

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7995 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 27, 2018

P.C. :

Heard Mr. Yadav, learned Counsel for the petitioners and Ms Gover Khodadad Irani - respondent No.2 appearing in person at length.

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-3 in Marji Application No.149 of 2018. By that order, the learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'defendants' seeking permission to produce death certificate of Khodadad Irani on record.

3. In support of this Petition, Mr. Yadav strenuously contended that the defendants cannot be allowed to produce evidence which is not consistent with the pleadings. In other words, he submitted that when there was no pleading as regards the death certificate of Khodadad Irani, the plaintiffs will have no opportunity to rebut such pleading and thus evidence with regard to such fact when there is no pleading, cannot be relied by the defendants. In support of this proposition, he relied upon the decision of the Apex Court in *Arulmigu Chokkanatha Swamy Koil Trust Vs. Chandran*, (2017) 3 SCC 702, and in particular paragraph 22.

He further submitted that in the application, there is no reason for production of the documents at the belated stage and as there is no reason, the learned trial Judge was not justified in allowing the application. In support of this submission, he relied upon the decision in ***Punjab and Sind Bank Vs. Akash Timber Traders, 1996 A I H C 909*** (Jammu and Kashmir High Court). He further submitted that at the time of filing Marji Application, defendants had filed list of documents and in that list, did not rely upon the death certificate. In view thereof, the learned trial Judge was not justified in permitting the defendants to produce the death certificate. He relied upon the decision in ***Joginder Pal Vs. Parduman Singh, 1999 A I H C 1093*** (Punjab and Haryana High Court).

4. On the other hand, respondent No.2 invited my attention to the order dated 20.07.2018 passed by this Court in Writ Petition (St.) No.20672 of 2018. In that Petition, the plaintiffs herein had challenged the order dated 20.06.2018 passed by the learned trial Judge below exhibit-93 in Marji Application No.274 of 2016. By that order, the learned trial Judge allowed the application filed by the defendants for taking on record original copy of the death certificate dated 29.06.1974 of Mr. Khodadad Irani. She, therefore, submitted that as the original death certificate is already allowed to be produced on record, no case is made out for interfering with the impugned order.

5. I have considered the submissions advanced by the parties. I have also perused the material on record. By the impugned order, the learned trial Judge has permitted defendants to produce death certificate of Khodadad Irani. Marji Application No.274 of 2016 was filed by the defendants under Order under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree dated 08.07.2013 on the ground that the Suit was instituted by the plaintiffs against a dead person. Khodadad Irani had already expired on 29.06.1974 and thus the decree was passed against

the dead person. Marji Application No.149 of 2018 is taken out by the defendants inter alia praying for charging the plaintiffs and committing the matter to the concerned Metropolitan Magistrate for taking cognizance and prosecuting the defendants for the act of perjury committed in R.A.E. & R. Suit No.6687/1039 of 2009 as per Section 340(2) of the Code of Criminal Procedure, 1973. The common thread between two Marji Applications is that the plaintiffs had instituted the Suit against the dead person. By order dated 20.07.2018 in Writ Petition (St.) No.20672 of 2018, I have already upheld the order of the trial Court dated 20.06.2018 permitting the defendants to file original death certificate in Marji Application No.274 of 2016 filed by the defendant No.4 for setting aside ex-parte decree. In view thereof, I do not find that any case is made out by the plaintiffs for interfering with the impugned order.

6. In so far as the reliance placed by Mr. Yadav on the decision of **Arulmigu Chokkanatha Swamy Koil Trust** (*supra*) and in particular paragraph 22 thereof is concerned, a perusal of that decision shows that the Suit instituted by the plaintiff was dismissed by the trial Court on the ground that it is bad for non-joinder of the necessary party. The Appeal Court also dismissed the appeal on the ground that Suit is bad for misjoinder and non-joinder of the party. Aggrieved by that decision, plaintiffs preferred Second Appeal in the High Court, which was allowed by setting aside the trial Court and Appellate Court's decree. Thus, the decision rendered in **Arulmigu Chokkanatha Swamy Koil Trust** (*supra*) is after the full-fledged trial. In the present case, the impugned order is passed permitting the defendants to produce the death certificate. A perusal of the impugned order and in particular paragraph 4 thereof shows that by producing the death certificate, defendants want to establish that the time of filing of the Suit, their father was dead and as such, the Suit was filed against the dead person. The decree was

obtained by making false representation. The document which is sought to be produced is very much relevant for determining the actual controversy between the parties. The factum of death of Khodadad Irani is in issue.

7. Mr. Yadav relied upon the decision in **Punjab and Sind Bank** (*supra*), where it was held that when there is no whisper in application as to why documents were not produced at stage prescribed by Order XIII, refusal to grant permission was justified. In the present case, the defendants have sought permission to produce the documents. Order VIII, Rule 1-A enables the Court to permit production of document at a later stage with the leave of the Court. In the present case, the learned trial Judge has exercised that discretion, which cannot be termed as arbitrary. I, therefore, do not find that the decision in **Punjab and Sind Bank** (*supra*) advances the case of the plaintiffs. Mr. Yadav also relied upon the decision in **Joginder Pal's case** (*supra*). I have already permitted defendants to produce original death certificate on record. In view thereof also, decision in **Joginder Pal** does not advance the case of the plaintiffs. 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.

8. At this stage, Mr. Yadav orally applies for stay of this order for a period of 4 weeks from today. As by orders dated 20.07.2018 passed in Writ Petition (St.) No.20672 of 2018, I have already permitted production of these documents and when no stay was prayed for, I do not find that any case is made out for stay. Oral application is rejected.

(R. G. KETKAR, J.)