

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

CIVIL APPLICATION (CAO) No.298 OF 2019

in

M.C.A.St.No.37492/2018

in

RC No.48/2018 (S.A.St.No.4804/2018)

Ganpat s/o Laxman Khutemate

vs.

Uddhao s/o Devaji Khutemate & anr.

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

Court's or Judge's orders

Shri. A. K. Neware, Advocate for applicant/appellant.

CORAM : Manish Pitale J

DATED : 27.08.2019

It appears that due to failure in removing office objections, the registration of this Second Appeal was refused, which resulted in filing of application for restoration of the Second Appeal and condonation of delay in moving the said application.

2. By order dated 25.10.2018, the application for condonation of delay was allowed and order refusing registration of Second Appeal was revoked, subject to payment of costs of Rs.500/- to the High Court Legal Services Sub Committee within a period of four weeks. It was specifically mentioned in that order if the direction was not complied, earlier order refusing registration shall revive.

3. It is an admitted position that the said costs were not paid, as a result of which, the order refusing registration of the Second Appeal stood revived. Thereafter, an application was filed seeking extension of time to pay the amount of costs.

4. By the Second Appeal filed in the present case in February 2018, Judgment and Order dated 28.11.2017 passed by the First Appellate Court, has been challenged. The manner in which the appeal has been filed and it has been conducted in this Court, it appears that the attempt on the part of the appellant is more to keeping the matter pending in this Court and not to really seek a hearing on merits of the matter. Be that as it may, when the application seeking extension of time to deposit the costs was listed, this Court directed that the application be listed along with the Second Appeal for hearing today, so that the case of the appellant could be considered on merits.

5. Heard learned counsel for the applicant/appellant on the merits of the matter.

6. By the Second Appeal the appellant is seeking to challenge concurrent dismissal of the suit for partition, separate possession, declaration, permanent injunction, damages and mesne profit filed by him against the respondent. The case of the appellant was that he was adopted son of one Laxman Dewaji Khutemate. The said person was the brother of the

Udhao Dewaji Khutemate (original defendant). The case of the appellant was that since he was the adopted son of the deceased Laxman Khutemate, he had right in the said suit property. This was stoutly denied by the respondents in their written statement and they claimed that the appellant had no relation with the deceased Laxman. Therefore, the main issue in the present case was, as to whether the appellant was able to prove that he was indeed the adopted son of Laxman.

7. The two Courts below have concurrently found that the appellant miserably failed to prove his said assertion and that there was absence of cogent evidence to support the said claim made on behalf of the appellant. It was found that there was absolutely no documentary evidence in the form of any adoption deed or any such document to show that the appellant was adopted son of deceased Laxman. It was found that the oral evidence of the two witnesses who supported the aforesaid claim of the appellant was not believable, because they themselves were hardly eight and ten years old when the adoption ceremony is said to have been taken place. This was ascertained by the Court below by considering the evidence on record.

8. An appeal was preferred by the appellant. Based on certain letters purportedly written by deceased Laxman it was sought to be claimed that the said person had indeed treated the appellant as his son. But, these letters were also disbelieved, because there was total

absence of pleadings on the part of the appellant regarding the said letters. Apart from this, the Courts below also found that no material was placed on record on behalf of the appellant to show that purported letters were written in the handwriting of the deceased Laxman.

9. A perusal of the Judgments and Orders of the two Courts below and the material on record, shows that the appellant miserably failed to prove that he was adopted by the said Laxman. When the finding on the said issue is against the appellant, further claim made by him in respect of the suit property cannot be considered at all.

10. At this stage an attempt was made by the learned counsel for the appellant to rely upon two affidavits of persons claiming to be present when the adoption ceremony had taken place. An application for placing reliance on such additional material is sought to be handed over across the bar, which this Court has refused to accept. But learned counsel for the appellant has placed reliance on Judgment of the Hon'ble Supreme Court in the case of **Malyalam Plantations Ltd. vs. State of Kerala and anr. (AIR 2011 SC 559)** which pertains to the duty of the Appellate Court to receive additional evidence in the context of Order 41, Rule 27 of Code of Civil Procedure. The position of law laid down by the Hon'ble Supreme Court in the said Judgment is a reiteration of the well known principles governing exercise of powers by the Appellate Court in such

circumstances.

11. The facts of the present case and the manner in which the new material is sought to be placed before this Court shows that the requirement of Order 41, Rule 27 of the CPC is not satisfied at all. The attempt in the present case appears to be to somehow delay the inevitable and to seek remand of proceedings when no such grounds for producing additional evidence are made out. The bare affidavits of two persons said to have been present at the time of alleged adoption ceremony can be of no avail to the appellant when on full fledged trial before the Civil Court and an appeal before the District Court, the appellant miserably failed in his attempt to make out a case in his favour.

12. In view of above, it is found that there is no substantial question of law that arises in the present appeal and therefore this Court declines to exercise jurisdiction under Section 100 of the CPC.

13. The registration of this appeal itself was refused due to non-removal of office objections and even the costs were not paid by the appellant when a conditional order was passed. Since the appeal itself has been considered on merits and it is proposed to be disposed of, the appellant is exempted from removing office objections. This office is directed to register the appeal.

14. In view of the above, there is no substance found in the present appeal and accordingly it is dismissed. All pending applications are disposed of in view of dismissal of the appeal.

JUDGE

KOLHE