

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 16057 OF 2015
IN
SECOND APPEAL NO. 552 OF 1989
WITH
WRIT PETITION NO. 6722 OF 2016

Prakash s/o Mahadeo Gawad, Aged 50 years, occup. Agriculture, R/o Khed, Tq.& Dist.Osmanabad	.. Applicant/original Respondent-1A-A Legal representative of deceased Yamunabai
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versus

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| 01. | Haridas s/o Krushna Lomte,
Aged 63 years, occup. Agriculture
R/o Khed, Tq. & Dist. Osmanabad | |
| 02. | Krushna s/o Lala Lomte, deceased | .. Non applicants/(Non-
applicant no.1 is original |
| 03. | Kantabai w/o Krushna Raibhan,
Age 80 years, occup. Nil,
R/o Khed, Tq.& Dist.Osmanabad | Appellant and Non -
applicants no. 2 and 3
are original respondents |

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Mr. N. B. Khandare, Advocate for applicant

Mr. A. N. Nagargoje, h/f Mr. S. K. Chavan, Advocate for non
applicant no. 1

Mr. M. V. Ghatge, Advocate h/f Mr. R. K. Shingnapure, Advocate
for non applicant no. 2

CORAM : SUNIL P. DESHMUKH, J.
DATE : 25th November, 2016

ORAL JUDGMENT :

1. Heard learned counsel for the parties at quite some length.

2. The aspects as would be relevant for consideration of present civil application are that, regular civil suit no. 85 of 1982 was instituted by one Krishna s/o Lala Lomate, his wife Yamunabai, against Haridas Lomte, seeking declaration that defendant Haridas is not adopted son of the plaintiffs and for possession and injunction in respect of the properties of Krishna. It appears, the 1st plaintiff Krishna had expired and daughter of the plaintiffs had been brought on record as plaintiff no. 3. The suit was decreed by civil judge, junior division, Osmanabad under judgment and order dated 28-02-1986.

3. Defendant Haridas went in appeal bearing regular civil appeal no. 171 of 1986 before the district court. The appeal was dismissed on 10-11-1989 and second appeal no. 552 of 1989 had been preferred by defendant Haridas which is pending final hearing before this court.

4. During pendency of second appeal, Yamunabi – the 2nd plaintiff died on 01-05-1990.

5. It has been the contention of present applicant that Yamunabai had executed a will in his favour on 14-07-1988 since he had been taking her care. Under the will, lands bearing Gut no. 117 admeasuring 1 hectare, 46 aar, gut no.

149 admeasuring 87 aar and gut no. 120 admeasuring 4 aar along with share in well situated in village Khed and houses bearing no. 28 and 265 situated in said village are claimed to have been bequeathed in his favour. Thus, applicant contends to be legal representative of deceased Yamunabai.

6. On aforesaid premise, civil application bearing no. 959 of 1991 in second appeal no. 552 of 1989 had been filed by present applicant to get himself impleaded as respondent in the second appeal.

7. An order came to be passed on aforesaid civil application no. 959 of 1991 on 19-03-2009 taking into account proviso to rule 5 of Order XXII of the Code of Civil Procedure, 1908 ('CPC'), referring the matter to civil judge, junior division, Osmanabad to decide the question as to who is the legal representative of deceased Yamunabai.

8. It appears that thereafter, the third joint civil judge, junior division, Osmanabad under order dated 1-10-2010 in regular civil suit no. 85 of 1983 held that the present applicant Prakash Mahadeo Gawad is legal representative of deceased Yamunabai w/o Krishna Lomte by virtue of the will. Pursuant to aforesaid, the applicant herein had been impleaded as respondent to second appeal, under order dated

14-10-2011.

9. Haridas - the appellant in the second appeal had filed an application to recall order dated 14-10-2011 passed in civil application no. 959 of 1991. The honourable single judge of this court had sent back the matter for certification purportedly taking into account rule 470 of civil manual. Under the circumstances, the matter was taken up before the district court and the district judge by order dated 08-10-2015 passed in regular civil appeal no. 171 of 1986 had set aside the order passed by 3rd joint civil judge junior division on 1-10-2010 in regular civil suit no. 85 of 1983. It is against the order dated 08-10-2015 of the District Judge present civil application has been filed challenging said order and to set aside the same.

10. I have heard the learned counsel appearing on behalf of the applicant in the present civil application in second appeal no. 552 of 1989 and the learned counsel appearing for respective respondents.

11. Learned counsel Mr. Khandare appearing on behalf of the applicant submits that against aforesaid order passed by the district judge, two proceedings were initiated, one in the form of present civil application and the other in the nature of

writ petition bearing no. 6722 of 2016. Learned counsel Mr. A. N. Nagargoje and Mr. M. V. Ghatge for respective respondents in these two proceedings viz; the civil application as well as the writ petition, concede to that rather than writ petition, it would be civil application which should be decided.

12. Mr. Khandare submits that the decision of the district judge is untenable, for, he has dealt with the matter as if it is a probate proceeding rather than confining himself to the scope of enquiry under order XXII, rule 5 of the CPC. According to him, learned judge, in fact, at many a place, has observed that the will has been legal and duly proved as required under the law, and particularly taking into account sections 59 and 63 of the Indian Evidence Act and purports to cite certain judgments in support of the same. He submits that the consideration which weighed with the district judge, namely, the place of execution to hold that the will not having been proved, is of no significance in the face of facts emerging which would clearly show that will having been executed by deceased Yamunabai. As far as scope of the present matter is concerned, the aspect of will having been proved to be executed shall receive its due for representation of the estate left behind by Yamunabi. He submits, even otherwise, for the consideration which has weighed with the

learned judge the will cannot be said to have been proved at all is extraneous and improper when there is overwhelming evidence supporting execution of the will. He submits that one thing clearly emerges even from the testimony of Mr. Murge erstwhile clerk of advocate Shinde that the will, in fact, had been contemplated and executed. It is nobody's case that the will is not executed at all. The learned judge disbelieved the same only because there is no reference to the place of execution.

13. Learned counsel Mr. Khandare has referred to quite a few decisions viz; *Kardedla Parthasaradhi vs. Gangula Ramanamma*, reported in 2014 BCI 359 (supreme court) = 2015 (3) ALL M.R. 398, *Jaladi Suguna (deceased) vs. Satya Sai Central Trust & ors.* reported in 2009 (Supp.1) Bom.C.R. 492 (Supreme Court). He further referred to a decision of learned single judge of this court in the case of *Shivraj s/o Ramji Paul-Shete vs. Prayagbai w/o Mahadu Shete*, reported in 1994 (1) Bom.C.R. 561 to support his contention that the nature of enquiry under Order XXII, rule 5 of the CPC is summary.

14. Mr. Khandare goes on to submit that as a matter of fact after receipt of decision by the third joint civil judge, junior division, Osmanabad, further reference of the matter by

learned single judge may not be proper and would not be legally tenable for the civil manual would not be able to overtake the legislative rules and the same has not been envisaged. He further submits that once a decision has been reached by the subordinate trial court and had been accepted in fact by this court, a recall of the same would not have been possible and the further action pursuant to the same had been otiose proceeding and were without any efficacy.

15. Learned counsel for the applicant, however, contends that upon determination of question of representation, suit properties may not be amenable for decision as requested by learned counsel for the respondents and for said purpose, he purports to rely on a decision of the supreme court in the case of *Jaladi Suguna (deceased) vs. Satya Sai Central Trust*, reported in 2009 (Supp.1) Bom.C.R.

16. Learned counsel Mr. Nagargoje and Mr. Ghatge appearing for respondents no. 1 and 2 respectively, however, contend that looking at the background of facts, particularly that, the plaintiffs had a real daughter by name Kantabai who is already on record in the capacity as plaintiff, the estate of deceased Yamunabai is represented through the surviving plaintiff being daughter of deceased Yamunabai and is indeed

heir in fact and in law of Yamunabai and as such her estate stands sufficiently represented requiring no further representation and much less when the will is a contested one.

17. Learned counsel further contend that even if for the sake of arguments it is assumed that the applicant has certain rights with respect to property under the contested will, yet, so long as, the will is not probated, the rights would not be capable of being asserted. They, as such, contend that it is not proper in the facts and circumstances to detain the decision in the second appeal and the same may be subject to decision on the will in appropriate proceedings.

18. Learned counsel for respondents claim that rights of the applicant would be quite safe having regard to decisions rendered by courts and particularly the one in the case of *Bhaskar Barku Tahsildar vs. Gangram Supadu Tahsildar*, reported in 2001 (3) ALL MR 166, specially paragraphs no. 6 and 7 of said decision and contend that such claimed right by itself would not able to confer any right in relation to any estate of the deceased person.

19. Learned counsel for respondents further request, decision in second appeal may not be detained, for, any rights in respect of suit properties if are accrued under the will, same can be asserted by independent proceedings and not in second appeal.

20. Perusal of impugned judgment in civil application, shows, the district judge while setting aside the order passed on 01-11-2010 by the civil judge, junior division embarked upon an enquiry treating the proceeding as if it is probate and, as if, he had been sitting in appeal over order of trial court which held the applicant to be legal representative of deceased Yamunabai, oblivious of the scope and nature of enquiry in the proceedings which had its genesis in the order of this court passed in 2009 pursuant to Order XXII, rule 5 of the CPC. The discussion, as it would emerge, by the district judge would show that it is not as much about the execution of will by Yamunabai but is about that the same is shrouded by suspicious circumstances. It would not be worthwhile, to go into the discussion by the district judge, for, he appears to have been carried away by the considerations which may not be germane in the facts, circumstances and scope and nature of enquiry as would be envisaged under Order XXII, rule 5 of the CPC. Apart from aforesaid, it would appear that learned

judge has committed error not only in appreciation but also appears had been astray on the facts on record and is quite subjective.

21. Despite the testimony of the witness attesting the will, the district judge largely depended on the deposition of Chhagan Murge who had been a person an erstwhile clerk of advocate Subhash Shinde. The learned judge was also swayed by awareness of the applicant with regard to the suit property. The attesting witness to the will, namely, Babasaheb, in quite uncertain terms, appears to have referred to that Chhagan Murge, the erstwhile clerk of advocate Subhash Shinde had written down the contents of the will and Yamunabi had accepted the same and put her signature on the will in presence of the witnesses and had asked them to attest the same and Chhagan Murge had endorsed the will and had attested it as a writer of the contents of same. Yamunabi had accordingly executed will in favour of Prakash. The district judge found that Murge had proved the will executed on 14-07-1988 and that Yamunabai died in 1990. The learned judge, however, purportedly disbelieved the execution of will, for, neither the applicant nor the attesting witness Babasaheb Lobhe has stated about the place at which it had been executed. The learned judge appears to

have excessively relied on testimony of Chhagan Murge who later on, after writing down the will had sour relationship with advocate Subhash Shinde, The learned judge appears to have readily relied on his testimony that the will had been prepared on the instructions of third person rather than Yamunabai, however, the learned judge has not given a thought to that said Chhagan Murge had severed ties with advocate Subhash Shinde. It appears that with severance of the ties of Chhagan Murge with advocate Subhash Shinde, some criminal litigation had arisen against Shri Murge. The district judge in the narration of the order has, in fact, observed that the witness has been won over by the other side. Although all aforesaid has been observed, what overwhelmed learned judge appears to be the place of executing the document. Thus, the position emerges that the will is held to be not duly proved.

22. At this stage, so far as estate of of Yamunabai is concerned, without affecting rights of either side, representation can safely be allowed in view of evidence in respect of execution of the will being not displaced by any credible material. Finding after discussion of evidence recorded by learned district judge, appears to be rather far-fetched and based on subjective satisfaction rather than

objective particularly having regard to the evidence as has been recorded which, to a large extent, shows that the will has been executed.

23. The learned judge has fallen oblivious of that these were not probate proceedings and it was not a case to decide as to whether the will can be said to have been executed under shrouded and suspicious circumstances. However, it would not be proper to comment on this aspect involved in the matter and leave the matter to be decided in other appropriate proceedings. It is open for the parties to contest the effect and consequences of the will and about the circumstances in in which it is executed, but so long as the same does not take place, it would be difficult to consider that the applicant can be kept away from the proceedings in which the properties which are appearing to be bequeathed under the will are in dispute.

24. Although the arguments by respondents sound to be quite persuasive, yet looking at the decisions so relied on, on behalf of the applicant, I do not think that arguments would be able to hold sway over the proceedings at this stage.

25. In these proceedings, though it appears that there is a contest/dispute with regard to the will, yet summary enquiry does not reveal that it is not a case wherein it cannot be said that the claim of the applicant for representation of estate of deceased Yamunabai can be absolutely discarded in view of findings recorded by the trial court as well as from discussion in the order by district court. Thus, to the extent of representation by applicant to the estate with reference to the will of deceased Yamunabai, his claim appears to be sustainable.

26. It would thus be deemed, in facts and circumstances, appropriate and expedient to grant present civil application.

27. As such, civil application stands allowed in terms of prayer clause (B) and is disposed of.

28. Needless to refer to that the observations as aforesaid while deciding present civil application have limited efficacy for decision only in civil application and have no influential and/or binding value any further and no efficacy beyond decision in civil application. The observations as above are not the findings on facts and shall not be taken into account in any other proceedings with respect to the estate of the

deceased and disputes by and between the parties.

29. It is desirable that the parties take steps deemed appropriate in right earnest.

30. In view of aforesaid, writ petition no. 6722 of 2016 stands disposed of.

31. Second appeal to proceed with accordingly.

SUNIL P. DESHMUKH,
JUDGE

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