

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.2267/2019

Abbas Ali Murtaza Ali Ajani and others

...Versus...

Gulshan Ali wd/o Mehbood Ali and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Shri M.P. Kariya, Advocate for petitioners
Mrs. S.J. Banerjee, Advocate for respondents

CORAM : AVINASH G. GHAROTE, J.

DATE : 18/01/2023

1. Heard Shri M.P. Kariya, learned counsel for the petitioners. The petition challenges the order dated 20/12/2018 passed by the learned Civil Judge Senior Division, Hinganghat in pursuance to the order dated 15/07/2016 by the District Judge-3, Wardha in Regular Civil Appeal No.194/2012 in which on account of the demise of Masuma (original defendant no.1/ respondent no.1 in appeal), Maheboob Ali, the nephew of the said deceased defendant Masuma, had applied for impleadment. The said person, however, passed away without his claim being decided, as a result of which, now respondent nos.1 to 3 in the present petition, the legal representatives of Maheboob Ali have applied for impleadment. The impleadment as sought by Maheboob Ali was on basis of a Will dated 10/10/2000 claimed to have been executed by the original defendant no.1/respondent no.1-Masuma in favour of

Maheboob Ali. The learned Appellate Court by the order dated 15/07/2016 had directed the Civil Judge Senior Division, Hinganghat to answer the question and return the records to him, which has been so done by the order dated 20/12/2018 (pg.78).

2. Shri Kariya, learned counsel for the petitioners submits that the learned Civil Judge Senior Division, Hinganghat was not competent to have decided the validity of the Will, as according to him, such a course of action was not permissible in law. He therefore submits that the impugned order is required to be quashed and set aside and the legality and validity of the Will be directed to be determined in a separate proceeding, which may be instituted in that regard.

3. Mrs. Banerjee, learned counsel for the respondents opposes the contention and submits that the course of action adopted by the learned Appellate Court, was clearly permissible in law and therefore the impugned order is required to be sustained.

4. The original defendant no.1 (respondent no.1 in appeal), namely, Masuma had passed away on 22/06/2014 at Raipur before which she is claimed to have executed a Will in favour of Maheboob Ali, the father of the present respondent nos.1 to 3. It is on the basis of this Will that Maheboob Ali had filed an application for impleadment, which is continued by respondent nos.1 to 3 after his demise. The provisions of Order 22 Rule 5 of the Code of Civil Procedure (for short,

“CPC”, hereinafter) enjoin upon the Court to determine the question as to whether or not a person is legal representative of a deceased party to the suit, be it a plaintiff or the defendant. The provisions of Order 22 Rule 5 of CPC are made applicable to appeals by virtue of Order 22 Rule 11 of CPC. The proviso to Order 22 Rule 5 of CPC categorically provides that where such a question arises before the Appellate Court, it may, before determining the question, direct any subordinate Court to try the question and to return the records together with the evidence and findings, which would then be taken into consideration by the Appellate Court in determining the question. In the instant case, by the order dated 15/07/2016 the learned Appellate Court has referred the question as to who is the legal heir of the deceased Masuma, to the Civil Judge Senior Division, Hinganghat, who after recording evidence, has rendered his finding in that regard and sent it to the learned Appellate Court. It is, therefore, apparent that the finding rendered by the impugned order, is for the purpose of Order 22 Rule 5 of CPC and not otherwise.

5. This being the position, I do not see any reason to interfere in the impugned order. The writ petition is therefore without any merits and is accordingly dismissed. No order as to costs.