

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1210 OF 2016

Kailash s/o Satyanarayan Khandal,
Age-59 years, Occu-Business,
R/o Ambedkar Chowk,
Hingoli

-- PETITIONER

VERSUS

1. Vijaykumar s/o Satnarayan Khandal,
Age-65 years, Occu-Business,
R/o Royal Residency, Pushpa Nagari,
Aurangabad,
2. Santoshkumar s/o Satnarayan Khandal,
Age-56 years, Occu-Business,
R/o Laxmi Vyankatesh,
Ward No.15, House No.280/3,
Jamdade Mala, Parshwanath Colony,
Ichalkaranji, Dist.Kolhapur,
3. Jagdish s/o Satnarayan Khandal,
Age-50 years, Occu-Business,
R/o Gulab Bhavan, In front of Parashar Bank,
Indore (MP),
4. Jyoti w/o Sunil Khandal,
Age-39 years, Occu-Household,
R/o Vijay Kirana Stores, Gorkshan Road,
Akola, Through G.P.A.
Rajendra s/o Satyanarayan Khandal,
Age-55 years, Occu-Business,
R/o Anmol Complex, Ganesh Colony,
Nagpur Road, Wardha,
District Wardha.
5. Rajendra s/o Satnarayan Khandal,
Age-56 years, Occu-Business,
R/o Anmol Complex, Ganesh Colony,
Nagpur Road, Wardha,

District Wardha,

6. Bhumika d/o Sunil Khandal,
Age-23 years, Occu-Education,
R/o Jay Bhole Kirana Shop,
Gorakshan Road, Akola,
District Akola,
7. Satnarayan s/o Chothmal Khandal,
Age-84 years, Occu-Nil,
R/o Ambedkar Chowk, Hingoli,
8. Parwatibai w/o Satnarayan Khandal,
Age-80 years, Occu-Household,
R/o Ambedkar Chowk, Hingoli
9. Pushpadevi w/o Satnarayan Khandal,
(Deleted)
Age-64 years, Occu-Household,
R/o Marwadi Galli, Maheboobabad,
Taluka Maheboobabad,
District : Warangal (AP)
10. Padmawati w/o Dwarkadas Sharma,
(Deleted)
Age-60 years, Occu-Household,
R/o A-2, Sara Garden, Behind Sharolet
Showroom, Mukundwai,
Aurangabad,
11. Leeladevi w/o Nandkumar Ghan,
Age-56 years, Occu-Household,
R/o A.P.Patel and Company,
Near Ambedkar Chowk, Hingoli,
Dist.Hingoli

-- RESPONDENTS

Mr.S.S.Gangakhedkar, Advocate for the petitioner.
Mr.D.M.Shinde, Advocate for respondent Nos. 1 to 6.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 15/01/2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is the original defendant challenging the order of the Trial Court dated 08/10/2015 by which application Exh.49 has been rejected to the extent of proper valuation of the suit property and deficiency in payment of court fees.

3. I have considered the strenuous submissions of the learned Advocate for the petitioner and the learned Advocate on behalf of respondent Nos. 1 to 6 who are the original plaintiffs. Reliance is placed upon an affidavit filed by them. Respondent Nos.7 and 11 have not entered an appearance despite service of court notice. Respondent Nos. 9 and 10 have been deleted under the leave granted by this Court on 29/07/2016.

4. Upon considering the strenuous submissions of the litigating sides and on perusing the record available, there is no dispute that the 6 respondents herein preferred Spl.Civil Suit No.70/2011 seeking the relief of mandatory injunction or alternatively, partition and

separate possession in respect of the property mentioned in Schedule A and B filed with the plaint, to the extent of 1/8th share for each of the plaintiffs, declaration to the effect that the sale deed executed by defendant No.1 in favour of defendant No.3 (the petitioner herein), bearing Day Book No.4301/2011 dated 30/08/2011 is not binding on the plaintiffs to the extent of their shares and further reliefs in connection with the suit property.

5. There is no dispute that plaintiff No.4 Jyoti is the daughter in law of defendant No.1 whose husband Sunil has passed away. It is equally undisputed that the suit property includes 2 vacant plots and one house property.

6. The first issue raised by the petitioner is that Section 6(v) of the Maharashtra Court Fees Act would be applicable in this case. The Trial Court, by the impugned order, has concluded that Section 6(vii) would become applicable which means that even the explanation thereto would have its effect.

7. There can be no dispute that Section 6(v) would apply to suits where land, houses and gardens are a subject matter and the claim put forth is purely for seeking possession of the said suit properties.

Section 6(vii) pertains to a suit for partition and separate possession of a share of the joint family property or of joint property or to enforce a right to a share in any property on the ground that it is a joint family property. The explanation there below deals with properties in which a share is sought and which consists of any land assessed to land revenue for the purpose of agriculture. It is undisputed that the two vacant plots are not such portions of land that are assessed to land revenue for the purpose of agriculture. They are NA plots. In this backdrop, the conclusion of the Trial Court in the impugned order that Section 6(vii) would be applicable, cannot be termed as being perverse or erroneous.

8. The other issue that survives in this petition is with regard to whether plaintiff No.4 can be subjected to payment of court fees. The Trial Court, by the impugned order, has concluded that plaintiff No.4 is exempted from payment of court fees in the light of the GR dated 01/10/1994 and 23/03/2000 issued by the State of Maharashtra with reference to the Bombay Court Fees Act, 1959 which is now known as the Maharashtra Court Fees Act.

9. It requires no debate that a lady litigant who is litigating in a matrimonial dispute, would be exempted from the payment of court

fees even if it is in connection with maintenance or her property right or violence or divorce. It also requires no debate that the GR dated 23/03/2000 was introduced by the State, having a clarificatory character, for describing property disputes to be exempted from the exemption granted under the first GR dated 01/10/1994 in relation to women litigants.

10. The learned Advocate for the petitioner has relied upon the judgment of this Court in the matter of Prabhakar Dayaram Narkhede Vs. Vijaya alias Shakuntala G. Chaudhari [2007(2) Mh.L.J. 175] and Shehala Pramod Desai Vs. NIL [2012 (5) MH.L.J 340 = 2012 AIR (Bom) 168 = 2012(5) Bom.C.R.875] to support his contention that save and except a matrimonial dispute, a lady litigant who is litigating for partition and separate possession so as to earn her share in the suit property with no semblance of a matrimonial dispute, cannot be exempted from payment of court fees. He also relies upon the Division Bench judgment of this Court in the matter of Girish Kanaiyalal Munshi Vs. Nil [AIR 2008 Bombay 136]. Learned Advocate for the original plaintiffs has relied upon the judgment in the matter of Kiran Chunnilal Talreja and another Vs. Ramchandra Devidas Talreja and another [2009 (Supp.1) Bom.C.R. 567].

11. It is clear that the judgments delivered in the matter of Prabhakar, Shehla and Kiran (supra) have been delivered by the learned Single Judges of this Court. I am relying upon the view taken by the learned Division Bench in the matter of Girish (supra), wherein the assistance of the Advocate General of the State of Maharashtra was taken.

12. For better appreciation of the matter in hand, I deem it appropriate to reproduce paragraph Nos. 8 to 15 from Girish (supra) hereunder :-

“8. Referring to the explanatory Notification of 23/03/2000, the Learned Single Judge D.K.Deshmukh, J. held that:

a) The purpose of this 2nd Notification was to define the term ‘property disputes’.

b) The Notifications issued by the government on 1/10/1994 and 23/03/2000 are instances of conditional legislation and not delegated legislation. This is because when an Act of Parliament gives power to the Executive to bring an act into force or to the Government to exempt person or property from operation of the enactment, the power conferred in such a situation on the Executive or the Government is an instance of conditional legislation.

c) In view of the above, it is pertinent to note the judgment of the Constitution Bench of the Supreme Court in the case of Jalan.

Trading Co. Pvt. Ltd. v. Mill Mazdoor Sabha , wherein it was held that the power bestowed upon the Government under Section 36 of the Payment of Bonus Act, 1965, of exempting an establishment or a class of establishments from operation of the Act, amounts to conditional legislation and is not void.

d) The Learned Single Judge held that as the two Notifications are pieces of conditional legislation, the well settled principles of interpretation of statutes would apply to them.

e) The Learned Single Judge further held, that insofar as the principles governing the interpretation of a Notification granting exemption from payment of tax or fee is concerned, they have been laid down by the Supreme Court in its judgment in the case of Union of India and Ors. v. Wood Papers Ltd. and Anr. , wherein the Court observed that when the question is whether a subject falls in the notification or in the exemption clause, then it being the nature of exception, is to be construed strictly against the subject, but once the doubt about the applicability is lifted and the subject falls in the notification, then it calls for a wider and liberal construction.

f) In view of the aforementioned judgment, the Learned Single Judge, in the present case, held that when the question to be decided is whether a litigant falls in the category which is entitled to exemption, the Notification ought to be strictly construed since it is in the nature of an exception made to a general rule.

g) The Learned Single Judge concurred with the view expressed by the Supreme Court in the case of Commissioner of Income.

Tax, Gujarat v. Cellulose Products of India Ltd. , so far as the principle governing interpretation of fiscal statutes is concerned, and observed that a perusal of the definition of 'property disputes' as found in the 2nd Notification dated 23/03/2000 is so clear that it does not admit any doubt and therefore there is no question of placing any interpretation or construction on that provision.

9. The Learned Single Judge Deshmukh, J. further observed that:

a) While holding an enquiry to find out what kind of litigation filed by women litigants is exempted from payment of court fees, it is necessary to examine the situation existing at the time when the 2nd Notification dated 23/03/2000 was issued.

b) This Notification was issued as a result of various judgments of this Court wherein the term 'property disputes' was given a wide interpretation.

c) It is well established that the Notification dated 23/03/2000 is an amendment Notification. In view of this, it is imperative to note to the judgment of the Privy Council in the case of *D. R. Fraser & Co. Ltd v. The Minister of National Revenue* AIR (36) 1949, wherein the Privy Council observed that, 'When an amending act alters the language of the principal statute, the alteration must be taken to have been made deliberately'.

d) Therefore the 2nd Notification was issued with the intention of changing the then existing situation and if despite the amendment the situation continues to be the same, the amendment would be an exercise in futility.

10. In the case of *Bipin Dalpatbhai Shah v. Vasantben Rasilal Zaveri* 2001(4) All MR 1, the Learned Single Judge referred to the liberal interpretations given to the Notification of 1/10/1994 by K.G. Shah J, Gokhale J. and Nijjar J. in matters decided prior to 23/03/2000 (ie. The date on which the 2nd Notification was issued) and held that in relation to a testamentary petition filed by a woman, she would be remitted from payment of court fees insofar as she is the beneficiary in the estate of the deceased.

11. It is vital to note that the learned Single Judge in the case of *Bipin Dalpatbhai Shah v. Vasantben Rasilal Zaveri* did not take into consideration the change that the Government wanted to bring about by issuing the 2nd Notification and that the decisions that were relied on in the judgment were ones rendered before the 2nd Notification was issued and as such should not have been relied upon after the 2nd Notification was issued.

12. In *Ramila Rajnikant Kilachand v. Harsh R. Kilachand and Ors.* 2004(6) Bom. C.R. 75, the Learned Single Judge held that;

i) The term 'matrimonial matters' as referred to in the Government Notification dated 23/03/2000, includes even such a dispute wherein the husband may not be a party.

ii) The terms 'arising out of' and 'concerning' matrimonial matters are used not with the intention to restrict but with that of giving a wider meaning to the same.

iii) If a woman files a suit for her share in the property of her deceased husband, she is entitled to claim compensation from payment of court fees as such a suit falls within the ambit of

'matrimonial matters'

13. The Learned Single Judge D.K.Deshmukh,J. in the present case, perused through the aforementioned judgment and held that:

i) In order for a dispute to be qualified as one 'arising out of or concerning matrimonial matters', the dispute must necessarily be between parties who are parties to the marriage.

ii) In the absence of the definition of 'matrimonial matters' in either the Notification or the Bombay Court Fees Act (1959), a useful reference may be made to the explanation of the same appearing in Sub-section 1 of Section 7 of the [Family Courts Act](#), a perusal of which makes it clear that, all matters in relation to which the Family Court has jurisdiction, are matters arising out of disputes between the parties to the marriage.

14. With reference to a petition filed for probate of a Will, the Learned Single Judge D.K. Deshmukh,J. was of the view that:

a) Such a petition is never a petition in relation to any dispute concerning any property but is in relation to the validity or otherwise of a Will and can by no stretch of imagination be termed as a petition 'arising out of or concerning matrimonial matters'

b) A testator can name any person, who may or may not be his widow or his relative, as an executor of his Will and therefore merely because in a Will the widow has been named as the executor, would not entitle her to exemption from payment of court fees.

c) In a probate petition, a dispute will arise only if somebody files a caveat, however at the time when liability to pay court fees arises in a probate petition, nobody can say with any amount of certainty that a dispute will arise in that petition, and hence a petition filed by a woman for probate of a Will, will not enjoy exemption from payment of court fees.

d) Contrary to the argument advanced before this Court on behalf of the petitioners, that a petition for probate of a Will arises out of matrimony, such a petition filed under the [Indian Succession Act](#) actually arises out of death and not matrimony.

15. The Learned Single judge D.K.Deshmukh,J. disagreed with the view taken by the Learned Single Judge in the case of Dr. (Mrs.) Geeta S. Naik, dated 26/06/1996, wherein it was held that a woman litigant is exempted from payment of court fees for a petition filed to protect her property right. In view of the aforementioned decision, the Learned Single Judge D.K.Deshmukh,J. in the present case held that:

a) The Learned Single judge in the case of Dr. (Mrs.) Geeta S. Naik, made no attempt to examine the intention of the Government by reading into the operative part of the Notification and in the circumstances, when construing the words of the Notification on their plain simple meaning did not lead to an absurd or unreasonable interpretation, there existed no necessity to refer to the preamble of the said Notification.

b) Furthermore, the Learned Single Judge in the aforesaid case ought to have considered that it is a settled law that in a probate petition, right to property or title to any property is never decided

by the testamentary Court. This view has also been upheld by the Supreme Court in the case of Ishwardeo Narain Sing v. Smt. Kamla Devi AIR 1954.

c) A perusal of another judgment of the Supreme Court in the case of Delhi Development Authority v. Mrs. Vijaya Gurshaney and Anr. wherein the Supreme Court held that a testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will and grant of a probate or Letters of Administration does not confer title to property, clearly elucidates the fact that in a probate petition, there can never be any dispute relating to property but only a question relating to the validity of the Will.”

13. While dealing with the issue, as to whether the definition or meaning of a 'matrimonial dispute' could be expanded to include all matrimonial matters, the Advocate General was called upon to make his submissions before the learned Division Bench. His submissions are reproduced in paragraph No.25 which read as under :-

“25. As per our request, the learned Advocate General Mr.Ravi Kadam, very ably assisted the Court, with regard to interpretation of the aforesaid Government Notification as under:

a) It was as a result of various decisions of this Court wherein the term 'property disputes' was given a wide interpretation, that the Government issued the explanatory Notification dated 23/03/2000, as an amendment to the Notification dated 1/10/1994, to clarify that the words 'property disputes' would be

restricted to those arising out of and concerning matrimonial matters.

b) Thus it is clear that the intention of the 2nd Notification was to change the then existing Notification, and if despite the amendment, the situation continues to remain the same, then the amendment would be an exercise in futility.

c) Therefore it is imperative that the Notification and in particular the words 'arising out of and concerning matrimonial matters' be construed literally in their clear and ordinary meaning so that the ambit of the words 'property disputes' is not interpreted in such a wide manner which would be contrary to the intention of the Government behind issuing the Notification.

d) In reference to the judgment of Dharmadhikari J. in the case of Ramila Rajnikant Kilachand v. Harsh R. Kilachand and Ors. (Supra), relied upon by the Petitioners, the Learned Advocate General stated that:

i) The words 'matrimonial matters' arising in the Government Notification of 23/03/2000, which connote only cases of disputes between the parties to a marriage, cannot be replaced by the wider term 'matrimonial relationship'.

ii) The Learned Single Judge erred in interpreting the law viz. the Notification, in a manner as it 'ought to be' and not what 'it is'

e) Lastly, petitions relating to testamentary matters arise not out of a matrimonial matter, but out of death.

f) In the circumstances petitions filed by a widow for probate of her deceased husband's Will, will fall outside the purview of the

Notifications granting exemption from payment of court fees.”

14. After considering the rival contentions of the litigating sides and the submissions put forth by the Advocate General, the learned Division Bench concluded the issue in paragraph No.26, which reads as under :-

“26. After hearing the learned Senior Counsel Dr.Tulzapurkar and the learned Advocate General and in light of the extensive arguments forwarded on behalf of the Petitioner and the State, the various judgments of this Court regarding the exemption from payment of court fees by women litigants and several other relevant judgments of this Court and the Hon’ble Supreme Court, the following issues can be clearly outlined.

A) The intention of the Government behind issuing the 2nd Notification 23rd March,2000.

a) The Notification dated 23/03/2000, which qualified ‘property disputes’ as disputes arising out of and concerning matrimonial matters, was issued as a consequence of various judgments of this Court wherein the term ‘property disputes’ was given a wide interpretation.

b) The Notification dated 23/03/2000 is in the form of an amendment Notification. In view of this, it is pertinent to note the reference made by Deshmukh J. in his judgment of 4/06/2007, to the judgment of the Privy Council in the case of D. R. Fraser & Co. Ltd v. The Minister of National Revenue AIR (36) 1949, wherein the Privy Council has observed that, ‘When an

amending act alters the language of the principal statute, the alteration must be taken to have been made deliberately'.

c) The 2nd Notification was issued with the intention of changing the then existing situation and if despite the amendment the situation continues to be the same, the amendment would be an exercise in futility.

d) Hence the intention of the Government behind issuing the 2nd Notification is amply clear from plain simple interpretation of the words of the Notification themselves, that the term 'property disputes' would be restricted to only those concerning or arising out of matrimonial matters and would hence exclude petitions filed for probate of Wills.

B) Interpreting it widely would go beyond the intent of the Government

a) Notwithstanding the fact that the Notification exempting a certain class of women from payment of court fees is a beneficial piece of legislation, an extended meaning to the words 'property disputes', would tantamount to indulging in exercise of legislation Page 1539 in the garb of interpretation. A similar view was taken by Palkar J. in his judgment in the case of Smt Ashabai w/o Shivaji Shiral and Anr v. The Executive Engineer, MSEB 1999(2) Bom CR 194.

b) A petition for probate of a Will is neither a petition in relation to any 'property dispute' nor does it 'arise out of or concern a matrimonial matter.'

c) A petition for probate of a Will is never a petition in relation to

any dispute concerning any property but is in relation to the validity or otherwise of a Will. The judgment of the Supreme Court in the case of [Delhi Development Authority v. Mrs. Vijaya Gurshaney and Anr.](#) AIR 2003 SC 3669, which Deshmukh J. referred to in his judgment of 4/06/2007 clearly brings to light the aforementioned view, wherein it was held that a testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will and grant of a probate or Letters of Administration does not confer title to property.

d) As rightly contended by the Learned Advocate General, Mr.Ravi Kadam, on behalf of the state, testamentary cases do not arise out of matrimonial matters but rather arise out of 'death'.

C) Furthermore it is pertinent to differentiate between matrimonial matters and matrimonial relationship as the two terms are not synonymous and hence the term 'matrimonial matters' arising in the Notification of 23/03/2000 cannot be replaced by 'matrimonial relationship' so as to bring a petition filed by a widow for probate of her deceased husband's Will, within the ambit of the Notification.

D) Lastly, the words 'property dispute arising out of or concerning matrimonial matters' should be given their plain and simple meaning, that is, a dispute arising between parties to a marriage, (attention may be brought to the reference made by Deshmukh. J. to the [Family Courts Act Sub-section 1 Section 7](#), to elucidate the meaning of the term 'matrimonial matters') and

should therefore exclude testamentary petitions wherein not only is there an absence of a dispute, other than in cases when somebody files a caveat, it is not a matter between two parties to a marriage.”

15. Learned Advocate for the plaintiffs, in the matter in hand, has contended that since the husband of plaintiff No.4 has passed away, her claim for partition and separate possession can be considered to be a matrimonial dispute since she would not have been required to litigate if her husband would have been alive or would have apportioned his share to her before his death. This contention finds an answer in the conclusions of the learned Division Bench in the Girish Case (supra) in paragraph Nos.26(B)(d), (C) and (D). It is concluded that even testamentary cases with regard to the death of the husband would not come within the meaning of 'matrimonial dispute'.

16. Considering the law laid down in Girish case (supra) and which was not cited before the Trial Court thereby depriving the Trial Court of proper assistance by the litigating sides, the conclusion of the Trial Court that plaintiff No.4 would be exempted from payment of court fees, deserves to be set aside.

17. As such, this petition is partly allowed. The impugned order dated 08/10/2015 is partly set aside only to the extent of plaintiff No.4 Jyoti who would now be liable to pay court fees on the claims put forth in the suit. Application Exh.49 is therefore partly allowed to that extent and Rule is made partly absolute accordingly.

(RAVINDRA V. GHUGE, J.)