

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

WRIT PETITION NO. 243 OF 2021

Ashok Jagatnarayan Pande __ Vs. __ Kailash Jagatnarayan Pande and ors

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

Court's or Judge's orders

Mr. S.A.Sonak, Advocate for petitioner
Mr P.P.Kothari, Advocate for Respondent No. 1
Mr. K.P.Shrivas, Advocate for Respondent Nos. 3 to 7

CORAM : AVINASH G. GHAROTE, J.
DATE : 09/02/2023

1] Heard Mr. Sonak, learned counsel for the petitioner, Mr. Kothari, learned counsel for respondent No.1 and Mr.Shrivas, learned counsel for respondent nos. 3 to 7. Though respondent No.2 is served, none appears.

2] The petition challenges the common order dated 7.1.2020 below Exh. 217 an application for grant of permission to examine DW-2 and Exh. 218 an application for issuance of witness summons to DW-2.

3] Mr. Sonak, learned counsel for the petitioner categorically admits that the application is not one under Order 18 Rule 4 of CPC, as it does not deal with the parameters as required therein. According to him, the application is based upon the order of the Hon'ble Apex Court dated 17.4.2017 which directs *de novo* adjudication and therefore the application ought to have been allowed.

4] Mr. Shrivastava, learned counsel for respondent nos. 3 to 7 supports the contention of Mr. Sonak, learned counsel for the petitioner.

5] Mr. Kothari, learned counsel for respondent no.1 submits that the *de novo* adjudication as directed by the Hon'ble Apex Court has to be construed in light of the order dated 17.4.2017, which according to him does not have the effect of directing a trial *de novo* but only adjudication of certain things as indicated therein.

6] The order dated 17.4.2017 by the Hon'ble Apex Court in Civil Appeal No. 5299/2017 reads as under;

- “1. Learned counsel granted.
2. We have heard learned counsels for the parties.
3. There is no operative finding recorded either by the High Court or the learned Trial Court as to which of the two Wills i.e. dated 06.12.2008 and dated 31.12.2008 is valid.
4. In absence of any determination of the aforesaid question, the decree passed by the learned Trial Court as well as the reversal of the said decree by the High Court cannot have our acceptance. The issue with regard to the respective rights of the parties remain undetermined.
5. In the above circumstances, according to us, the High Court should have remitted the matter to the learned Trial Court for the determination of the said question.
6. In view of above, we set aside the order of the High Court and remand the matter to the Trial Court for *de novo* adjudication in light of what is indicated above.
7. The appeal consequently is allowed as indicated above.”

7] A perusal of the order would indicate that the Hon'ble Apex Court found that on account of non-

rendering of any finding regarding the validity of the wills dated 6.12.2008 and 31.12.2008, the issue with regard to the respective rights of the parties remained undetermined and for determination of the said question, the matter was remanded back to the trial Court for *de novo* adjudication. This would clearly indicates that the matter is remanded back to the trial Court for determining the question regarding the validity of the two wills, which has to be done on the basis of the material which is already available on record, unless otherwise permitted by the trial Court under the appropriate provisions of law as applicable. Since the application at Exh. 217 merely seeks to cross examine DW-2 Vikas Khedikar, in view of the order dated 17.4.2017, the same has rightly been rejected by the learned trial Court by the impugned order. I therefore do not see any reason to interfere. The petition is therefore dismissed. No costs.

JUDGE

Rvjalit