

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3901 OF 2016**

Mr. Suresh Narayan Shewale

Petitioner

Vs

Mr. Vitthal Tukaram Harpale and

Ors.

.. Respondents

Mr.Abhijeet A.Desai, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 02/04/2016

PC:

1. Heard Mr. Abhijeet A. Desai, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 10.2.2016 passed by the learned Civil Judge, Jr. Dn., Pune below Exhibit 34 in Regular Civil Suit No.1095 of 2015. By that order, the learned trial Judge rejected the application filed by the petitioner, hereinafter referred to as 'defendant', under section 9-A of C.P.C for rejecting plaint on the ground that the Court of Civil Judge, Junior Division has no jurisdiction to entertain and try the suit.

3. Respondents, hereinafter referred to as 'plaintiffs', have instituted suit, inter alia for cancellation of sale deed dated 27.2.1968 executed by their father in favour of parents of defendant; for execution of reconveyance deed by appointing Nazar of the Court and for declaration that the plaintiffs have become owners; for declaration that the Will dated 7.7.1991

executed by defendant's mother in his favour bequeathing the suit property is illegal and is not binding on the plaintiffs.

4. During the pendency of the suit, the defendant took out application under section 9-A on 15.12.2015 at Exh.34, inter alia, contending that in respect of the Will dated 7.7.1991, the learned Civil Judge, Senior Division, Pune has granted probate on 3.8.2011. By prayer clause (d), the plaintiffs have challenged the Will dated 7.7.1991. Once probate is granted by the Court of Civil Judge, Senior Division, Court of Civil Judge, Junior Division, has no jurisdiction to entertain, try and decide the said prayer. The Court of Civil Judge, Junior Division, cannot declare the Will dated 7.7.1991 which was validly executed by late Gangubai Tukaram Shewale and which is validly proved by the defendant in the probate proceedings as illegal. By the impugned order, the learned trial Judge rejected the application.

5. Mr. Desai strenuously contended that having regard to the prayers made by the plaintiffs, it cannot be said that they have sought declaration of their title. That apart, as the probate is granted by the learned Civil Judge, Senior Division, Pune, learned Civil Judge Jr. Dn., has no jurisdiction to consider and grant prayer clause (d).

6. He relied upon the decision in the case of Smt Rukmani Devi Vs Narendra Lal Gupta, AIR 1984 Supreme Court 1866 to contend that a probate granted by a competent court is

conclusive of the validity of such will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate.

7. He also relied upon the decision of the Apex Court in the case of Kunwarjit Singh Dhillon Vs. Hardy Singh Dhillon, AIR 2008 Supreme Court 306 to contend that mere fact that probate of Will was granted by competent court in respect of property does not bar civil suit for declaration of title and permanent injunction in respect of self same property. Probate Court is not competent to decide title. He submitted that in the present suit the plaintiffs have not claimed title in respect of the suit property.

8. I have considered these submissions advanced by learned counsel Mr. Desai. I have also perused the material on record. As noted earlier, the plaintiffs have instituted suit for cancellation of sale deed dated 27.2.1968 as also for getting reconveyance deed and for declaration of their ownership in respect of suit property. In addition to these prayers, the plaintiffs have also sought declaration that the Will dated 7.7.1991 executed by late Gangubai Tukaram Shewale in favor of the defendant is bogus, forged and fabricated and, therefore illegal and not binding on the plaintiffs.

9. While considering the application, the learned trial Judge observed in paragraphs 5 and 6 that probate court is not competent to determinate the question of ownership or title of

the testator. It is further observed that the plaintiffs have raised issue of title and, therefore, the Court has jurisdiction to entertain and try the suit. The learned trial Judge further held that the issue raised in the application at Exh.34 requires full-flaged trial and there is no need to frame preliminary issue. In short, relief claimed by the plaintiffs in terms of prayer clause (d) cannot be decided on the basis of preliminary issue and the same issue can be gone into along with other issues.

10. In the case of *Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner*, (2004) 3 SCC 137, the Apex Court has observed that merely because some of the reliefs cannot be granted in the Civil Court, it would not entail an automatic rejection of the entire plaint. In other words, assuming that prayer clause (d) cannot be granted by the learned Civil Judge, Jr. Dn., in view of grant of probate by the learned Civil Judge, Sr. Dn., as also for not applying for revocation of probate, nonetheless the Civil Court cannot consider and decide the other prayers.

11. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. At the same time, while framing the issues, the learned trial Judge will frame issue as to whether the plaintiffs are entitled to relief in terms of prayer clause (d) in view of probate granted by the learned Civil Judge, Sr Dn., Pune on 3.8.2011. Subject to this, Petition fails and

the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

12. All parties including trial Court shall act on the authenticated copy of the order.

(R.G.KETKAR, J.)