

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

SECOND APPEAL NO. 552 OF 1989
WITH
CIVIL APPLICATION NO. 4794 OF 1993

Haridas S/o Krishna Lomte ...Appellant

Versus

Krishna S/o Lala Lomte L.Rs.
Died Yamunabai and Ors. ...Respondents

Mr. V.D. Sapkal, Advocate for holding for
Mr. Sudhir K. Chavan, Advocate for Appellant
Mr. N.B. Khandare, Advocate for Respondent No. 1A N
Mr. M. V. Ghatge, Advocate holding for Mr. R.K. Shinganpure
Advocate for Respondent No. 2

CORAM : A.M. DHAVAL, J.
DATE: 13th DECEMBER, 2018

ORAL ORDER :

1. The acceptance of compromise submitted by appellant and respondent No. 2 is strongly objected by legal heir of respondent No.1.

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2. The suit property was belonging to one Krishna. Yamuna is his wife, Kantabai is daughter from another wife. They filed Regular Civil Suit No. 85/1983 against Haridas, the present appellant for declaration that the adoption of the defendant was illegal and for perpetual injunction in the alternative for possession. The trial court held that the adoption was proved and the suit was partly allowed in respect of perpetual injunction. The

claim for declaration was dismissed. The First Appeal was filed by present appellant (original defendant) before the learned Additional District Judge. Meanwhile, original defendant Krishna, plaintiff No.1 died. The Appellate Court dismissed the appeal of Haridas and allowed the cross objections of the original plaintiffs and declared that the adoption was not valid. The decree for perpetual injunction was confirmed. Hence, the original defendant has come in appeal. Though the Second Appeal was admitted in June, 1990, no substantial question of law has been framed. Therefore, the appeal is as good as not admitted.

3. During the pendency, Yamunabai died and intervenor Prakash Mahadev Gawad was not her natural heir but he claimed that Yamunabai has executed will in his favour and by virtue of will, he claimed to be impleaded himself.

4. From the arguments advanced, it is apparent that on 19th February, 2009, this Court directed the trial Judge to hold enquiry and the parties led evidence and the trial court passed an order holding the will valid. The said order was challenged before the District Court, which reversed the finding of trial court. In the writ petition, this Court has expressed no findings and has held that the intervenor was entitled to appear as intervenor.

5. Kantabai, Plaintiff No. 3 who is daughter of Plaintiff No.1 Krishna and step daughter of Yamunabai has filed compromise terms with the present appellant. Present appellant gives up his case of adoption. Present appellant is cousin of Kantabai and as Kantabai has desire that the property should remain in the family, she agreed to transfer the suit property to Haridas for consideration of Rs. 6,00,000/-. Amount of Rs.5,00,000/- was already received by Kantabai and remaining amount was to be paid. The compromise terms were filed on 06.08.2014 and those are verified by the then Registrar in presence of the advocates for the parties.

6. Learned Advocate Mr. Khandare submits that at the relevant time, Prakash Gawad claiming under will of Yamuna was not party, he was not heard. His contention is that there was fulfledge recording of evidence for proof of will and the parties got opportunity to prove the will. The will has been proved and therefore, his client is not required to file fresh proceedings to prove the will. In this regard, he relied on ***Dashrath Kate Vs. Brij Mohan Shrivastava 2010 (1) SCC 277.***

7. Per contra, learned Advocate Mr. Sapkal for the appellant relied on ***Suresh Bansal Vs.Krishna 2010 (I) ALL***

MR 961 to submit that Mr Prakash Gawad. will have to establish his will by filing separate proceedings as observed by this Court in the Civil Application and the findings in enquiry under Order 22 Rule 5 will not operate as res judicata and final and conclusive.

8. The only point for consideration is whether the compromise can be accepted or not ?

9. The compromise terms indicate that the Appellate Court has held that the appellant is not the adopted son. The appellant is giving up his case that he is adopted son of Krishna. The second issue is about only perpetual injunction for which there are concurrent findings on the facts. Now, Kantabai, on death of Yamuna is expected to be in possession. In compromise, she is accepting that the appellant is in possession. Learned Counsel Mr. Sapkal submits that though there were findings against the appellant, there was stay to the decree of perpetual injunction by both the courts. If the respondent No. 2 Kantabai is admitting that appellant Haridas is in her possession, the issue does not survive. Kantabai and Yamunabai were held to be in possession. Yamunabai died in 1990. Therefore, Kantabai is only person concerned with the issue regarding the possession and

protection to the possession.

10. The present respondent No.1 Prakash Gawad cannot be held to be in possession by virtue of Yamunabai's will who died in 1990. So, respondent No.1 Prakash is not concerned with the decree of perpetual injunction. In second appeal, this court can deal with only the rights of the parties as determined by the trial court and the first appellate court. Prakash has raised a new ground which was not considered and which was not in existence when the trial and first appeal were in progress. This court on Yamuna's death in 1990 was called upon to consider his application as intervenor by virtue of will of Yamunabai under Order 22 Rule 5.

11. It is well settled that enquiry under Order 22 Rule 5 is of summary nature and finding therein cannot amount to res judicata. In **Suresh Bansal's** case, it is observed para No. 9 under :-

(i) The application for impleadment filed at the instance of the appellant on the basis of the Will alleged to have been executed by the deceased plaintiff must be allowed and the appellant must be impleaded in the suit along with the natural heirs and legal representatives of the deceased plaintiff, subject to grant of probate by a competent court of law.

(ii) *In our view, if at this stage, the appellant is not permitted to be impleaded and in the event an order of eviction is passed ultimately against the tenant/respondent, the tenants will be evicted by the natural heirs and legal representatives of the deceased plaintiff who thereby shall take possession of the suit premises, but if ultimately the probate of the alleged Will of the deceased plaintiff is granted by natural heirs and legal representative of the deceased. Therefore, in the event of grant of probate in favour of the appellant, he has to take legal proceeding against the natural heirs and legal representatives of the deceased plaintiff for recovery of possession of the suit premises from them which would involve not only huge expenses but also considerable time would be spent to get the suit premises recovered from the natural heirs and legal representatives of the deceased.*

(iii) *If the appellant is allowed to carry on the eviction petition along with the natural heirs and legal representatives of the deceased plaintiff, in that case decree can be passed for eviction of the tenant when the appellant shall not be entitled to get possession from the tenants in respect of the suit premises until the probate in question is granted and produced before the Court. Therefore, ultimately if the court grants a decree for eviction of the tenant/respondent from the suit premises, such decree shall be passed subject to production of probate by the appellant.*

(iv) It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order XXII Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings.

12. Mr. Khandare submits that in the present proceedings, there was enquiry and the Judgment in Dashrath Kate's case (supra) is in identical facts is applicable. On going through this Judgment, I find that the facts are quite different. In that case, suit was filed by Sakubai against her tenant. Sakubai died during the pendency of the suit and pendency of revision arising from interim relief applications. The appellant has examined himself and after due enquiry, he was added as legal heir of Sakubai by the trial court. In the light of these facts, the issue was - whether the appellant was required to prove his locus-standi again by leading separate evidence and the Apex Court held that the evidence earlier recorded under Order 22 Rule 5, which was subjected to cross-examination by the defendant can be considered for determining the locus standi. It

was held that defendant was outsider and he had no interest in property as owner. He could not have challenged the will at all. The status of the appellant was finally decided as far as the defendant was concerned. In this light, it was held that findings therein could be used in the same proceedings against the tenant at the time of final hearing of the suit.

13. In the present case, as rightly argued by learned Advocate Mr. Sapkal, there are no specific findings that the will has been proved. The trial court during the enquiry held that the will was proved. The District Court set aside the said findings and this Court in para Nos. 22 to 28 has held that he was not deciding whether the will was proved or not. It is observed as follows:-

Needless to refer to that the observations as aforesaid while deciding present civil application have limited efficacy for decision only in civil application and have no influential and/or binding value any further and no efficacy beyond decision in civil application. The observations as above are not the findings on facts and shall not be taken into account in any other proceedings with respect to the estate of the deceased and disputes by and between the parties.

14. In the light of these facts, I find no substance in the argument that the will has been proved and Prakash Gawad is not required to prove it again by filing separate proceedings.

15. By virtue of will, if proved, Prakash Gawad can claim only title and not possession. The possession will have to be claimed from Kantabai. In the light of these facts, compromise can be accepted with some modifications.

16. The compromise terms disclose that Kantabai was transferring her rights to Haridas for consideration. This can be done by her only by Sale Deed or by gift deed whatever she likes. There cannot be transfer effected by order of this Court, contrary to the provisions of the Transfer of Properties of Act. Mr. Sapkal has rightly submitted that the compromise terms need not be restricted to the dispute between the parties in the proceedings. Considering the facts, the compromise is accepted with clarification that the rights claimed by Prakash Gawad, respondent No.1 herein as heir of Yamunabai will not be affected in any way in view of this compromise. If Kantabai as a natural heir of Yamunabai transfers her own interest derived from Krishna as well as interest derived from Yamunabai to the appellant herein, it will be subject to the decision of the suit,

which respondent No.1 may file for title on the basis of will executed by Yamunabai. It is also clarified that the compromise terms will not effect transfer of the land but the parties will be at liberty to effect transfer by the legal mode. With these observations, the compromise is accepted.

17. The Appeal is disposed of as settled in terms of compromise terms.

18. Decree shall be drawn up accordingly.

19. Civil Application stands disposed of.

(A.M. DHAVALA)
JUDGE

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