

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CIVIL REVISION APPLICATION NO.66 OF 2018

Chandrakant s/o Sambaji Shende,
aged about 63 years, Occ. Retired Teacher,
Agriculturist and Ration Shop owner,
R/o Gandhi Ward, Warora, Tah. Warora,
District Chandrapur

And ors.

... Applicants

-vs-

Dashrath s/o Sambhaji Shende,
(Original Name : Dashrath Uddhav Ramteke)
Aged about 45 years, Occupation : Service,
Nagar Parishad Office, Warora, Tahsil Warora,
District Chandrapur.

... Non-Applicant

Smt D. R. Muley, Advocate for applicant.
Shri A. S. Dhore, Advocate for non-applicant.

CORAM : A.S.CHANDURKAR, J.
DATE : October 30, 2018

P.C.

The applicants are the original plaintiffs who are aggrieved by the order passed by the trial Court below Exhibit-74 rejecting the said application that was moved under provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 read with Section 11 of the Code seeking dismissal of the counter-claim as filed.

2. The plaintiffs had filed suit for declaration that they were the owners of the suit property described in paragraph 2 of the plaint. Further prayer for possession along with damages had been made. In that suit the non-applicant herein filed his written statement and also raised a counter-claim. In that counter-claim he sought 1/8th share in the suit property. The plaintiffs sought dismissal of the counter-claim on the ground that in the earlier adjudication in Succession Case No.12/1999 it had been held that the plaintiff No.1 was entitled to be issued a letter of administration with regard to the property of Sambhaji Shende. It was therefore not permissible for the non-applicant to claim to be a legal heir of said Sambhaji Shende. Another ground raised was that the non-applicant had filed R.C.S. No.51/1989 against the present applicants and hence the subsequent proceedings were barred by principles of res judicata. The trial Court rejected that application by observing that said aspect could be considered after the evidence was led by the parties.

3. It is submitted by the learned counsel for the applicants that in the light of earlier adjudication in the succession case wherein it has been held that the plaintiff No.1 alone is entitled to the letter of administration, it was not open for the non-applicant to claim 1/8th share in the suit property on the basis of being a legal heir of Sambhaji Shende. It was further submitted that the earlier civil suit having been dismissed and no steps

having been taken for its restoration, the counter-claim was barred by principles of *res judicata*. It was submitted that without considering these aspects, the trial Court wrongly rejected the application.

3. The learned counsel for the non-applicant supported the impugned order. He submitted that the proceedings for grant of letter of administration were summary in nature and rights of the parties have to be adjudicated in the civil suit. Similarly, the earlier suit was for injunction simplicitor and it was not decided on merits. Hence the counter-claim was liable to be entertained on merits.

4. On hearing the learned counsel for the parties it is found that the trial Court did not commit any jurisdictional error in rejecting the application below Exhibit-74. The proceedings for grant of letter of administration were only for having entitlement to the deposits of Sambhaji Shende in the bank. The question whether the non-applicant is a legal heir of Sambhaji Shende would be a matter to be tried on the basis of evidence of the parties. Similarly, the earlier suit having been dismissed for want of prosecution, there is no adjudication on merits. The trial Court has rightly observed that these aspects could be considered after the parties lead the evidence. No jurisdictional error is thus found. Thus by observing that it is open for the applicants to raise all permissible defences before the trial Court which

shall be considered in accordance with law and by clarifying that observations made in this order are only for deciding the present proceedings, the Civil Revision Application stands dismissed with no order as to costs.

JUDGE

Asmita