

MHKO110009362012



Reg.Civil Suit No.354/2012

(CNR No.MHKO110009362012)

Order below Exh.45

01. The present application is made on behalf of the plaintiff with the prayer to direct the defendants to start their evidence before the evidence of plaintiff.

02. It is the submission of the plaintiff that, plaintiff executed a registered Will bearing No.5185 dated 10/09/2007 in favour of defendant. The said Will is null and void and to declare same as illegal, plaintiff instituted the present suit for the relief of declaration and injunction. Defendant filed his written statement. In para No.5 of written statement defendant contended that, the Will in question was legal. Hence it is submission of the plaintiff that, as defendant ascertaining the legality of the Will, he has to prove the said Will as legal one. For that purpose defendant has to start his evidence before the evidence of plaintiff.

03. Defendant filed his say vide **Exh.47** submitting that, the contents of application were imaginary one and not tenable in the eyes of law. As per the issues casted in the suit, burden of proof is on the plaintiff to prove all issues in question. Hence defendant is not supposed to start his evidence before the plaintiff. He further contended that, plaintiff has to prove his case on his own footing and also has to prove

the Will. So as per the law plaintiff has to start his evidence. Plaintiff has no locus standi to make the present application. In result application is not tenable in the eyes of law. Defendant finally submitted to reject the application by imposing heavy costs.

04. Perused the application and say thereon. Heard to both parties.

05. Before dealing with the application, it is necessary to consider here Order XVIII Rule 1 of Code of Civil Procedure, which runs as follows -

1. Right to begin – *The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that, either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.*

06. Now let us deal with the present application in the light of abovesaid provisions. In the present case in my hand, plaintiff came with the story that, the Will in question was illegal and to cancel the said Will, he instituted the present suit. On perusing issue No.3 which runs as follows -

Issue No.3 - Does the plaintiff prove that, the Will Deed executed in favour of defendant No.1 dated 10/09/2007 is illegal and liable to be set aside ?

07. It is seen that, burden of proof is on the shoulder of plaintiff to prove that, the Will dated 10/09/2007 executed in favour of the defendant No.1 is illegal and liable to be set aside. Considering the issue itself, it is crystal clear that, it is the plaintiff, who has to prove the illegality of the Will and for that purpose plaintiff has to start his evidence. On the other hand defendant nowhere admitted that, the Will in question was illegal. If defendant did not admit the contents of plaintiff to the extent that, the Will in question was illegal, then considering Order XVIII Rule 1 of C.P.C., plaintiff has right to begin his evidence. Only on the application of the either party to the suit, right to begin the evidence shall not be shifted from one party to the another party. Hence in the present case in my hand also, I am of the candid opinion that, defendant is not entitled to start his evidence before the evidence of plaintiff. Hence considering above legal and factual situation, I am of the candid opinion that, application is divert from the merit. In result, I proceed to pass following order.

ORDER

- 1] Application at Exh.45 is hereby rejected.
- 2] Application at Exh.45 is disposed off accordingly.

Date : 10/11/2022

(L.M. Pathan)
Civil Judge Junior Division,
Peth-Vadgaon