

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**MISCELLANEOUS CIVIL APPLICATION NO.222 OF 2016**

Arvind Bhailal Shah & Ors. ...Applicants  
(Original Defendant Nos. 1, 2 and 8)

vs.

Mahendra Bhailal Shah & Ors. ...Respondents  
(Original Plaintiff/Original Defendant Nos. 3 to 7)

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Mr. M.A. Shah, i/b. Auroma Law, for the Applicants.

Mr. R.R. Lanjekar, for Respondent No.1.

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**CORAM : S.C. GUPTE, J.**

**DATED : 30 JANUARY 2017**

**P.C. :**

. Heard learned Counsel for the parties.

2. This Miscellaneous Civil Application seeks transfer of a pending suit before the Bombay City Civil Court at Dindoshi to this Court to be heard along with Testamentary Suit No.11 of 2016. The subject matter of both suits, namely, the suit in the City Civil Court and the Testamentary Suit pending before this Court, is the estate of late Bhailal Shah and the last Will and Testament of late Bhailal. It is the case of the Plaintiff in the Bombay City Civil Court suit, who is Respondent No.1 to the present Miscellaneous Civil Application, that late Bhailal died intestate and that the suit flat, which is part of his estate, is succeeded to by the parties herein as legal heirs of late Bhailal by way of intestate

succession. On the other hand, it is the case of the Applicants herein, Applicant No.3, being the sole executrix of the last Will and Testament of late Bhailal, that late Bhailal had made a Will in respect of his estate, including the suit flat, bequeathing the property exclusively to Applicant Nos. 1 and 2 herein. The question, which directly and substantially arises in both the suits, is whether the Will set up by the Applicants herein is the valid last Will and Testament of late Bhailal. It is the Plaintiff's own case in the City Civil Court suit that the Will of late Bhailal set up by the Applicants herein (Original Defendants to the City Civil Court suit) is forged and fabricated and not binding upon the Plaintiff and a share in the property is acquired by him by intestate succession, and should be partitioned in his favour in his suit. A decision in the probate proceedings pending before this Court on the question of proof of the Will will have a direct impact on the Plaintiff's partition suit pending before the City Civil Court. It is in the interest of justice that multiplicity of proceedings be avoided by clubbing the two suits together.

3. Learned Counsel for the Applicants relies on the judgment of the Supreme Court in the case of **Nirmala Devi vs. Arun Kumar Gupta**<sup>1</sup>, as also the judgments of Kerala and Jharkhand High Courts, respectively, in the cases of **Rosamma Joseph vs. P.C. Sebastian**<sup>2</sup> and **Pushplata Prasad vs. Dilip Kumar Sinha**<sup>3</sup>. These judgments similarly considered transfer of suit and joint trial in the case of a partition suit based on intestacy and a probate case pending before another Court. The judgments clearly support the Applicants.

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1 (2005) 12 Supreme Court Cases 505

2 AIR 1996 Kerala 113

3 AIR 2007 Jharkhand 1

4. Learned Counsel for the Respondents relies on the decision of Delhi High Court in the case of **Lalit Bhatia vs. Dina Nath Bhatia**<sup>4</sup>. In that case, the Court came to the conclusion that no useful purpose would be served by tagging the probate proceeding with the partition suit, as the evidence in the probate case had already been concluded and that tagging of the two proceedings would in fact ensue delay, defeating the very scheme of law for consolidation of proceedings. These facts are clearly distinguishable from the facts of the present case.

5. Civil Miscellaneous Application is, accordingly, allowed in terms of prayer clause (a).

( S.C. GUPTE, J. )

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4 2011 (125) DRJ 432