

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3548 OF 2014

HITEN PRITHVIRAJ PATEL
VERSUS
JIGNASHA PRITHVIRAJ PATEL AND OTHERS

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Advocate for petitioner : Mr. P. R. Katneshwarkar
Advocate for respondent No. 1 : Mr. A. S. Bajaj

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CORAM : V. K. JADHAV, J.
DATED : 16th JANUARY, 2015

PER COURT :-

1. The respondent No.1 has instituted Special Civil Suit No. 21 of 2012 for partition to the extent of her 1/4th share in the suit property, as shown in Schedule "A" and "B", annexed to the plaint. It is the case of respondent No.1 that suit properties are ancestral joint family properties of the parties to the suit. The parties to the suit are having firm business and other properties. The other properties said to have been purchased from the earnings of the firm. The defendants have filed their written statement and denied the claim. Shri Ambalal Purushottam Patel had one son viz. Prithviraj (respondent No.2 herein) and two daughters viz. Meena and Vimlaben. In the year 1978, said Ambalal died. After his death, as per his will deed his wife Shantaben became owner of the firm to the extent of 50%. In the year 1989 Shantaben died. Based on the different will deeds, said

Meena filed probate proceeding in the High Court, bearing Testamentary Petition No. 424 of 1990 and Prithviraj Patel (respondent No.2 herein) filed Testamentary Petition No. 647 of 1990. Both the petitions were heard by this Court and disposed of by common judgment and order dated 21.9.2010. Being aggrieved by the said judgment, both the parties preferred two separate appeals which are pending before the Principal Seat of this Court for final adjudication. In the Special Civil Suit No. 21 of 2012, certain issues are framed and more particularly issue No.7 directly relates with the Testamentary proceeding. Consequently, the petitioner had filed an application Exh.50 under Section 10 of C.P.C. for staying hearing of Special Civil Suit No. 21 of 2012, being a subsequent suit. The learned Judge of the trial court, by its impugned order has rejected the said application Exh.50. Hence, this writ petition.

2. The learned counsel for the petitioner submits that the suit property is substantially involved in the above Testamentary Suit and the issue of ownership and possession is directly and substantially in issue in the said Suits/Appeals. The learned counsel submits that the provisions of Section 10 of Civil Procedure Code attracts and thus, the subsequent Suit, bearing Special Civil Suit No. 21 of 2012 deserves to be stayed.

3. The learned counsel for respondent No. 1 submits that the Probate Court having limited jurisdiction to consider the genuineness of the Will before granting probate without going into the question of title to the property. The parties in the Testamentary Suit and the parties in the Civil Suit are different. The learned counsel further submits that the Special Civil Suit No. 21 of 2012 has been instituted for partition and separate possession. In view of this, the application filed under Section 10 of C.P.C. by the petitioner is misconceived and the learned judge of the trial Court has rightly rejected the same.

4. Though the parties to both the Suits are not the same, it appears from the pleadings of the parties that the original plaintiff/respondent No.1 herein, is litigating under the same title of her father, who is party in the Testamentary proceedings. It is well settled that the matters in issue in both the Suits need not be identical and it is enough if they are substantially the same. The decision in one suit must *non suit* the other suit and this must be the phraseology to answer the question whether the matter in issue in the two suits is either directly or substantially same. It appears that in the event the Testamentary Proceedings are disposed of finally, in either of the way, the decision rendered in the Testamentary proceedings in no way affects the merit and fate of the subsequent Suit.

5. The learned counsel for respondent No.1, in support of his argument, has placed reliance on the judgment of Jharkhand High Court, in the case of ***Dipak Agrawala and Anr. Vs. Smt. Chandrakal Agarwala and Ors. reported in 2003 (2) JCR 62 Jhr.*** wherein, the learned Judge, in paragraph No. 6 of the judgment, has made following observations:-

“6. The Court below, in my view, has completely misconstrued the provision of Section 10, its scope and application, it is well settled that the probate Court having a limited jurisdiction is only to consider the genuineness of the will before granting probate without going into the question of title to the property which is the subject matter of the will. It is equally well settled that by granting probate the Court is not deciding the dispute to the title. The issues involved in the suit with regard to the claim of jointness cannot be the subject matter of probate proceeding. The Court below, therefore, has exceeded its jurisdiction in applying the provisions of Section 10 of the Code and stayed the further proceeding of the suit till the decision of the probate case which is pending before the Calcutta High Court. The impugned order, therefore, cannot be sustained in law.”

6. It appears that the facts and the ratio laid down in the above said case squarely applies to the facts of the case in hand. In the Testamentary proceeding, limited question is required to be considered about genuineness of the Will before granting probate

without going into question of title to the property. The learned Judge of the Trial Court has rightly considered this aspect and rejected the application at Exh. 50.

7. In view of the above discussion, no interference is called for. The Writ Petition is devoid of any merit and the same stands dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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