

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

923 WRIT PETITION NO.8564 OF 2018

Ramsing Lumbha Rathod
Age : 60 years, occ : business
R/o Pundlik Nagar, Galli No.7,
House No.516, Garkheda,
Aurangabad.

Petitioner.

Versus

1. Dr. Mohd. Nasrullah Farooqui
Deceased through LRs.
- 1-A. Sabera Begum Mohd. Nasrullah
Farooqui,
Age : 75 years, occ : agri./household
R/o Bunglow No.2, Cantonment,
Aurangabad.
- 1-B. Abeda N Baig w/o Ahmed Junaid
Baig, Age : 53 yrs occ : household
R/o Leawood Kansan, United
States of America.
- 1-C. Zaheda Quadri Syed Ehteshamuddin
Quadri, age : 51 yrs, occ : household
R/o Champa Chowk, Roshangate,
Aurangabad.
2. Mohd. Majedulla Mohd. Nasrullah
Age : 49 years, occ : agri.,
R/o Bunglow No.2, Cantonment,
Aurangabad.
3. Mohd. Suhail Mohd. Nasrullah
Farooqui, age : 43 yrs, occ : legal practice
R/o as above.
4. Pravin Pavan Kulkarni
Age : 35 years, occ : business
R/o B-18, Renukapuram, Near
Renuka Mata Mandir, Beed By-pass
Road, Aurangabad.

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Mr. Shrikant Kulkarni, Advocate holding for
Mr. D.K. Kulkarni, Advocate for the petitioner.

Mr. H.I. Pathan and Mr. Rajesh Mewara,
Advocates for respondent Nos.1-A to 1-C, 2 and 3.

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CORAM : **Rohit B. Deo, J.**

DATE : 9th January 2020.

JUDGMENT :-

. Rule. Rule is made returnable forthwith. Heard finally with the consent of the parties.

2. The petitioner brought suit for specific performance being Special Civil Suit No. 209 of 2007 against one Smt. Sadatunissa Begum as regards an agreement executed in the year 2006 by her purported General Power of Attorney Holder – respondent No.4.

3. The suit was decreed in the year 2007. Lest, litigants are prejudiced, I would refrain from making any observation on the course which the proceedings took and the manner in which the suit was defended, or rather not defended, by the attorney.

4. The petitioner contends that decree was executed through process of the Court and that not only was a sale deed executed, the petitioner was placed in possession of the

suit property, which is land admeasuring 2 Acres. The claim that the petitioner is in possession of the property is in serious dispute.

5. Respondent No.1, claiming to be the son of Smt. Sadatunissa, preferred an application for condonation of delay and leave to prefer appeal. Memo of appeal raises serious allegations inter alia that the decree was obtained fraudulently since Smt. Sadatunissa died on 06.11.1997 in Saudi Arabia and that the suit was filed, prosecuted and decree obtained against dead person. The appellate Court condoned the delay. The appeal is now fixed for hearing.

6. In the interregnum, the petitioner preferred application seeking rejection of leave to file the appeal. The petitioner contended that leave to prefer appeal may not be granted. Respondent No.1-represented by legal heirs, preferred an application purportedly under Order 41 Rule 27 of the Code of Civil Procedure seeking to produce additional evidence. The appellate Court allowed the said application to the extent of production of additional evidence as regards the death certificate showing that Smt. Sadatunissa Begum died on 06.11.1997 in Saudi Arabia.

7. The grievance of the petitioner is two-fold. His grievance is that having allowed production of additional evidence, the appellate Court did not pass the logical and consequential order under Order 41 Rule 28 of the Code of Civil Procedure. The contention is that the death certificate will have to be proved and that the appellate Court ought to have ordered that the evidence be recorded either by the appellate Court or the Court below. To this extent, the learned Counsel for the contesting respondents fairly does not dispute the position flowing from the mandate of Rule 28. The learned Counsel fairly concedes that if the appellate Court is directed to record the evidence, the respondent shall adduce evidence as regards the death certificate. The other submission is that since independent proceedings in the nature of Civil Suit for declaration challenging the sale deed were initiated, the appeal is not maintainable. No finding is recorded by the appellate Court on the said submission. The said submission is therefore left open for the appellate Court to consider at the stage of final adjudication of the appeal.

8. The submission of respondent No.1 is that judicial process has been abused and that fraud is visible on the face of record. In view of the said submission, it would be appropriate if the appellate Court decides the appeal with

utmost priority and in any event within two months.

9. The order impugned stands modified to the extent indicated. The additional evidence shall be recorded by the appellate Court.

10. Rule is made absolute in above terms.

(ROHIT B. DEO, J.)

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