

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.5255 OF 2015

Ratnakar Mulchand Gabhane, Ramnagar, Nagpur.

-vs-

Ramesh Moreshwar Ingle and ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri S. S. Sitani, Advocate for petitioner.

Shri A. V. Bhide, Advocate for respondent No.1.

CORAM : A.S.CHANDURKAR, J.

DATE : AUGUST 09, 2016

Heard.

The challenge in the present writ petition is to the order passed by the trial Court below Exhibit-17 whereby the application moved by the respondent No.1 under Section 10 of the Civil Procedure Code, 1908 (for short, the Code) has been allowed and the trial of R.C.S. No.1024/13 has been stayed during pendency of Spl. C.S. Nos.318/2009 and 1214/2008.

The petitioner is the original plaintiff who has filed R.C.S.No.1024/2013 seeking specific performance of agreement dated 19/03/2010. It is the case of the petitioner that one Shri Dilip Ingle had executed an agreement for sale of the suit property in favour of the petitioner. However,

said Shri Dilip Ingle expired in July 2011 after which the petitioner filed the aforesaid suit against his legal heirs which included the respondent No.1. In the said suit, the respondent No.1 filed an application under Section 10 of the Code seeking stay of the aforesaid suit on the ground that the legality and validity of the Wills dated 21/06/2004 and 17/07/2006 executed by the father of said Dilip Ingle was under challenge in Spl.C.S. No.318/2009. It was stated that the adjudication of the right of said Shri Dilip Ingle to enter into the agreement dated 19/03/2010 depended on validity of the said Wills. This application was opposed by the petitioner and by the impugned order, the trial Court allowed the said application.

Shri S. S. Sitani, the learned counsel for the petitioner submitted that the ingredients of Section 10 of the Code were not attracted in the facts of the present case. The question of validity of the Wills was not the subject matter in the suit filed by the petitioner which was a simple suit for specific performance. Merely because there was reference made in the agreement dated 19/03/2010 to the aforesaid Wills, the same would not be a reason to stay the proceedings in the said suit. Relying upon the decision of the Honourable Supreme Court in **(2013) 4 SCC 333 Aspi Jal and anr. vs. Khushroo Rustom Dadyburjor**, it was submitted that the

aspect of validity of both the Wills was not directly and substantially the matter in issue in the suit filed by the petitioner. He therefore submitted that as the requirements of Section 10 of the Code were not satisfied, the suit filed by the petitioner did not deserve to be entertained.

Shri A. V. Bhide, the learned counsel for the respondent No.1 supported the impugned order. He submitted that there were three previous suits in which the validity of the Wills dated 11/06/2004, 21/06/2004 and 17/07/2006 was under question. In another suit filed by the respondent, a Will claimed to be executed by the vendor of the petitioner was under challenge. He submitted that the respondent No.1 was the defendant in the suit filed by the petitioner being the legal heir of the vendor of the petitioner. As both the Wills were under challenge in the suit for partition and as the right of said Shri Dilip Ingle to sell the suit property depended upon the adjudication upon both the suits, the trial Court was justified in passing the impugned order.

I have heard the respective counsel for the parties at length and perused the documents filed on record. In the agreement dated 19/02/2010 on the basis of which the petitioner has filed suit for specific performance, it has been stated therein that the father of the vendor, Shri Moreshwar had executed two Wills dated 21/06/2004 and 17/07/2006

and had bequeathed the suit shop in favour of Shri Dilip Ingle. These Wills dated 21/06/2005 and 17/07/2006 were subjected to challenge by the respondent No.1 in Spl. C. S. Nos.318/2009 and 1071/2011. The respondent No.1 is also arrayed as a defendant in the suit filed by the petitioner.

In *Aspi Jal and anr.* (supra), the Honourable Supreme Court after considering the provisions of Section 10 of the Code proceeded to observe that the test for applicability of Section 10 of the Code was whether a final decision being reached in the previously instituted suit would operate as *res-judicata* in the subsequent suit. It was further observed that if the matter in controversy was the same, it was immaterial what further reliefs were claimed in the subsequent suit.

As per the provisions of Section 10 of the Code, the matter in issue should be directly and specifically in issue in the previously instituted suit. These proceedings may be between parties under whom any of them claim or are litigating for the same title.

In the present case as noted above, the Wills dated 21/06/2004 and 17/07/2006 are the subject matter of challenge in the previously instituted suit by the respondent No.1. The petitioner in his suit is seeking specific performance of the agreement dated 19/03/2010 which in turn has been executed on the basis of the Wills dated

21/06/2004 and 17/07/2006 It is therefore clear that when the respondent No.1 has challenged the execution of the aforesaid Wills in the previously instituted suits and which the petitioner is relying on the very same Wills in the subsequent suit, the matter with regard to validity of both the Wills would have direct bearing in the present proceedings. The entitlement to execute the agreement dated 19/03/2010 depends on the validity of the said Wills. The trial Court by directing the suit filed by the petitioner to be stayed till the earlier suits are decided did not commit any jurisdictional error so as to warrant interference in writ jurisdiction. Therefore, on being satisfied that the requirements of Section 10 of the Code have been duly met, I do not find any case made out to interfere in writ jurisdiction. The writ petition is therefore dismissed with no order as to costs.

JUDGE

-: C E R T I F I C A T E :-

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