

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

CIVIL REVN. APPLICATION NO. 722 OF 2015

Prabhakar Murlidhar Jagtap,
R/at Nimgaon, Tal. Malegaon, Dist.Nashik. ... Applicant

v/s

Rajubai Gangadhar Jagtap,
R/at Dhandare, Tal.Malegaon, Dist.Nashik;
& ors. ... Respondents

Mr.Amey Deshpande for the applicant.

Mr.P.S.Dani, senior advocate i/by Girish Agrawal for the respondents.

Coram: N.M. Jamdar, J.

Dated: 28 September 2016

P.C.:

The Petitioner has filed petition challenging the order passed by the learned Civil Judge, Senior Division, Malegaon, dated 10 September 2015, rejecting the application filed by the Applicant under Order 7 Rule 11-D of the Code of Civil Procedure.

2 The Respondent has filed Civil Miscellaneous Application No.55 of 2014 for setting aside the order dated 30 September 2005

in Civil Misc. Application No.23 of 2003, filed pursuant to Section 263 of the Indian Succession Act. Learned counsel for the Applicant, relying on the decisions of the learned Single Judge of the Calcutta High Court in the case of *In the Goods of Ganapati Sarkar and Pradip K. Sarkar v/s Umarani Bose*¹ and the Division Bench of the Calcutta High Court, in the case of *P.P.Sharma v/s Swaran Lata*² and *Shyama Charan Baisya v/s Prafulla Sundari Gupta*³, submitted that, in the present case, in view of the earlier proceedings that have been undertaken by the Respondents, the bar of principles of *res judicata* is clearly attracted and it is impermissible for the Respondents having chosen to contest the matters on merits, to re-agitate the issue.

3 The learned Civil Judge, upon consideration of the rival contentions, has come to the conclusion that the matter requires detailed scrutiny and on the face of it, it cannot be said that the principles of *res judicata* are attracted, as the nature of the proceedings is different. The learned Civil Judge has not concluded the issue and has merely deferred the same to be considered after leading of evidence and held that *res judicata* in the present matter is a mixed question of law and fact. The learned Judge was well within his jurisdiction to take a view on the facts of the case presented before him that the issue presented is a mixed question of law and fact. Merely because another view is possible, there is no ground to invoke Section 115 of the Code of Civil Procedure. Even otherwise the view

1 1959 AIR (Cal.277

2 2008 (150) DLT 328

3 MANU/WB/0039/1915

taken is correct. Since the contentions of both the parties are kept open on this ground, no further clarification is required.

4 The civil revision application is rejected.

(N. M. Jamdar, J.)