

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2390 OF 2015

Mohan Vasudeo Kulkarni and anr. : Petitioners.

Versus

Sudhir Ramchandra Kulkarni and ors. : Respondents.

Mr. Gajanan M Savagave for the Petitioners.

Mr. Rupesh A Zade for the Respondent Nos.1 to 4.

CORAM : R. M. SAVANT, J.

DATE : 06th October 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 20/01/2015 passed by the learned Joint Civil Judge, Senior Division, Baramati by which order the application (Exhibit 28) filed by the Petitioners – original Defendant Nos.4 and 5 invoking Sections 9 and 11 of the Code of Civil Procedure came to be rejected.

2 The suit in question being Regular Civil Suit No.27 of 2014 has been filed by the Respondent Nos.1 to 4 herein for partition and declaration. The partition is sought of the suit properties whereas the declaration is sought in respect of the will dated 25/07/1970 of one Digambar as not binding on the share of the Plaintiffs.

3 The Defendant Nos.4 and 5 invoked the provision of Section 9 of the Code on the ground that in view of the earlier adjudication relating to the

grant of probate in respect of the will of Digambar and the findings recorded therein as regards the partition of the properties, the instant suit being Regular Civil Suit No.27 of 2014 was not maintainable.

4 In so far as Section 11 of the Code is concerned, the said provision was invoked on the ground that the instant suit is barred by principles of res-judicata as the earlier suit being Regular Civil Suit No.222 of 1985 filed for partition has been dismissed.

5 In so far as the issue of the suit being not maintainable on account of there being prior partition is concerned, the Trial Court recorded a finding that since the will of the deceased Digambar has not been produced by the Defendants, it is not clear as to which property is covered by the said will. The Trial Court observed that though the probate has been granted and though against the order granting probate an Appeal was filed by the father of the Plaintiffs which Appeal was dismissed and in which Appeal a finding was recorded that the partition had taken place pursuant to which the said Digambar disposed of the properties by bequeathing them to Vasudeo's wife Sushilabai, and though Ramchandra/Digambar has disposed of his share, the said fact would have to be gone into at the hearing of the suit and the suit cannot be dismissed at the threshold on the said ground in view of the will not being produced.

6 In so far as the issue of res-judicata is concerned, the Trial Court rejected the application on the ground that the earlier suit was dismissed for non-prosecution and was not decided on merits and therefore the same would not come in the way of the Plaintiffs from prosecuting the instant suit for partition.

7 The learned counsel appearing for the Petitioners i.e. the original Defendant Nos.4 and 5 Shri Savagave would contend that since in the Appeal filed against the grant of probate to the said Sushilabai a finding has been recorded that there was a partition between the brothers which took place in the year 1958, the Trial Court erred in rejecting the application filed invoking Section 9 of the Code.

8 In my view, it is not possible to accept the said contention. The Trial Court has rejected the application invoking Section 9 of the Code on the ground that though the probate has been produced, the will has not been produced on record and therefore it was difficult to ascertain as to which are the properties covered by the will. In my view if there has been any partition which has taken place between the brothers earlier, the same would impinge upon the entitlement of the Plaintiffs to the reliefs sought in the suit. It would not have any bearing on the maintainability of the suit. In my view, the order

passed by the Trial Court in respect of the application invoking Section 9 of the Code cannot be found fault with.

9 In so far as the aspect of res-judicata is concerned, there is no dispute about the fact that earlier suit being Regular Civil Suit No.222 of 1985 has been dismissed for default and not on merits. The same would obviously not come in the way of the Plaintiffs from filing the instant suit. Moreover in the instant case an issue relating to res-judicata has already been framed in the suit which the Trial Court has observed can be tried in the suit by offering proper opportunity to the parties. Hence the order passed rejecting the application filed invoking Section 11 at this stage also cannot be found fault with.

10 In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]

Certified to be true and correct copy of the original signed Judgment.