

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9787 OF 2019

1. Bhagwan s/o Narayanrao Deshmukh
Age 75 years, Occ. Agriculture
R/o. Dawala, Tq. Vaijapur
District Aurangabad
 2. Sow. Indrayanibai w/o Bhagwan Deshmukh
Age 63 years, occ. Agriculture
R/o. As above
 3. Rahul s/o Bhagwan Deshmukh
Age 34 years, Occ. Agriculture
R/o. As above
 4. Yashwant s/o Bhagwan Deshmukh
Age 37 years, Occ. Agriculture
R/o. As above
- ...Petitioners
(Ori. Plaintiffs)

versus

1. Pushpa w/o Narayanrao Jadhav
Age 45 years, Occ. Agriculture
R/o. Loni, Post. Savadgaon,
Tq. Vaijapur, District Aurangabad
2. Housabai w/o Parasnath Thombre
Died through L.Rs.
- 2-a) Ganesh s/o Babasaheb Thombre
Age 63 years, Occ. Agriculture
R/o. Bhaigaon, Tq. Vaijapur
District Aurangabad
- 2-b) Sumanbai w/o Babasaheb Thombre
Age 60 years, Occ. Agriculture
R/o. Bhaigaon, Tq. Vaijapur
District Aurangabad
- 2-c) Ashabai w/o Bhimraj Moin,
Age 40 years, occ. Agriculture
R/o. Chorwagalgaon, Tq. Vaijapur
District Aurangabad
- 2-d) Savita w/o Dnyaneshwar Gaikwad
Age 38 years, Occ. Agriculture
R/o. Rohila, Tq. Nandgaon,
District Nashik

- 2-e) Sushila w/o Shivaji Shinde
Age 50 years, Occ. Agriculture
R/o. Bhaigaon, Tq. Vaijapur
District Aurangabad
- 3. Warubai w/o Laxman Thombre
died through L.Rs.
- 3-a) Karbhai w/o Laxman Thombre
Age 61 years, Occ. Agriculture
R/o. Purangaon, Tq. Vaijapur
District Aurangabad
- 3-b) Babu s/o Laxman Thombre
Age 58 years, Occ. Agriculture
R/o. At present Rothi Ladgaon
Road Vaijapur
Tq. Vaijapur, Dist. Aurangabad
- 3-c) Latabai @ Bharti w/o Sakahhari Thombre
Age major, Occ. Agriculture
R/o. Purangaon, Tq. Vaijapur
District Aurangabad
- 3-d) Kamalbai w/o Nanasaheb Kadam,
Age major, Occ. Agriculture
R/o. Ukkalgaon, Tq. Kopargaon
District Ahmednagar
- 3-e) Bhimbai w/o Lahani Kadam
Age major, Occ. Agriculture
R/o. Bilwani, Tq. Vaijapur
District Aurangabad
- 4. Sahebrao s/o Namdeo Lande
Age major, Occ. Wireman M.S.E.B.
R/o. Khamballa, Tq. Vaijapur,
District Aurangabad
- 5. Dyandeo s/o Namdeo Lande
Age major, Occ. Agriculture
R/o. As above
- 6. Vitthal s/o Namdeo Lande
Age major, Occ. Agriculture
R/o. As above
- 7. Machindra s/o Namdeo Lande
Age major, Occ. Agriculture
R/o. As above
- 8. Ambadas s/o Namdeo Lande

Age major, Occ. Agriculture
R/o. As above

9. Babasaheb s/o Parasnath Thombre
Age major, Occ. Agriculture
R/o. As above.

...Respondents
(Ori. Defts. 2 to 9)
(R. Nos. 2 to 9 are formal
parties)

.....
Advocate for Petitioners : Mrs. Pooja V. Langhe with Mr. V. R. Langhe
Advocate for Respondent No.1 : Mr. A. R. Vaidya
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CORAM : V. K. JADHAV, J.
DATED : 24th JANUARY, 2020

ORAL JUDGMENT:-

1. Rule. Rule made returnable forthwith. By consent, heard finally at admission stage.

2. The petitioners are the original plaintiffs. The petitioners have instituted Special Civil Suit No. 389 of 1992 (Old) and now it is renumbered as Special Civil Suit No. 17 of 2018 (new) for specific performance of contract and decree of perpetual injunction. The trial court though decreed the suit, in appeal the appellate court has confirmed the decree to the extent of decree of perpetual injunction and remanded the matter to the trial court by setting aside the decree to the extent of specific performance of contract. In the pending suit, the present respondent No.1 has filed an application Exh.156 under Order I Rule 10(2) of Civil Procedure Code, 1908 for impleading her as defendant in the suit. It has been pleaded in the suit that the plaintiffs entered into an agreement with defendant Nos. 1 and 2 i.e. Housabai and Warubai, respectively. After the death of defendant Housabai, her legal heirs were brought on record. It is the case of respondent No.1

that she is one of the legal heirs of original defendant Housabai and she was not brought on record as legal heir of deceased defendant Housabai. The learned Joint Civil Judge, Senior Division, Vaijapur by order dated 25.06.2019 below Exh.156 in Special Civil Suit No. 17 of 2018 allowed the said application and directed the petitioners-plaintiffs to bring the name of the applicant (respondent No.1 herein) on record as defendant by carrying out the amendment in Exh.1. Hence this writ petition.

3. Learned counsel for the petitioners-original plaintiffs submits that so far as the decree to the extent of perpetual injunction which has attained finality, the petitioners herein have filed Special Darkhast No. 4 of 2016. In the said Darkhast, respondent No.1 herein has filed application under Order 1 Rule 10 of C.P.C. similar to the averments made in the application, which is subject matter of the present writ petition. Respondent No.1 herein has filed the said application in Special Darkhast No. 4 of 2016 on the basis of the legal heir-ship certificate issued by the Sarpanch of the village. Learned counsel submits that the executing Court by order dated 24.1.2019 below Exh.64 in Special Darkhast No. 4 of 2016 rejected the application Exh.64. Being aggrieved by the same, the present respondent No.1 and others have preferred writ petition No. 1911 of 2019 in this Hon'ble court and this Court (Coram: P.R. Bora, J.) by order dated 19.3.2019 dismissed the writ petition by confirming the order passed by the executing Court. Learned counsel submits that respondent No.1 has

suppressed all these material facts and the trial court has passed order on the same contentions. Learned counsel submits that there is no documentary evidence except the certificate issued by the Sarpanch to substantiate the contention raised by respondent No.1 that she is one of the legal heirs of deceased defendant Housabai. Learned counsel submits that the impugned order is thus liable to be quashed and set aside. Thus, the writ petition deserves to be allowed.

4. Learned counsel for respondent No.1 submits that so far as the Darkhast proceedings are concerned, these enquiries as contemplated under order XXII of C.P.C. may not be relevant and if in the suit an application is filed under Order I Rule 10 of C.P.C. the trial court has rightly considered the said application and directed the petitioners-plaintiffs to implead respondent No.1 as one of the legal heirs of deceased defendant Housabai as party defendant in the suit. Learned counsel submits that the sister and widow of deceased brother of respondent No.1, respectively, are taken on record as legal heirs of deceased defendant Housabai. Learned counsel submits that respondent No.1 had to institute another suit to substantiate her contention and to seek remedy from the civil court. Learned counsel submits that in order to avoid multiplicity of litigation, the trial court has rightly allowed the application Exh.156. No interference is required. Thus, the writ petition is liable to be dismissed.

5. Recently, the Hon'ble Supreme court in the case of

Varadarajan vs. Kanakavalli and others, Civil Appeal No. 5673 of 2009 decided on 22.01.2020 has held that even in the execution proceeding, the enquiry as contemplated under Order XXII Rule 5 is permissible. The present respondent No.1 has filed an application Exh.64 in Special Darkhast No. 4 of 2016 which arises out of the judgment and decree passed in the same suit and upon considering the submissions made on behalf of both sides, the executing court by order below Exh.64 dated 24.01.2019 rejected the said application. Learned Judge of the executing court has specifically observed that though the application is on oath, pleadings in the application do not get support from any documents or record. Learned Judge of the executing court therefore, observed that it is impossible to conclude that the respondent herein is the second daughter of deceased Housabai. This Court (Coram: P.R. Bora, J.) in writ petition No. 1911 of 2019 preferred by respondent No.1 and others against the order passed below Exh.64 in Special Darkhast No. 4 of 2016 has referred the certificate issued by the Sarpanch and also examined the record pertaining to the mutation entry. This Court (Coram: P.R. Bora, J.) by referring the mutation entry No. 2221 pertaining to land gut Nos. 16 and 26 has observed that names of the Sushilabai and Sumanbai are taken on record as legal heirs of deceased Housabai and the name of present respondent No.1 is not recorded even in the mutation entry as one of the legal heirs of deceased defendant Housabai. The respondent No.1 has not approached the trial court in the pending suit with clean hands. Respondent No.1 has filed application Exh.156 after her application

Exh.64 in Special Darkhast No. 4 of 2016 came to be disposed of. Even during pendency of the said application Exh.156 writ petition filed by her against the order passed below Exh.64 in Special Darkhast No. 4 of 2016 came to be disposed of by this Court as detailed above. However, respondent No.1 has suppressed all these material facts. Consequently, in the impugned order, the trial court has referred the legal heir-ship certificate issued by the Sarpanch alongwith application and further given importance to the statement made on oath. Had there been disclosure of all these facts, I am sure that the trial court would have rejected the application Exh.156. In terms of the ratio laid down by the Supreme Court in the case cited above, a decision under Order 22 Rule 5 of the Civil Procedure Code would not operate as a res-judicata in a subsequent suit between the same parties or persons claiming through them wherein the question of succession are heirship to the deceased party in the earlier proceedings is directly raised. So far as Order under 22 Rule 5 of the Code is concerned, the legal representative is appointed for orderly conduct of the suit only and such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters. Thus, keeping this option open, and in view of the discussion above, I proceed to pass the following order.

O R D E R

I. Writ petition is hereby allowed.

- II. The order dated 25.06.2019 passed by Joint Civil Judge, (Senior Division) Vaijapur, below Exh.156 in Special Civil Suit No. 17 of 2018 is hereby quashed and set aside.
- III. The application Exh.156 is hereby rejected.
- IV. The writ petition is accordingly disposed of.
- V. Rule made absolute in the above terms.
- VI. The trial court is hereby directed to dispose of the Special Civil Suit No. 17 of 2018 as expeditiously as possible, preferably within a period of one year from today and the parties shall co-operate the trial court for early disposal of the suit, within specified period, as directed.

(V. K. JADHAV, J.)

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