr. Khodadad Irani died on 29.06.1974 and his address at the time of death as also permanent address of the deceased was shown as 7, Sea View, Tarracc, 71, Wood House Road, Colaba, Mumbai, which is the suit premises. A perusal of the application exhibit-93 shows that applicant had filed

affidavit of evidence along with the list of documents and had submitted copy of the death certificate dated 29.06.1974 along with the list of documents which was not admitted by the Advocate for the plaintiffs and the same was rejected by the Court vide order dated 18.04.2018. It was further asserted that they applied for certified copy of the death certificate to the Corporation who issued original death certificate. It was, therefore, prayed that the original death certificate may be taken on record. Thus, the entire controversy between the parties is whether the decree was passed against the dead person.

5. As noted earlier, along with the application filed under Order IX, Rule 13, defendant had filed photocopy of the death certificate issued by Panchayat. As the same was not admitted in evidence, they approached the Corporation for obtaining the copy of the death certificate. The death certificate is issued by the Corporation under Section 12/17 of the Registration of Births & Deaths Act, 1969 and Rule 8/13 of the Maharashtra Registration of Births and Deaths Rules, 2000. By the impugned order, the learned trial Judge has allowed the application. A perusal of the reasons given by the learned trial Judge in paragraph 4 shows that the learned trial Judge has rightly observed that from perusal of the pleadings, the death of the original defendant is in issue. In such circumstances, the document sought to be produced by the defendants is very much relevant for determination of the actual controversy between the parties. Order VIII, Rule 1A reads thus,

“1-A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him. - (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or

power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents-

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory.”

6. A perusal of sub-rule (3) thereof clearly shows that the document which ought to be produced in Court by the defendant under this rule, but, is not so produced, cannot be produced without the leave of the Court. In the present case, though the learned learned trial Judge has referred to the provisions of Order VII, Rule 14(3), it is applicable in respect of production of documents by the plaintiff. In the present case, provisions of Order VIII, Rule 1A is applicable. The learned trial Judge has now permitted the defendants to produce these documents. In view thereof, I do not find that the learned trial has committed any error in allowing the application. Hence, Petition fails and the same is dismissed. It is, however, 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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