

ORDER BELOW EXH. 265

(Passed on : 14.11.2018)

01. Present application is filed by the plaintiff to recast the issue and frame the issue as prayed.

02. In short, it is the contention of the plaintiff that the plaintiff No.4 is not the wife and plaintiff No. 1 to 3 are not the sons of deceased Suryakant. Therefore, the burden is upon the defendants to prove the said fact. Hence, prayed to frame the issue casting the burden on the defendants.

03. Defendants filed say and opposed the application contending that already the previous issues are deleted which is proposed to be framed by way of this application. Issues are properly framed. Hence, prayed to reject the application.

04. Heard both the parties. It is argued by Advocate Sabnis for the defendants that the plaintiff ought to have challenge the order passed below Exh. 263 by which issues are deleted. Therefore, this application is not tenable. On the contrary, it is argued by Advocate Gaikwad that paternity is denied by defendants therefore, the burden is upon the defendants to prove the said fact, in view of the Section 112 of the Evidence Act. In support of the argument, he relied upon the case of **Riyaz Ahamad Nagarchi Vs. Kumari Shipa & oth.**

05. 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.

06. So far as contention of the plaintiffs regarding Section 112 of the Evidence Act and the ratio in the above referred case law is concerned, it is necessary to mention here that in this matter before me defendants are not the father of plaintiff No. 1 to 3. Defendant No. 1 is grandfather and defendant No. 2 is the uncle of plaintiff No. 1 to 3. In this situation, the presumption under Section 112 will not apply to the pleading of defendants and no negative burden can be put on defendants to prove the fact of paternity.

07. As the ratio in the above referred case law is on the basis of facts in that matter. The paternity was denied by father in that matter. Therefore, in that situation, the Hon'ble High Court laid down the ratio that in view of Section 112 of Evidence Act negative burden is on the

father. Therefore, I respectfully submit that the plaintiff will not get the benefit of above case law.

08. Already I have deleted the issues by passing order below Exh. 263. Said order is not challenged till today. Therefore, there is no need to frame the issue as prayed by the plaintiff and the application deserves to be rejected. Hence, I pass following order,

ORDER

Application is rejected.

Nilanga.
Dated : 14.11.2018.

Sd/-
(R. P. Kulkarni)
Civil Judge Senior Division,
Nilanga.