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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4883 OF 2014

Shri Deepak Trimbak Punde .. Petitioner

Vs.

Shri Uday Trimbak Punde and others .. Respondents

Mr.Madhav J. Jamdar, Advocate for the Petitioner.

Mr.Abhijit B.Kadam, Advocate for the Respondent No.1.

CORAM : R. G. KETKAR, J.

DATE : 11th JUNE, 2015

P.C. :

. Heard Mr.Madhav J.Jamdar, learned Counsel for the petitioner and Mr.Abhijit B.Kadam, learned Counsel for the respondent No.1 at length.

2. By this petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 12/03/2014 passed by the learned Civil Judge, Senior Division, Pune below Exhibit 59 in Misc. Application No. 58 of 2009. By that order, the learned trial Judge rejected the application made by the petitioner under Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. In support of this petition, Mr.Jamdar submitted that respondent No.1 has filed proceedings for getting probate of the alleged Will dated 21/11/2002 allegedly executed by one Trimbak

Punde. He submitted that in cause title of the application, respondent No.1 has described that application is for Letter of Administration/ Probate. However, in the prayer clause, respondent No.1 has sought probate of alleged Will dated 21/11/2002. He submitted that alleged Will testator has appointed the executor and therefore, in view of Section 222 of the Indian Succession Act, 1925 (for short 'Act'), the application made by respondent No.1 for probate is not maintainable. He also submitted that Section 229 lays down grant of administration where executor has not renounced. Section 230 of the Act lays down form and effect of renunciation of executorship. Section 231 lays down the procedure where an executor renounces or fails to accept an executorship within the time limited for such acceptance or refusal thereof. In that event, letters of administration may be granted to a person who would be entitled to administration in case of intestacy. Section 232 of the Act lays down that grant of administration of universal or residuary legatees when the deceased has made a Will, but has not appointed as executor or the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will or the executor dies after having proved the Will, but before he has administered all the estate of the deceased, a universal or a residuary legatee may be admitted to prove the Will in the cases covered by clauses (a) to (c).

4. Mr.Jamdar submitted that in the present case, executor – Sopanrao Pandharinath Nikam has instituted Special Civil Suit No. 142 of 2011 for declaration of genuineness of that Will and for ownership of respondent No.1. In other words, executor has not renounced and is very much prosecuting the proceedings. In view of Section 222 of the Act, respondent No.1 cannot apply for grant of probate. The learned trial Judge, however, rejected the application on the grounds which are not genuine for deciding the application under Order 7 Rule (d) of C.P.C. The learned trial Judge rejected the application on the ground that suit instituted by Sopanrao Pandharinath Nikam transferred to his Court by the learned Principal District Judge, Pune on 21/12/2013 and is to be tried along with application for grant of probate. It is further recorded that entire evidence in the application was already completed and therefore, at this stage, the application under Order 7 Rule 11(d) could not be entertained. He submitted that application under Order 7 Rule 11(d) can be entertained at any stage of the proceedings. In support of this proposition, he relied upon the decision of the Apex Court in the case of **Samar Singh Vs.Kedar Nath, 1987 (Supp) Supreme Court Cases 663** and in particular, paragraphs 4 & 5 thereof. He submitted that the powers under Order 7 Rule 11 are conferred on the court so as to ensure that litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological

burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties.

5. On the other hand, Mr.Kadam supported the impugned order. He submitted that the learned trial Judge has categorically recorded a finding that entire evidence in the application is already completed as also having regard to the fact that executor has already instituted Special Civil Suit which is to be tried along with application, the learned trial Judge was justified in rejecting the application.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It is no doubt true that application under Order 7 Rule 11 can be entertained at any stage of proceedings as held by the Apex Court in the case of **Samar Singh** (*supra*). In the present case, the learned trial Judge while rejecting the application has noted that executor – Sopanrao Pandharinath Nikam has already instituted suit. By order dated 21/12/2013, the learned Principal District Judge, Pune transferred that suit and has clubbed with the application for grant of probate. The issues were framed and the order was passed consolidating the proceedings. In paragraph 4, the learned trial Judge has recorded that almost entire evidence in the application for grant of probate was completed and thereafter, the application was presented.

7. In the case of **Samar Singh** (*supra*), the Apex Court observed in paragraph 5 that in the absence of any restriction placed by the statutory provision, it is open to the court to exercise that power at any stage. It is further observed that

“.....while it is true the ordinarily preliminary objection to the maintainability of the petition on the ground of absence of cause of action should be raised by the respondent as early as possible but if a party raises objections after filing written statement the preliminary objection can not be ignored....”

8. In the present case, the petitioner did not raise the preliminary objection to the maintainability of the application for grant of probate at the earliest available opportunity. In paragraph 3 of the application dated 01/02/2014 filed by the petitioner under Order 7 Rule 11, the petitioner has contended that he had initially appointed an advocate and thereafter, he has recently appointed new advocate. Newly appointed advocate, after going through the contentions and prayers made therein, found that the application filed for grant of probate is not maintainable as the same is not filed by the executor and even if, matter is part heard, there is no bar for entertaining the application. In my opinion, reason given by the petitioner in paragraph 3 is unacceptable as the learned trial Judge has recorded that almost entire evidence is completed in the application for grant of probate. Mr.Jamdar submitted that petitioner's evidence is not over. As noted earlier, respondent No.1 has filed application for grant of probate. Sopanrao Pandharinath

Nikam, executor has instituted Special Civil Suit No. 142 of 2011 for declaration of genuineness of that Will. Both these proceedings are clubbed together. In the impugned order, the learned trial Judge has kept the issue of maintainability of application open to be dealt with at the time of deciding the proceedings. The burden is on the propounder of the Will to i) establish genuineness of the Will and ii) its due execution and attestation as contemplated under Section 63 of the Act. I do not find any merit in the submission of Mr.Jamdar that petitioner's evidence is not over. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. In the result, petition fails and the same is dismissed.

9. At this stage, Mr.Jamdar orally applies for stay of this order for a period of 8 weeks from today so as to challenge this order before the higher Court. Mr.Jamdar himself relied upon the decision of the Apex Court in the case of **Samar Singh** (*supra*) in which it is observed in paragraph 4 that the powers are conferred on the Court for ensuring that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. In view thereof, oral application made by Mr.Jamdar is rejected.

(R. G. KETKAR, J.)