

**ORDER BELOW EXH. 263**

(Passed on : 25.09.2018)

01. Present application is filed by defendant No. 2 & 5 to recast the issues.

02. In short, it is the contention of defendant No. 2 & 5 that present suit is for partition and separate possession. The plaintiffs in para No. 1 pleaded that plaintiff No.4 is the legally wedded wife of deceased Suryakant Telang. Said fact is denied by these defendants. But issues are not framed about the said fact. On the contrary, issues No. 5 & 6 are framed in negative from putting the burden of prove on the shoulders of defendant No. 2 and 5 to prove that plaintiff No. 4 is not a wife of deceased Suryakant and plaintiff No. 1 to 3 are not the legal heirs of deceased Suryakant. Negative issues cannot be framed and therefore, it is necessary to delete issue No. 5 & 6 and to frame the additional issue regarding the pleading that plaintiff No. 4 is legally wedded wife of Suryakant. Hence, prayed to allow the application.

03. Plaintiff filed say and opposed the application contending that proper issues are framed after taken into consideration pleadings of the parties. Issues No. 4 and 5 are framed as per the specific pleading of defendant No. 2 & 5 in para No. 3 of the written statement. Application is filed at belated stage. There is no need to delete or frame the issues. Hence, prayed to reject the application.

04. Heard both the parties. It is argued by Advocate Sabnis for the defendants that it is specific pleading in the plaint that plaintiff No. 4 is the wife of deceased Suryakant to which defendant No. 2 & 5 is denied. Therefore, burden to prove the said fact ought to have been put on the shoulder of plaintiffs but issue No. 5 & 6 framed in the present matter put the negative burden on defendants to prove that plaintiff No. 4 is not a wife and plaintiff No. 1 to 3 are not the heirs of deceased Suryakant. Negative evidence cannot be lead. Hence, Prayed to delete issue No. 5 and 6 and frame the issues in the positive form putting the burden on the shoulder of the plaintiff.

05. On the contrary, it is argued by Advocate Jalkote for the plaintiff that in written statement there is pleading that defendant No. 6 is the wife of Suryakant. Therefore as per Section 106 of the Evidence Act, said burden is upon the defendants. Therefore, there is no necessity to delete the proper issues already framed and to frame the additional issues. Only to delay the matter application is filed at belated stage. Hence, prayed to reject the application.

06. Upon hearing both the parties and perusing the respective pleadings of the parties, the plaintiffs came with a specific case that plaintiff No. 4 is a wife of deceased Suryakant and plaintiff No. 1 to 3 are the legal heirs of Suryakant. Said fact is denied by the defendants. In these situation, the person who came before the Court with a specific

case has to prove fact alleged by him, unless said fact is admitted by the other side. When there is specific pleading of the plaintiffs about their relationship with the deceased Suryakant, then, initial burden is upon them to prove their relationship with deceased Suryakant and as per the provision of Order 14 of the C.P.C. burden to prove the said fact ought to have been put on the shoulder of plaintiffs. But it appears from the issues framed below Exh. 101 that negative burden is put on the shoulder of defendants regarding the relationship of the plaintiffs with deceased Suryakant.

07. It also appears that those issues are in negative form. The issues cannot be framed in negative form. The person who is alleging the positive thing ought to prove the same. Therefore, issue No. 5 and 6 are necessary to be deleted as no negative evidence can be lead.

08. Further, though the defendants have pleaded that defendant No. 6 is the legally wedded wife of deceased Suryakant but the initial fact of proving the relationship by the plaintiffs is on them and if they succeeds to prove the said fact then the onus will shift on the defendants. Therefore, question of Section 106 of the Evidence Act will not arise to the contention of the defendants in this matter.

09. Further, it is necessary to frame the issue regarding the relationship of the plaintiffs with deceased Suryakant because entire suit is based upon the said contention, unless that issue is framed the rights

of the parties cannot be determined effectively. Hence, I pass following order,

**ORDER**

1. Application is allowed as follows :
  - (a) Issue No. 5 & 6 are deleted.
  - (b) Additional issue No. 1-A is framed as follows :
    - (1-A) Does plaintiffs prove that plaintiff No. 4 is a wife and plaintiff No. 1 to 3 are the sons of deceased Suryakant Ramrao Telang ?
2. Parties are at liberty to lead the evidence on the additional issue.

Sd/-

(R. P. Kulkarni)

Civil Judge Senior Division,  
Nilanga.

Nilanga.

Dated : 25.09.2018.