

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Writ Petition No. 5264 of 2016

Kusum Kumari Tharkre and one another
Vs.
Smt. Sadhana Thakre and one another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. S.G. Karmarkar, Advocate for Petitioners
Mr. P.V. Vaidya, Advocate for Respondents

CORAM : MANISH PITALE, J.

DATED : APRIL 24, 2019

By this writ petition, the petitioners (original defendants) have challenged the order dated 11/07/2016, passed by the Court of Civil Judge (Sr. Dn.), Nagpur (Trial Court), whereby the application filed by the petitioners for framing new issue and striking out issue No.3 already framed, has been rejected.

2. The respondents (original plaintiffs) have filed the suit for declaration and permanent injunction against the petitioners. The first prayer made in this suit is for declaration that the Will Deed dated 01/01/2006, shown to have been executed by deceased Santosh S/o Ghularamji Thakre is bogus, concocted, fabricated and illegal. Certain other prayers have also been made in the suit by the respondents.

3. The Trial Court framed 5 issues wherein issue No. 3 reads as follows.

“3) Whether the defendants prove that the will deed dated 01/01/2006 is legal and binding upon the plaintiffs?”

4. At this stage, the petitioners have filed an application under Order 14 Rule 5 of the Civil Procedure Code for framing new issue and striking out the issue No.3. The new issue proposed on behalf of the petitioners reads as follows.

“Whether the plaintiffs prove that Will dated 01/01/2006 is bogus, concocted, fabricated and illegal?”

5. The Trial Court has passed the cryptic order on 11/07/2016, rejecting the said application of the petitioners, holding that there was no need to change the issue. The Trial Court is partly justified in holding that there is no need to change the issue because issue No.3 is correctly framed in the present case as petitioners admittedly are claiming through the aforesaid Will dated 01/1/2006 and to that extent burden certainly lies upon the petitioners (original defendants) to prove that the said Will dated 01/1/2006 is indeed legal and binding upon the plaintiffs, as claimed by them. Therefore, the prayer for striking out the said issue could not have been granted and the impugned order passed by the Trial Court to that extent is correct.

6. But, the Trial Court failed to appreciate that the very first prayer in the suit for declaration pertains to a declaration that the aforesaid Will dated 01/1/2006 is bogus, concocted, fabricated and illegal. Therefore, if such declaration is to be granted, the

burden would certainly lie upon the respondents to prove the aforesaid aspects pertaining to the will deed. Therefore, the Trial Court ought to have directed an additional issue to be framed in terms of the prayer made on behalf of the petitioners. The application filed by the petitioners before the Trial Court should have been at least partly granted.

7. In the light of above, present writ petition is partly allowed to the extent that the additional issue is directed to be framed by the Trial Court as proposed in the said application moved on behalf of the petitioners, which reads as follows.

“Whether the plaintiffs prove that Will dated 01/01/2006 is bogus, concocted, fabricated and illegal?”

8. At the same time, it is made clear that the initial burden of proving that the Will Deed dated 01/01/2006 is legal would lie upon the petitioners herein and it is only thereafter that the burden of proving the aforesaid additional issue would lie upon the respondents herein.

9. With the above observations, the instant writ petition is partly allowed.

JUDGE

MP Deshpande