

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1354 OF 2020

01 Premlata w/o Angad Karad,
age: 45 years, Occ: Medical
Practitioner/Service,
R/o Plot No.22, Gurukunj Housing
Society, Tilak Nagar,
Opp. Bharat Mata Mandir,
Aurangabad.

02 Saurav s/o Angad Karad,
age: 20 years, Occ: Education,
R/o Plot No.22, Gurukunj Housing
Society, Tilak Nagar, Opp.Bharat
Mata Mandir, Aurangabad.

03 Shruti d/o Angad Karad,
age: 20 years, Occ: Education,
R/o Plot No.22, Gurukunj Housing
Society, Tilak Nagar, Opp.Bharat
Mata Mandir, Aurangabad.

Petitioners

Versus

Gayabai w/o Kisanrao Karad,
since deceased, through her
legal representative
Bhagwat s/o Kisanrao Karad,
age: 64 years, Occ: Medical
Practitioner/Social Worker,
R/o Karad Hospital, Opp: Telephone
Bhavan, Nutan Colony,
Samata Nagar, Aurangabad.

Respondent

Mr. D.V.Soman, advocate for the petitioners
Mr. A.N.Sabnis, advocate holding for Mr.A.M.Karad, advocate for
the Respondent.

CORAM : ROHIT B. DEO, J.

DATE : 28th January, 2020.

ORAL JUDGMENT :

1 Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2 Petitioners are the defendants in Special Civil Suit No.208 of 2015 brought by deceased Gayabai Kisanrao Karad, for partition and separate possession.

3 The parties shall be referred to by their status in the trial Court.

4 Deceased Gayabai had two sons, namely - Angad and Bhagwat and two daughters. Concededly, Angad expired on 03.09.2004. Defendant no.1 - Smt.Premalata is the widow and defendants no.2 and 3 are the children of Angad.

5 The suit seeks partition and separate possession of the suit properties, which, concededly, are recorded in the name of Angad. It is not necessary to spell out in detail the reasons and circumstances which are put forth by the plaintiff to substantiate her claim that she has share and interest in the suit

property.

6 Plaintiff – Smt. Gayabai expired on 17.07.2018. The surviving son – Bhagwat preferred an application Exhibit-40/1 seeking permission to continue the suit as legal representative of deceased plaintiff – Gayabai. Bhagwat contended that by virtue of the Will dated 03.10.2017, executed by plaintiff-Gayabai, the share and interest of Gayabai, in the suit properties, is exclusively bequeathed in his favour.

7 The defendants strongly resisted the prayer to permit Bhagwat to continue the suit as a legal representative of deceased Gayabai.

8 By the order impugned, the trial Court has permitted Bhagwat to continue with the suit as legal representative of deceased Gayabai.

9 At this stage, it would be necessary to note that Bhagwat is concededly a Class-I heir of deceased Gayabai, and would, therefore, even *dehors* the Will deed, have share and interest in the estate of Gayabai along with other legal heirs. Viewed from this perspective, Bhagwat is undoubtedly entitled

to continue the suit.

10 The seminal issue is, whether the trial Court could have recorded a finding that Bhagwat is legal representative by virtue of the Will, even a *prima facie* finding, without conducting the inquiry envisaged under Order 22 Rule 5 of the Civil Procedure Code. The answer must clearly be in the negative. It is true that the trial Court was alive to the legal position that the validity of the Will can be decided only after recording of the evidence. However, the misdirection appears to be in paragraph 29 of the order impugned wherein the trial Court has observed that Bhagwat appears to be legal representative of deceased Gayabai and is required to be joined in the suit in such capacity.

11 The learned Counsel for the petitioner would submit that even the *prima facie* finding that Bhagwat is a legal representative on the basis of the purported Will, was unwarranted. The submission is, that there was no inquiry conducted under Order 22 Rule 5 of the Civil Procedure Code, as would sustain the *prima facie* finding. This submission is well merited.

12 I am satisfied that while Bhagwat is entitled to continue the suit along with such other legal heirs of Gayabai, as would be desirous of being party to the suit, the *prima facie* finding and/or observation that Bhagwat is a legal representative by virtue of the Will, is unsustainable. While the order impugned need not be set aside in entirety, it needs to be clarified that Bhagwat would presently continue the suit as a legal heir and not as a legal representative.

13 Needless to observe, every contention in the petition and in rebuttal is left expressly open and the trial Court would decide every contention on its own merits, at an appropriate stage.

14 Rule is made absolute in aforestated terms.

**ROHIT B. DEO
JUDGE**

adb