



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 1104 OF 2024

- 1 Rita Celine Desa, Aged about 76 years, Occ: Retired from Service, R/o 895, Clarke Town, Bezonbagh, Nagpur. Currently residing in Canada.
2. John Kenneth Desa, aged about 37 years, Occ. Service, R/o 895, Clarke Town, Bezonbagh, Nagpur. Currently residing in Canada.

PETITIONERS

VERSUS

1. Col. Sydney Desa, Aged about 76 years, Occ. Retired from Service, R/o 503-B, Kwaliti Garden, Off NIBM Road, Kondhwa, Pune.
2. Carmen Juliet Desa, aged about 78 years, Occ. Household, R/o 301/B Wing, Holy Plaza, C.H.S. Noopur Palace, Sheetal Nagar, Mira Road (East), Mumbai - 401107.
3. Caroline Fredric Desa, aged about 45 years, Occ. Service, R/o 301/B Wing, Holy Plaza, C.H.S. Noopur Palace, Sheetal Nagar, Mira Road (East), Mumbai – 401107.
4. Clementine Fernandes, aged about 41 years, Occ. Service, R/o 301/B Wing, Holy Plaza, C.H.S. Noopur Palace, Sheetal Nagar, Mira Road (East), Mumbai – 401107.
5. Ninotchka Chistopher McLeod, aged about 75 years, Occ. Retired from Service, R/o Nikhera Complex, New Colony, Nagpur.
6. Susan Arun Godbole, aged about 70 years, Occ. Retired from service, R/o 19, Deotale Layout, Ambazari, Nagpur.
7. Kay Ann Mari Desa, aged about 42 years, Occ. Service, R/o 895, Clarke Town, Bezonbagh, Nagpur. Currently residing in Canada.

RESPONDENTS

Shri A.M. Quazi, counsel for the petitioners.
Shri M.M. Shareef, counsel for the respondent no.1.
Shri V.Y. Khobragade, counsel for the respondent nos.2, 3 and 4.
Ms P.P. Moon, counsel for the respondent no.5.
Shri A.P. Bhuihar, counsel for the respondent no.6.
Shri P.V. Ghare, counsel for the respondent no.7.

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE ON WHICH ARGUMENTS WERE HEARD : DECEMBER 11, 2025

DATE ON WHICH JUDGMENT IS PRONOUNCED : JANUARY 12, 2026

JUDGMENT

RULE. Rule is made returnable forthwith and heard finally with consent of the learned counsel for the parties.

2. The petitioners-original defendant nos.1 and 3 have assailed the order dated 23.08.2023 passed by the trial Court on an application under Section 114 AND Order XLI read with Section 151 of the Code of Civil Procedure, 1908 (for short, 'the Code') to the extent of placing burden of proof with respect to additionally framed issue upon the defendants instead of the plaintiffs and sought for a direction to the trial Court for recasting the said issue. For the sake of convenience, the parties are hereinafter referred by their status in the civil suit.

3. The controversy in the instant petition arises in the backdrop of following facts:-

(i) The respondent no.1 filed Special Civil Suit no.248 of 2014 claiming declaration, partition, separate possession, mesne profits and perpetual injunction claiming share in the immovable property of Ms Mary Maud Desa, daughter of John Wilfred Desa, as described in the plaint.

(ii) In the suit, the plaintiff has prayed for a declaration that the registered Will dated 28.05.2013 allegedly executed by Ms Mary Maud Desa (one of the daughters of late John Wilfred Desa) is a forged and fabricated document with no legal sanctity and having no binding effect on the plaintiff and other legal heirs. The plaintiff also claimed a

declaration with respect to another registered Will dated 26.02.2007 executed by Ms Mary Maud Desa to be fraudulent and sought cancellation of the said document. Apart from this, the plaintiff claimed for a declaration of having 1/5th share in the suit property.

(iii) The defendants appeared in the suit and filed their written statement.

(iv) The trial Court framed issues *vide* Exhibit 32 on 29.11.2016 and the suit proceeded for evidence. The parties led evidence by examining their respective witnesses and after the evidence of the defendants was over, an evidence closing pursis *vide* Exhibit 105 was filed by them on 20.09.2019 and the matter was fixed for arguments.

(v) On 15.02.2020, the plaintiff advanced final arguments in the suit and the matter was posted for further arguments on 29.02.2020.

(vi) On 29.02.2020, the defendant nos.1 and 3 filed an application at Exhibit 110 under Order XIV Rule 5 of the Code for framing of additional issues. On the same date, the defendants also filed a separate application at Exhibit 108 seeking rejection of plaint under Order VII Rule 11 of the Code.

(vii) The defendant nos.1 and 3 filed additional submissions dated 09.03.2020 at Exhibit 118 in support of the application dated 29.02.2020.

(viii) The plaintiff opposed the application by recording his say on 09.03.2020.

(ix) On 15.07.2023, the trial Court rejected both the applications at Exhibits 110 and 118.

(x) On 03.08.2023, the defendant nos.1 and 3 filed an application (Exhibit 134) under Section 114 and Order XLI read with Section 151 of the Code and sought for review of the order dated 15.07.2023.

(xi) The plaintiff opposed the said application by filing his say.

(xii) By order dated 23.08.2023, the trial Court allowed the application and framed the additional issues which are reproduced below:-

“1. Do defendant Nos.1 to 3 prove that plaintiff is not the son of late Mr.John Vilfred Desa and full brother of Miss Marry Moud Desa ?

2. Whether suit is barred by resjudicata ?”

(xiii) Although the additional issues are framed at the instance of the defendant nos.1 and 3, a grievance is raised through the instant petition seeking recasting of the issues to shift the burden on the plaintiff instead of the defendants.

4. Shri A.M. Quazi, learned counsel for the petitioners strenuously submitted that the trial Court has committed an illegality in placing the burden upon the defendant nos.1 and 3 by ignoring the pleadings of the parties in the suit. He submitted that the trial Court has failed to appreciate that the primary burden to prove the case lies upon the plaintiff, who has asserted that he is the son of late John Wilfred Desa. Further, in view of the provisions of Sections 101, 102 and 103 of the

Indian Evidence Act, 1872, the burden of proof lies upon the party who asserts the existence of any fact and since the plaintiff has asserted himself to be the son of late John Wilfred Desa, no negative burden be shifted on the defendant nos.1 to 3 to prove the said assertion of the plaintiff. He thus submitted that the primary burden to prove the assertion of the plaintiff lies upon the plaintiff which cannot be shifted and even the onus of proof may be sparingly shifted, however in absence of anything on record, the primary burden and onus upon the plaintiff cannot be shifted in this case.

5. In support of his submissions, he placed reliance on the judgment of this Court in ***Usha Ganeshrao Ingale & Others Versus Lalita Devidas Yewale & Others*** [Second Appeal No.328 of 2019], judgment of the Karnataka High Court in ***Sri S. Paramashivaiah s/o late Somasundaraiah & Others Versus Sri S.C. Chandrashekaraiah s/o Channabasappa & Others*** [Writ Petition No.30145 of 2017] and the judgment of the Coordinate Bench of this Court in ***Mainabai Rangnath Patankar Versus Kundalik Dhondiba Kaladhane & Others*** [2019(1) Bom.C.R. 352].

6. Shri P.V. Ghare, learned counsel for the respondent no.7 (original defendant no.2) advanced submissions in tune with its affidavit-in-reply and supported the case of the petitioners.

7. Per contra, Shri M.M. Shareef, learned counsel for the respondent no.1-original plaintiff vehemently opposed the petition. He submitted that the application submitted by the defendant nos.1 and 3 under Order XIV

Rule 5 of the Code, at the stage of final arguments in the suit, is an attempt to somehow protract the proceedings of the suit and avoid contesting the suit on merits. By narrating the stages through which the proceedings of the suit were conducted, he invited the Court's attention to the fact that after the evidence of the defendants was closed and the matter was fixed for arguments from 30.09.2019 to 15.02.2020, no need was felt by the defendant nos.1 and 3 for framing of any additional issue. He submitted that after the final arguments were advanced by the plaintiff on 15.02.2020 and the matter was posted on 29.02.2020, the application at Exhibit 110, under Order XIV Rule 5 of the Code was filed. He thus submitted that the application for framing the additional issues was unwarranted and rightly rejected by the trial Court. He also submitted that since the application for review (Exhibit 134) was allowed and the additional issues are framed at the instance of the defendant nos.1 and 3, they are not entitled to raise any grievance in that regard. He also submitted that after the additional issues were framed, the defendant nos.1 and 3 have filed an application for setting aside the 'No Evidence Order (Exhibit 140)' which was allowed by the order dated 20.01.2024 and the defendant nos.1 and 3 were directed to lead evidence without fail. He submitted that the petitioners/defendant nos.1 and 3 have not challenged the order in which the trial Court has categorically observed that the burden was on them to prove the additional issues. By relying on the provisions of Sections 101, 102 and 103 of the Indian Evidence Act, 1872, he submitted that the trial Court has rightly placed the burden on

the defendant nos.1 to 3 who have applied for framing of additional issues. He also submitted that the plaintiff cannot be compelled or forced to lead evidence on additional issues and in case of failure of the plaintiff to prove his case, he would be at loss to suffer an adverse inference. He submitted that the trial Court has rightly cast burden on the defendant nos.1 and 3 and their insistence to shift the burden on the plaintiff at the stage of final arguments of the suit would cause serious prejudice to the rights of the plaintiff. In support of his submissions, he placed reliance on the judgments of the Hon'ble Supreme Court in ***Rathnamma & Others Versus Sujathamma & Others*** [(2019) 19 SCC 714] and ***Ashok Kumar Versus Raj Gupta & Others*** [(2022) 1 SCC 20].

8. While considering the rival contentions, it is seen that the controversy mainly revolves as to on whom the burden should have been placed. It has to be noted that the additional issues are framed on the basis of the application under Order XIV Rule 5 of the Code filed by the petitioners/defendant nos.1 and 3. Undisputedly, this application at Exhibit 110 for framing the additional issues was filed at the stage of final hearing, that too in the midst of part-heard arguments of the plaintiff. This application was rejected by order dated 15.07.2023 by categorically observing therein that the defendant nos.1 and 3 have not challenged the earlier order dated 07.12.2011 passed by the District Court so also by considering the fact that the suit was at the stage of final arguments. Under these circumstances, the application for review at Exhibit 134 was allowed and resultantly the additional issues are framed. Thus, it

becomes clear that it was at the instance of the defendant nos.1 and 3 that the additional issues are framed at the stage of final hearing. Pertinently, although the issues were framed in the suit in the year 2016, the defendants had not shown any due diligence in filing the application for framing additional issues and there are no reasons put forth by them as to why any application under Order XIV Rule 5 of the Code was not filed earlier.

9. As regards the burden of proof, the position of law is pointed out by the learned counsel for the respective parties by inviting the Court's attention to the provisions of Sections 101, 102 and 103 of the Indian Evidence Act, 1872. Even the position of law laid down in the judgments relied upon by the parties with respect to burden of proof and onus of proof is highlighted and the same is not disputed. A quick reference may be made to the legal position as laid down by the Hon'ble Supreme Court in *Anil Rishi Versus Gurbaksh Singh* [(2006) 5 SCC 558] from which paragraphs 19 and 20 are reproduced below:-

“19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff

and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

20. In *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr.* the law is stated in the following terms :

‘29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.’

10. In the instant case, the plaintiff has filed the suit seeking declaration, partition and separate possession with respect to the suit property. The plaintiff has claimed 1/5th share in the suit property. Based on the pleadings of the parties, Issue no.3 was framed about entitlement of the plaintiff for 1/5th share in the suit property and accordingly the suit proceeded. As such, the burden to prove his case lies upon the plaintiff. In case, the plaintiff does not prove the very case which he has pleaded in the suit, he would suffer the consequences. Further in case, the plaintiff does not lead any evidence to discharge the burden cast upon him, the Court would be entitled to draw an appropriate adverse inference against

the plaintiff. Therefore, even by considering the additional issues as framed, there is no necessity to recast those issues to shift the burden upon the plaintiff, particularly in view of the fact that the issues already framed had cast burden upon him to prove them. Reliance can be placed on the position of law as laid down by the Hon'ble Supreme Court in **Ashok Kumar** (supra) in which the position of law is reiterated that it is the burden on the litigating party to prove their case adducing evidence in support of their plea and the Court should not compel any party to prove his case in the manner suggested by the contesting party.

11. It is pertinent to note that the impugned order is passed on an application for review, Exhibit 134, without recording therein the observations about any error apparent on the face of record. The impugned order does not reflect as to how the reasons on account of which the order below Exhibit 110 was passed were nullified necessitating review of the earlier order. Be that as it may, there is no challenge to the order dated 23.08.2023 in its entirety, however the grievance put forth by the petitioners/defendant nos.1 and 3 is to the extent of putting the burden upon them to prove the additional issues framed. For the reasons recorded above, I do not find any necessity to recast the additional issues framed *vide* order dated 23.08.2023.

12. Having regard to the above mentioned factual and legal aspects, no indulgence is warranted under Article 227 of the Constitution of India with the impugned order. The writ petition deserves to be dismissed and the same is dismissed with no order as to costs. Rule stands discharged.

Having regard to the fact that parties to the suit are of advanced age and the suit is at the stage of final arguments, the trial Court is directed to expeditiously decide the civil suit i.e. Special Civil Suit No.248 of 2014 preferably within a period of three months from today. Order accordingly.

(PRAFULLA S. KHUBALKAR, J.)

APTE