

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 1161 OF 2013

Pradip Kamlakant Sulakhe ... Petitioner
Vs.
Sau. Uma Ashok Bhangare & Anr. ... Respondents

Mr. A.V. Borwankar, Advocate for the petitioner.
Mr. Sagar Kursija h/f. Mr. T.D. Deshmukh, Advocate for respondent
No. 5.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **13th June, 2017.**

P.C.:

Rule. Rule made returnable forthwith. By consent, this Petition is heard finally and decided at the stage of admission.

2. In this Writ Petition, the order dated 30th October, 2012 passed by the learned Civil Judge Senior Division, Barshi in Special Civil Suit No. 48 of 2011 below Exhibit 45 is under challenge.

3. Respondent nos. 1 and 2 and petitioner are the siblings, respondent nos. 3 and 4 are the children of the deceased sister and respondent No. 5 is the formal party who is representing. Though respondent nos. 1 to 4 are served, they remained absent throughout, hence the Writ Petition is heard in their absence.

4. The father of the petitioner and respondent No. 1, by will dated 15th January, 1999 has bequeathed the entire property in favour of the

petitioner. However, respondent No. 1/sister had knowledge of this will on 7th December, 2004 and, therefore, she filed the suit on 14th December, 2010 for partition and also challenged the execution of the will.

5. According to the learned counsel for the petitioner, respondent No. 1/original plaintiff had knowledge of the said will in December, 2004 and as she is challenging the will, the suit should have been filed within three years from the date of knowledge of the will. However, as the suit was not filed within the stipulated time, it is barred under Article 56 of the Limitation Act. The learned counsel submitted that though there is suit for partition, it all depends on the validity of the will. The period of limitation starts from the knowledge of the will to respondent No. 1/original plaintiff and therefore, the petitioner has filed an Application raising the issue under section 9A of the Code of Civil Procedure on the ground of limitation. The learned counsel further submitted that as per the ratio down by the Hon'ble Supreme Court in the case of **Foreshore Coop. Hsg. Ltd. & Ors. Vs. Pravin D. Desai and Ors., reported in 2015(3) ALL MR (SC) 951**, the learned Judge ought to have framed the issue as a preliminary issue, instead the learned Judge has rejected the Application.

6. Perused the impugned order. The learned Judge in paragraph 14 of the order had held that respondent No. 1/plaintiff had knowledge of the will on 7th December, 2004. It is further held that “when the said will is not at all binding on the plaintiff, it cannot enforce any right against the plaintiff. Therefore, the consequential relief in respect of the said will is meaningless. Thus, there is no bar of limitation.”. This finding of the learned Judge is not correct in view of the decision in the case of **Foreshore Coop. Hsg. Ltd. & Ors.** (*supra*). The learned Judge either should have framed preliminary issue under section 9A of CPC or after giving opportunity to both the parties to lead evidence should have decided the said issue. The learned Judge after recording the evidence, may accept or reject the evidence of the petitioner, however, it is required to frame the said issue at this stage.

7. I am informed by the learned counsel for the petitioner that written statements are filed and the Court has framed the issues but there is no recording of the evidence. Under such circumstances, the trial Court to frame the issue.

8. Writ Petition is allowed.

(MRIDULA BHATKAR, J.)