

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.15613 OF 2023

Pundalik Annappa Kapse and Ors. ... Petitioners
V/s.
Shabgonda Babgonda Patil and Ors. ... Respondent

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Mr. Chetan G. Patil, for the Petitioners.

Mr. Prajakt Arjunwadkar for Respondent Nos. 3A to 3D.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 18, 2023

P.C.:

1. The petitioners are defendant Nos. 3 and 4 in Regular Civil Suit No.65 of 2003 filed by respondent No.1 seeking a declaration of his ownership and further declaration that Will deeds dated 20th May 1998 and 15th January 2001 are declared as illegal and bogus. Further relief of injunction restraining the defendants from disturbing plaintiff's possession over the suit property.

2. The defendant No.1 and 2 contested the suit. Defendant Nos. 3 and 4 failed to file their written statement. The Trial Court by judgment and decree dated 22nd June 2009 decreed the suit granting a declaration that plaintiff No.1 is owner of the suit property and Will deeds executed on 20th May 1998 and 15th January 2001 are declared as illegal and bogus. Further relief of

injunction restraining respondents from disturbing plaintiff's possession over the suit property was also granted.

3. Aggrieved by the said judgment and decree, defendant Nos.1 and 2 filed Regular Civil Appeal No.58 of 2009, curiously in the said appeal, defendant Nos.3 and 4 were not made respondents. The appellants, therefore, filed an application below Exhibit-53 seeking permission to add defendant Nos.3 and 4 as respondents in the appeal. The Appellate Court by order dated 21st September 2023 rejected the application. Writ petition against the said order was withdrawn on 5th December 2023.

4. The petitioners also filed an application on 19th August 2023 to implead them as legal representatives based on Will dated 20th May 1998. The Appellate Court by the impugned order rejected the application.

5. The learned counsel for the petitioners submitted that the Trial Court has passed a decree against a dead person i.e. defendant No.4 who died during the pendency of the suit therefore, such decree is nullity. According to him, by the impugned order power of the Appellate Court under Order 41 Rule 33, of the Civil Procedure, 1908 is taken away as representatives of defendant No.4 are not made party. According to him, validity of finding recorded on issue No.2 could have been considered by the Appellate Court in exercise of power under Order 41 Rule 33 of the Code of Civil Procedure, 1908. Therefore, right of legal representatives of defendant No.4 to have adjudication under Order 41 Rule 33 of the Code of Civil Procedure, 1908 is taken

away.

6. On perusal of the record, it appears that the Trial Court granted declaration of ownership of rights of plaintiff No.1. Moreover, Trial Court passed a decree declaring Will deeds dated 20th May 1998 and 15th January 2001 as illegal and bogus. On perusal of the appeal memo filed by the defendant No.1 and 2, it appears that defendant No.1 and 2 restricted scope of their appeal insofar as the decree stands against defendant Nos.1 and 2. Once, the scope of appeal filed by defendant Nos. 1 and 3 is restricted by defendant Nos.1 and 2, the Appellate Court cannot travel beyond the scope of challenge raised by the defendant Nos.1 and 2.

7. The petitioners may be right in contending that the Appellate Court has power under Order 41 Rule 33 of CPC to consider validity of finding on an issue rendered by the Trial Court. It is well settled for modifying operative part of the decree, cross objections under Order 41 Rule 33 of CPC need to be filed by the party to the suit against whom, the Trial Court has passed a decree. Therefore, in the facts of the case, if the petitioners are not made a party by the appellant, considering scope of the appeal, only remedy available for such person aggrieved by Trial Court's decree is to file independent appeal to ventilate his rights against decree passed by the Trial Court. In absence of filing such appeal, he cannot thrust himself upon the appellant to implead him as respondent particularly when such an application filed by the appellant is already rejected by the Appellate Court and confirmed by this Court. Moreover, in an appeal filed by defendant No.1 and 2, rights of defendant No.3 and 4 are unlikely to be prejudiced.

Therefore, in the facts of the case, defendant No.3 and 4 are not necessary party. Therefore, the Lower Appellate Court has committed no error of jurisdiction while rejecting the application of defendant Nos. 3 and 4.

8. The writ petition is, therefore, rejected. No costs.

(AMIT BORKAR, J.)