

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

WRIT PETITION NO. 3236 OF 2017

Shri Arvind Damodar Gaidhani. ... Petitioner.

Versus

Smt. Shubhangi Nandkishor Gaidhani & ors. ... Respondents.

Mr. Girish R. Agrawal, advocate for the petitioner.

Mr. G.S. Godbole i/b. Mr. Roshan S. Tanna, advocate for respondent Nos. 1 to 3.

Ms. Asha Bhambwani i/b. Ms. Smita Gaidhani, advocate for respondent No. 5.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : NOVEMBER 7, 2017**

P.C.:

1 Heard the learned Counsel for the petitioner and the learned Counsel for the respondents.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioner herein being aggrieved by the order dated 7/9/2006 passed by the District Judge-9, Nashik in Civil Appeal No. 1 of 2007. The Petitioner herein happens to be one of the original defendant No. 2 in RCS No. 133 of 2000, which was filed by the sister-in-law and her children against the present petitioner, who happens to be the widow and children of the deceased brother of the petitioner. The suit was decreed in favour of the plaintiffs vide Judgment and Order dated 22/11/2006 and a preliminary decree was drawn. During the pendency of the appeal, the original appellant No. 1 expired. It is a matter of record that all the legal heirs were on record as defendants and therefore, it was not necessary to bring the legal heirs on record and neither the appeal would abate against the original appellant No. 1.

4 It is the case of the present petitioner that during the pendency of the suit, his deceased father had executed a Will by which it was stated that the present petitioner would be the sole legatee of the self

acquired property and the subject matter of the preliminary decree drawn by the Civil Judge, J.D., Nashik would only be upto the extent of the ancestral property. The Petitioner had placed implicit reliance upon the Will of his father. The present respondent Nos. 1 to 5 had disputed the genuineness and validity of the Will. By filing application below Exh. 155, the Petitioner had prayed for permitting him or rather asserting the right to sue the appeal in place of his father. The said application was rejected by the District Judge-6 Nashik vide order dated 18/4/2015. Being aggrieved by the said order, the Petitioner had filed Writ Petition No. 8426 of 2015 in which the Petitioner upon instructions had submitted that he would withdraw the application below Exh. 155 with liberty to file a fresh application giving specific details of the property.

5 A fresh application was filed by the Petitioner giving the details of the property of which he claims to be a legatee by virtue of the said Will. It is the contention of the Petitioner that by virtue of the said Will, he is the only legatee of the estate of the deceased and therefore,

according to him, it would not be necessary to bring the legal heirs of the deceased appellant on record and he would represent the estate of the deceased in appeal. The respondent had strongly objected to the same since the Will was disputed. It is admitted position that the appeal would not stand abated since all the legal heirs were on record. According to the learned Counsel for the Petitioner, he does not object to the status of the legal heirs but objects to their status as legal representative of the estate of the deceased on the basis of the Will. It is pertinent to note that in the fresh application also the only prayer was to assert the right to sue the appeal as an appellant and the Petitioner had not prayed that he be treated as the legatee of the appellant No.1 in the proceedings. The said learned Court i.e. the District Judge-9 had rightly considered the prayers of the petitioner in both the applications. The learned Judge had rightly considered that the appellant No. 2 had not filed an application to bring all the legal heirs on record as party to the appeal. That the learned District Judge had left the issue open even in respect of Will since he would be granted permission to sue the appeal and that right was survived only

being legal heirs of the deceased appellant. It was the claim of the Petitioner before the learned District Judge that he happens to be the beneficiary of the Will executed by the appellant No. 1 and therefore, he be granted permission to pursue the appeal in the capacity of the beneficiary of the Will in place of appellant No. 1. This ultimately amounts to predetermining the issue in respect of genuineness and validity of the said Will. The learned Court has rightly held that since the appellant No. 2 i.e. present petitioner is already one of the appellant, the said application for defending the right of the appellant No. 1 which accrued to the appellant No.2 because of the Will in favour of the Appellant No.1 cannot be allowed for the simple reason that this Court cannot consider the validity of the Will executed by the appellant No. 1.

6 According to the learned Counsel for the Petitioner, it is contended that the learned Court ought to have considered the basic issue that by virtue of the Will, the self acquired property was bequeathed upon the appellant No. 2 i.e. the present petitioner and

therefore, he would be the only legatee. The learned Counsel has placed reliance upon Order 22 Rule 4 and 5. However, the learned Counsel for the respondent has vehemently opposed the contention of the learned Counsel for the Petitioner and has drawn the attention of this Court to Order 20 Rule 18 which reads as under :

“18. Decree in Suit for partition of property or separate possession of a share therein.- Where the court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.”

7 It is also submitted that both the applications i.e. application below Exh. 155 as well as the application below Exh. 169 were restricted to the prayer seeking the right to sue the appeal and to

prosecute the appeal as legal heirs and therefore, the scope of the said applications cannot be enlarged simply on the say that on the basis of the will which is disputed, the Petitioner cannot claim to be a legatee of the estate of the deceased.

8 Taking into consideration the rival contentions of the parties, this Court is of the opinion that at this stage, Order 22 Rule 4 and 5 would have no application. That the legal heirs are on record. The Will is disputed. The Petitioner is one of the appellant in the Appeal No. 1 of 2007 and therefore, he need not file separate application seeking the right to sue the appeal in place of his deceased father. A Will by itself would not give a right to the Petitioner to claim to be a legatee of the said estate of the deceased. However, all the contentions in respect of the Will would remain open to be decided in an appeal.

9 The learned Counsel for the respondent Nos. 1 to 3 submits that the petitioner would have the liberty to produce the Will at the time

of drawing of final decree. The learned Counsel for the respondent also fairly submits that the Petitioner cannot be precluded from filing the separate suit to prove the Will.

10 In view of this, it can be said that the findings recorded by the District Court cannot be interfered with. The Petition is dismissed. Rule is accordingly discharged.

(SMT. SADHANA S. JADHAV,J)