

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 13055 OF 2016

Mukesh Satpal Malhotra
And Ors.

...Petitioners

Versus

Puneet Satpal Malhotra
And Ors.

...Respondents

....

Mr.P.K. Dhakephalkar, Senior Advocate a/w. Farhan Dubash i/b.
D.B. Zaveri, Advocate for the Petitioners.

Mr.Santosh Paul, Advocate i/b. Santosh S. Musale, Advocate for
Respondents No.1 to 5.

....

CORAM : R. G. KETKAR, J.
DATE : 6th DECEMBER, 2016

P.C.

1. Heard Mr. P.K. Dhakephalkar, learned Senior Counsel for the petitioners and Mr.Santosh Paul, learned Counsel for respondents No.1 to 5, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants No.1 to 4', have challenged the judgment and order dated 17.9.2016 passed by the learned Civil Judge, Senior Division, Pune below Exhibit-1 in Special Civil Suit No.1254/2014. By that order, the learned trial Judge held that Civil Court has jurisdiction to entertain and try the suit.

3. Respondents No.1 to 5, hereinafter referred to as the 'plaintiffs', have instituted the suit *inter alia* contending that Satpal Malhotra was the father of Plaintiff No.1, defendant No.1 and defendant No.5. Satpal died on 23.7.2013 leaving behind his wife Rajinder Mohini, plaintiffs and defendants No.1 to 5. It is the case of the plaintiffs that Satpal left behind him several immovable and movable properties belonging to the joint family and most of the properties are set out in Annexure-I i.e. immovable properties. These properties are acquired with the funds of the joint family property and are, therefore, joint family properties. The plaintiffs further asserted that there was no partition effected though that is stated in the last alleged Will of Satpal dated 2.3.2007 and alleged codicil dated 15.2.2012. The plaintiffs claimed that the alleged Will is brought in existence by defendant No.1 and same is not genuine and, therefore, Satpal is deemed to have died as intestate. Plaintiff No.1 and his branch, therefore, got a share in the joint family property.

4. The plaintiffs further asserted that in the alleged Will of 2.3.2007 Satpal gave entire property to his wife Rajinder Mohini. She died on 19.3.2014. Defendant No.1 claims that she executed the Will on 7.2.2014. The plaintiffs claimed that said

Will is also a fraudulent and not a genuine Will and same is invalid and it is not her last Will. Rajinder Mohini is also deemed to have died intestate. Therefore, plaintiff No.1 gets a share in the properties left out by Rajinder Mohini. The plaintiffs instituted suit challenging both the Wills of deceased Satpal and Rajinder Mohini and for partition of joint family properties left behind by them.

5. The plaintiffs have *inter alia* prayed for declaration that the alleged Will of Satpal dated 2.3.2007 and his alleged codicil dated 15.2.2012 are illegal, null, void and fictitious and brought into existence by defendant No.1. It does not affect the rights of the plaintiffs to get share in the joint family properties; for declaration that the alleged Will of Rajinder Mohini dated 7.2.2014 is illegal, null and *void ab initio*; the same is fictitious and brought into existence by defendant No.1 and not binding on the plaintiffs and; it does not affect the rights of plaintiffs to get share in the joint family property; for declaration that the properties set out in Annexure-I and II continues to be the joint family properties of deceased Satpal and Rajinder Mohini. Plaintiff No.1 and his branch has 1/3rd undivided share in all the properties in Annexure-I and II and as such are liable to be

partitioned by metes and bounds equally amongst all the members of the family i.e. plaintiffs and defendants No.1 to 7 except defendant No.8; for passing preliminary decree of dividing and partitioning the properties by metes and bounds and hand over separate possession of plaintiffs share and plaintiff No.1's share and his branch. The plaintiffs have also claimed accounts of all the properties described in Annexure-I and II of the income, amongst other prayers.

6. During pendency of the suit, defendants No.1 to 4 filed application Exhibit-19 *inter alia* contending that by prayer clauses (a) and (b) in paragraph-29 of the plaint, the plaintiffs have challenged the Will dated 2.3.2007 and codicil dated 15.2.2012 executed by Satpal as also the Will dated 7.2.2014 executed by Rajinder Mohini. In other words, the plaintiffs are challenging the testamentary instruments. The Civil Court does not have the jurisdiction to entertain and rule on the challenge to the genuineness and legality of Will/Testamentary instruments. The prayers relating thereto are not triable by the Court for want of jurisdiction. Defendants No.1 to 4, therefore, prayed for framing of preliminary issue under Section 9A of C.P.C.. The plaintiffs filed reply Exhibit-93 resisting that

application. After hearing both sides, the learned trial Judge framed the following preliminary issue :

“Whether this Court has jurisdiction to entertain, try and decide the suit ?”

7. By the impugned order, the learned trial Judge has held that Civil Court has jurisdiction to entertain and try the suit. It is against this decision, defendants No.1 to 4 have instituted the present Petition.

8. In support of this Petition, Mr. Dhakephalkar has taken me through the Petition, averments made in the plaint as also findings recorded in the impugned order. He submitted that basically prayer clauses (c) onwards are consequential and dependent upon the findings against prayer clauses (a) and (b). He submitted that prayers (a) and (b) can be gone into only by the Probate Court. He submitted that in paragraph-12, the learned trial Judge recorded a finding that the decision upon genuineness and validity of execution of Will is province of the Probate Court. He invited my attention to paragraph-24 of the impugned order. The learned trial Judge has observed that the suit is not challenging the validity of execution of the Will but it

is with respect to the plaintiffs right and title in the suit and challenging the capacity of testators, dispositions in the Wills by both the testators. He submitted that as prayer clauses (a) and (b) can be tried only by the Probate Court, the learned trial Judge, in any case, ought to have dismissed the suit qua prayer clauses (a) and (b). He further submitted that even while deciding the application under Section 9A of C.P.C. Civil Court is empowered to reject some of the prayers and proceed with the suit with rest of the prayers.

9. On the other hand Mr. Paul supported the impugned order. He relied upon following decisions :

[i] **Ishwardeo Narain Singh v. Smt. Kamta Devi and others, AIR 1954 SC 280** and in particular paragraph-2 thereof to contend that the Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is

good or bad is not within the purview of the Probate Court.

[ii] **Chiranjilal Shrilal Goenka v. Jasjit Singh and others, (1993) 2 SCC 507**, wherein Apex Court has held that that the Probate Court does not decide any question of title, or the existence of the property itself.

[iii] **Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon and others, (2007) 11 SCC 357**, wherein Apex Court has held that the title of the testator in the properties bequeathed can be decided only by the Civil Court on evidence. A suit seeking declaration of title to certain properties on the allegations that the same were joint properties of HUF of which the plaintiff was a member and that he was the karta of the HUF and had by utilising the income from the ancestral properties acquired various properties including the suit properties, it cannot be said that the suit is not maintainable.

[iv] **Madhukar Rajanna Darbhe v. Union of India and others, 2007(5) ALL MR 339** and in particular

paragraph-9.

[v] **Ratnaprabha Digambar Nemade and ors. v. Kisan Laxmanrao Deshmukh, 2015(5) All MR 227** and in particular paragraphs-7, 9 and 10 thereof, to contend that it is not a function of the Probate Court to determine serious questions of title to the immovable property nor will the Probate Court go into the question whether the property disposed of by the Will was joint ancestral property or self acquired immovable property of the testator or to find out whether the person making the bequest of certain property had valid and legal title to dispose of the same.

10. Relying upon the decision of **Madhukar Darbhe** (supra), Mr.Paul submitted that it is not the mandate and intention of the legislature to adopt two tier system or split the reliefs by doing operation in the plaint as is suggested by Mr.Dhakephalkar. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused

the material on record. As noted earlier, the plaintiffs have come with a categorical case that Satpal left behind him several immovable properties belonging to the joint family and most of the properties set out in Annexure-I are acquired with the funds of the joint family properties, they are joint family properties. The plaintiffs have further averred that no partition was effected. Defendant No.1 has brought into existence the alleged Will of Satpal dated 2.3.2007 and alleged codicil of 15.2.2012. The plaintiffs claimed that they are not genuine and, therefore, Satpal deemed to have died as intestate. Defendant No.1 has also claimed that Rajinder Mohini had executed Will on 7.2.2014. Said Will is also not genuine and is invalid.

12. While passing the impugned order, the learned trial Judge has observed in paragraph-12 that the genuineness and validity of execution of the Will is province of the Probate Court. From paragraph-16 onwards, the learned trial Judge has referred to the assertions made in the plaint. After considering various paragraphs and in particular paragraphs-4 to 10, 13 and 23, the learned trial Judge observed in paragraph-24 that the plaintiffs are challenging the capacity of testators, dispositions made by both the testators in the Wills and codicil.

The plaintiffs are challenging validity and genuineness of dispositions made in the Will so also their title in suit properties.

13. It was further observed that from the assertions made in the plaint one cannot conclude that the suit of the plaintiffs is on the basis of Wills and codicil. The suit is instituted on the ground that the joint family properties and that the plaintiffs have share in the properties. Without there being partition, the alleged Wills and codicil were executed. The Wills and codicil came into existence due to collusion and ill-intention of defendants No.1 to 5 and 8. The learned trial Judge has further observed that if the averments made in the plaint are taken into consideration, it can be safely concluded that the suit is not challenging the validity of the execution of the Will, but, is with respect to the plaintiffs right and title in the suit properties to the capacity of both the testators.

14. Mr.Dhakephalkar submitted that prayer clauses (a) and (b) are the main prayers wherein the plaintiffs are contending that Satpal's will dated 2.3.2007 and codicil dated 15.2.2012 are illegal, null, void and fictitious and that the Will

dated 7.2.2014 of Rajinder Mohini is illegal, null and void ab-initio and same is fictitious. Prayer clause (c) onwards are the consequential reliefs. Prayer clauses (a) and (b) can be gone into only by the Probate Court and not by the Civil Court. I do not find any merit in these submissions. The learned trial Judge has considered the decision of **Madhukar Darbhe** (supra) and has observed that it is not the mandate and intention of the legislature to adopt two tier system or split the reliefs by doing operation in the plaint. In paragraph-34, the learned trial Judge reproduced paragraph-9 of **Madhukar Darbhe** (supra), which is to the following effect :

“We find that if arguments of Advocate B.N. Mohta are accepted, it would for the first time introduce a two-tier system under which a legatee or an executor would first be required to file probate proceedings and thereafter a civil suit to obtain substantive relief. Apart from arguments reproduced above, Petitioners could not point out any prejudice caused to them by continuation of existing system. Argument that judgment of Probate court acts as a judgment in rem is also of no assistance to Petitioners as question of title or other related issues are to be adjudicated in regular civil court only.”

15. In paragraph-35, the learned trial Judge has reproduced paragraphs-7, 9 and 10 of **Ratnaprabha Nemade** (supra).

16. After considering these decisions, in paragraph-38, the learned trial Judge observed that the present suit is not challenging the validity of the execution of Will but it is with respect to the title of the plaintiffs in the suit properties and challenging the dispositions made in the Wills which is the province of Civil Court and not of Probate Court. The learned trial Judge has referred to the decision of **Kanwarjit Dhillon** (supra). In my opinion, the learned Judge rightly came to the conclusion that Civil Court has jurisdiction to entertain and try the suit.

17. In the light of the aforesaid discussion, I do not find that the learned trial Judge has committed any error while passing the impugned order. Hence, the Petition fails and the same is dismissed.

(R. G. KETKAR, J.)