

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5974 OF 2024

Jimmy Dara Sukhia ...Petitioner

vs.

Dina Dara Sukhia and Others ...Respondents

Mr. Hitesh Vyas a/w. Mr. Rasik Raut, for the Petitioner.

Mr. Sukand Kulkarni, for the Respondents.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 06, 2025

ORDER

1. Heard the learned counsel for the parties.
2. The petitioner/ plaintiff takes exception to an order dated 2nd April, 2024 passed by the learned Civil Judge, Pune on an application filed by the petitioner seeking direction to defendant No. 3 to lead the evidence first.
3. By the impugned order, the learned Civil Judge was persuaded to reject the application, opining that in the light of the issues settled by the Court, the onus of proof lay on the plaintiff and, thus, in terms of the provisions contained in Order 18 Rule 1 of the Code of Civil Procedure, 1908, the plaintiff ought to begin.
4. Mr. Vyas, learned counsel for the petitioner, endeavoured to draw home the point that in the backdrop of the nature of the defence put-forth by the defendant, the Court ought to have directed

VISHAL
SUBHASH
PAREKAR

Digitally signed
by VISHAL
SUBHASH
PAREKAR
Date: 2025.03.12
14:13:22 +0530

the defendant No. 3 to adduce his evidence first. Mr. Vyas took the Court through the developments in the suit which has been instituted in the year 1995 with multiples rounds of litigation upto the Supreme Court.

5. Suffice to note, the instant case is an example of the processual hurdles which can be put in the swift and effective administration of the civil justice delivery system. I hasten to add that this assessment is party-agnostic. The challenges to various preliminary and procedural orders passed by the civil Court, at every stage, before the superior Court, and the litigative stratagem have hampered the progress of the suit. After 30 years of its institution, recording of evidence is yet to commence, despite the order passed by the Supreme Court in civil Appeal No. 2852 of 2021 on 22nd July, 2021. By the said order the Supreme Court directed the trial Court to make an endeavour to give a quietus to the issues before it, preferably in a period of one year from the date of communication of the said order.

6. The suit has been instituted for partition and separate possession of the suit property. The trial Court has settled, inter alia, the following issues:

1] Does plaintiff prove that the suit properties are jointly owned by the plaintiff and defendant ?

2] Does plaintiff prove that the plaintiff is having

undivided share in the suit properties during the lifetime of the original defendant No. 1?

3] Does plaintiff prove that he is entitled to seek partition and separate possession of the suit properties ?

4] Does plaintiff prove that the Will dated 20/06/1987 and Codicil dated 17/03/2002 is bogus, false, fraud and void-ab-initio being executed fraudulent ?

5] Does plaintiff prove that the Will dated 19/03/1998 executed by Dr. Viraf Sukhia is bogus, false, fraud and void-ab-initio being executed fraudulent ?

6] Does defendant no. 3 prove that suit property 1C is her self-acquired property ?

7. It would be contextually relevant to note that the plaintiff had filed an application for recast of issue Nos. 4 and 5 so as to cast the onus of proof on the defendant, which was repelled by an order dated 19th January, 2024. The said order was challenged by the petitioner in Writ Petition No. 3386 of 2024. This Court declined to interfere with the said order dated 19th January, 2024 and disposed of the said petition by an order dated 6th March, 2024 observing, inter alia, that the trial Court while deciding issue Nos. 4 and 5 shall take into cognizance the effect of the aforesaid order of the Supreme Court dated 22nd July, 2021 and decide those issues strictly in accordance with law.

8. Undaunted, the petitioner filed the instant application seeking

a direction to the defendant to lead evidence first. As the trial Court negatived the said contention, the petitioner has again invoked writ jurisdiction of this Court.

9. Mr. Vyas submitted that in the context of the pleadings and the issues settled by the Court, the defendant No. 3 must begin adduction of evidence under Order 18 Rule 1 of the Code.

10. Reliance was placed on a judgment of the Supreme Court in the case of **Jami Venkata Suryaprabha and Anr. vs. Tarini Prasad Nayak and Ors.**¹ wherein in the context of the provisions contained in section 102 of the Evidence Act and Order 18 Rule 1 of the Code, the following observations were made.

16] Under Section 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side. Where the defendant admits the facts alleged by the plaintiff but contends that the plaintiff is not entitled to any part of the relief which he seeks, it is the defendant who gets the right to begin.

17] Order XVIII of the Code of Civil Procedure in terms speaks of the 'hearing' of a suit and not the trial of the suit. A court is concerned with the trial of a suit from the time when it is instituted. The hearing of a suit is only a part of the trial of the suit. The determination of the question as to which party has a right to begin is an integral part of the hearing itself.

11. I find it difficult to appreciate as to how the aforesaid pronouncement assists the cause of the submission on behalf of the plaintiff. I have extracted the issues on purpose. A bare perusal thereof would indicate that the burden to establish the facts that

1 2024 SCC OnLine SC 3862.

the suit properties were jointly owned by the plaintiff and defendant, the plaintiff had an undivided share in the suit properties during the life time of defendant No. 1 and the plaintiff is entitled to seek partition and separate possession, squarely lies upon the plaintiff.

12. Undoubtedly, the defendants have propounded the Will of Dina Dara Sukhia (deceased defendant No. 1) and Dr. Veera Sukhia (deceased defendant No. 2). However, the said contention does not amount to admission of the facts alleged by the plaintiff so as to shift the onus of proof on the defendant at the threshold. The fact that issues of 4 and 5 expressly cast the onus on the plaintiff also assumes significance as the challenge thereto has failed. In the aforesaid view of the matter, there is no infirmity in the impugned order.

13. The petition thus stands dismissed with costs of Rs. 10,000/-.

14. Costs be deposited with the District Legal Services Authority, Pune within a period of two weeks from the date of uploading of this order.

(N. J. JAMADAR, J.)