

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7755 OF 2023

Gopinath Bhimaji Kedar (Deceased through LRs)
and Ors.

... Petitioners

Versus

Jagannath Khanderao Kedar and Ors.

... Respondents

— —
Mr. Sachin Gite for the Petitioner.
Mr. Girish Agrawal for Respondent Nos.1 and 2.
— —

CORAM : SHARMILA U. DESHMUKH, J.

DATE : June 28, 2023.

P. C. :

1. Questioning the correctness of the impugned order dated 22nd February, 2023 directing the defendant to lead evidence first, the present petition has been filed in a suit for partition. The trial Court has framed the following additional issue on 28th September, 2018, which reads thus:

“Additional issue No.1

whether defendant No. 1 to 4, 9 and 10 prove that there was prior partition between the parties ?”

2. An application came to be filed by the Respondent-plaintiff seeking a direction to defendant to lead evidence in view of the burden of proof being cast upon the defendant by way of the additional issue as regards the the previous partition between the parties. The issue raised in the present case is no longer *res integra* and is covered by the decision of this Court in the case **Bhagirath Shankar Somani vs. Rameshchandra Daulal Soni**, reported in [(2007) 5 Mah LJ 112.] and **Haran Bidi Suppliers v. V.M. & Co. Bhandara**, reported in [(2001) 4 Mah LJ 112. The decisions were considered by the Single Bench of this Court in the case of **Sou. Ratnabai Lalasaheb Jadhav and Others vs. Balasaheb Digambar Jadhav and Others** reported in **2021 SCC Online Bom 3476**, wherein, the consistent view has been taken by this Court that the provisions of Order 18 of the CPC are enabling provisions and as such, the Court is not vested the power to direct the defendant to enter the witness box first, so as to discharge burden of proof. In the present case, the burden is cast upon the plaintiff to prove the certain issues and the whether the additional issue framed by lower Court cast burden upon by the defendant to prove the previous partition between the parties.

3. Considering the law laid down by this Court, the

impugned order directing the defendant to lead evidence first is clearly unsustainable. The trial Court while passing the impugned order has taken into consideration the decisions of the Orissa High Court and the Madras High Court.

4. Learned counsel for the Respondent has placed on record the decision of the Orissa High Court and the Madras High Court which have taken a contrary view, inasmuch as it considered that as the defence raised is of prior partition it was for the defendants to lead evidence first to prove the previous partition between the parties. I am respectfully bound by the decisions of this Court and the issue is squarely covered by the decisions of this Court quoted above. It is not necessary to consider the decisions of the Orissa High Court and Madras High Court which take a contrary view.

5. The impugned order being unsustainable is hereby quashed and set aside.

(Sharmila U. Deshmukh, J.)