

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

33 FIRST APPEAL NO.1093 OF 2018

1. Ratanprabha d/o Tukaram Deshmukh,
Age 27 years, Occupation Education,
R/o Jagji Tq. Dist. Osmanabad.
2. Shobharani d/o Tukaram Deshmukh,
Age 25 years, Occupation Education,
R/o As above.
3. Vaibhav @ Mahadeo s/o Tukaram Deshmukh,
Age 12 years, Occupation Education, Minor,
U/G of His Mother i.e. respondent No.4.
4. Sindhutai @ Indumati Tukaram Deshmukh,
Age 47 years, Occupation Agriculture,
R/o As above. ...Appellants.

VERSUS

1. Sumanbai Tukaram Deshmukh,
Age 62 years, Occupation Household,
R/o Tulshiram Road, Barshi,
Tq. Barshi Dist. Solapur.
2. Dayanand Tukaram Deshmukh,
Age 28 years, Occupation Education,
R/o As above. ...Respondents.

...
Advocate for Appellants : Mr. Kore Ganesh J
Advocate for Respondents No.1 and 2 : Mr. Salunke V. D.
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 13-08-2019.

ORAL JUDGMENT :

1. Present appeal has been filed by the original objector challenging the order passed below Exhibit 01 in Misc. Application No.94 of 2008, thereby granting heirship certificate to the present respondents.

2. Present respondents had filed the said application contending that, they are the widow and son of one Tukaram Sopan Deshmukh who expired on 11-10-2007. He has left in all four properties. It was also stated that, deceased Tukaram had filed HMP No.49 of 1994 against the original applicant No.1. It was dismissed on 16-02-2002 and maintenance of Rs.2000/- per month was granted to her. It was specifically contended that, the applicants are the only heirs left by Tukaram, and therefore, they prayed for heirship certificate.

3. After the application was filed, it was assigned to the Court of 2nd Joint Civil Judge, Junior Division, Osmanabad who had issued citation and after citation when the present objectors had taken objection, an order came to be passed below Exhibit 01 stating that the said Court has no jurisdiction to try and contest the proceeding, and therefore, request letter for transfer of the application was given under para 311 of Civil Manual to the learned Principal District Judge, Osmanabad.

4. It appears that, in view of the said procedure laid down in Civil Manual, the learned Principal District Judge, Osmanabad transferred the

said matter to learned Civil Judge, Senior Division, Osmanabad, and thereafter, it came to be allowed on 05-11-2012. The said order is under challenge in this appeal.

5. Heard learned advocate Mr. G. J. Kore for appellants and learned advocate Mr. V. D. Salunke for respondents No.1 and 2.

6. It has been vehemently submitted on behalf of the appellants that, after the matter was transferred to the Court of Civil Judge, Senior Division, notices were not issued to the objectors and the matter proceeded behind the back of present appellants. Opportunity to contest was not given. Under such circumstance, the order that has been passed is illegal and deserves to be set aside, and the matter deserves remand.

7. It appears that, when the matter was before Civil Judge, Junior Division, the citation was issued in the newspaper dated 27-07-2012. But it appears that prior to that the present appellants appeared in the matter on 08-07-2009 itself. However, when the matter was still pending before the learned 2nd Joint Civil Judge, Junior Division, the procedure contemplated under Para 311 of Civil Manual was adhered to and the said order below Exhibit 01 for issuing request letter to learned Principal District Judge was passed on 13-08-2012. That means, for

about four years no steps were taken by the original applicants to proceed with the matter.

8. The record also shows that, though the objectors had appeared *suo motu* yet the publication of the notice has been done and for that purpose the Roznama dated 07-04-2012 would speak for itself in which it was mentioned that, since the paper publication is not issued, it should be issued now. Thereafter, it appears that, the order was passed by learned Principal District Judge of transfer of the matter and then the record and proceeding was received by Civil Judge, Senior Division on 30-12-2012. Order has been passed regarding issuance of notice to both the parties on Court motion but the Roznama and the other record does not show that in fact any notice was issued by the Court of Civil Judge, Senior Division to both the parties. It appears that, thereafter the original applicants appeared in the matter *suo motu*. The Roznama is silent about that. The learned Civil Judge, Senior Division did not even care to see as to whether in fact the notices have been actually issued or not and whether the parties are remaining present in pursuant to any such notice or not. Without any application of mind, it appears that affidavit-in-Chief was accepted by the learned Civil Judge, Senior Division, and therefore the matter came to be decided in absence of the present appellants. The say was filed

by the present appellants at Exhibit 11, and therefore, it was the duty of the learned Civil Judge, Senior Division to see whether those objectors were served again or not. Though in the impugned order there is mention of objection filed at Exhibit 11 yet without further considering the appearances of the parties statement is that the claim affidavit has not been challenged by the other side. Then shows total non application of mind on the part of learned civil Judge, Senior Division.

9. Under such circumstance, when there was no attempt to issue notice in view of the Roznama dated 30-08-2012, the order that has been passed by the learned Civil Judge, Senior Division, is illegal as no opportunity was given to the present appellants to challenge the claim affidavit as well as to lead their own evidence. Hence, the said order deserves to be set aside, the matter deserves remand. Hence, following order.

ORDER

- 1) Appeal is hereby allowed.
- 2) The order passed by the Civil Judge, Senior Division, Osmanabad in M. A. No. 94 of 2008, dated 05-11-2012 is hereby set aside. The said matter is restored to the file of learned Civil Judge, Senior Division, Osmanabad.

- 3) Both the parties are directed to remain present before the concerned Court on 03-09-2019.
- 4) Learned Civil Judge, Senior Division, to give an opportunity to the present appellants to contest the matter.
- 5) Needless to say that, the learned Civil Judge, Senior Division, is required to adopt the procedure for contested matter while deciding the said application.
- 6) Since the matter of 2008 is being remanded, learned Civil Judge, Senior Division to expedite the same and decide it as early as possible within a period of six (06) months from the date of appearance of both the parties.
- 7) Parties as well as Court to act upon authenticated copy of the order.
- 8) The record and proceeding be sent back immediately.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.