

Sequeira

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

WRIT PETITION NO. 5978 OF 2013

Shri Vikas Baban Shinde & ors. .. Petitioners
Vs
Mohan Ramchandra Shinde & ors. .. Respondents

Mr.Jaydeep Deo, for Petitioners.
Mr.Madhav Jamdar, for Respondent Nos.1 to 3.
Mr.J.S.Yadav a/w Lalasaheb Bandal i/b Vilas Tapkir, for Respondent No.8.

***CORAM : N.M.Jamdar, J.
Thursday, 27 October 2016.***

Oral Order :

The Petitioners have challenged the order passed below Exhibit 128 in Regular Civil Suit No.39 of 2012 by the learned Civil Judge Senior Division Karad, dated 6 September 2012 whereby the application filed by Petitioners has been rejected.

2. The Petitioners had taken out an application below Exhibit 128 for stay of the suit on the ground that First Appeal No.1236 of 2009 and an appeal filed from probate proceedings is pending and till the decision of these appeals the suit be stayed.

3. Initially Respondents had filed a reply that Suit No.592 of 1999 to which the objection was taken to valuation and plaint was

returned and thereafter the present suit was filed on 14 October 2003 after tendering the requisite Court fee. It was also contended that the parties in these two proceedings are different. The learned Civil Judge held that Defendants in the Special Civil Suit No.15 of 2001 are parties to the present suit and it is clear that the present suit is filed prior to Special Civil Suit No.15 of 2001. Thereafter the learned Judge has quoted extract from various decisions that were cited and has rejected the application.

4. Having heard the learned counsel for the parties I am of the opinion that the learned Civil Judge has not addressed two main contentions that were raised. Firstly, there is no reference at all as to what is pending in the first appeal and how the decision in the first appeal will affect the pending suit, also the learned Judge has proceeded on the basis that the application under section 10 of Code of Civil Procedure which contemplates a stay of the suit is applicable to the present application. It is the contention of the learned counsel for Respondents that section 10 of the Code of Civil Procedure is not applicable. However, this is not the ground on which the application has been dismissed. Another facet that is completely missed is that assuming the provisions of section 10 of Code of Civil Procedure are applicable whether present suit can be considered as instituted prior in point of time. The learned counsel for Petitioners has relied on the decision of the Apex Court in the case of *Sri Amar Chand Inani Vs The Union of India – (1973) 1 Supreme Court Cases 115*, to contend

that once the plaint was returned on the ground of pecuniary jurisdiction and thereafter suit was filed with correct valuation then, it cannot be considered as continuation of the suit and the suit will have to be treated as instituted on an subsequent date. In the reply it was the contention of Respondents that the suit will have to be treated as continuation of the earlier suit. This area of adjudication is also not adverted to by the learned Civil Judge. In these circumstances, it is necessary to set aside the impugned order and restore the application filed by Petitioners for *de novo* consideration. The learned counsel for Petitioners has placed on record the roznama as is available from the e-courts website. It shows that the suit is pending since the year 2012 at the same stage.

5. The order dated 6 September 2012 is quashed and set aside. The application below Exhibit 128 in Regular Civil Suit No.39 of 2012 (Special Civil Suit No.60 of 2003) pending on the file of learned Civil Judge Senior Division, Karad is restored. The application will be decided on its own merits and what is observed above is only to draw the attention of the learned Civil Judge to the controversy and the various facets that are involved and it is not a reflection on the merits of the rival contentions. Writ Petition is disposed of on above terms.

(N.M.Jamdar, J.)