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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.643 OF 2018

Rajaram Tanaji Kumbhar & Ors.	..Applicants.
V/s.	
Balvant Rau Kumbhar	..Respondent.

Mr.Sandeep S.Koregave for the applicants.

Mr.Manoj Patil for the respondent.

CORAM : M.S.SONAK, J.

DATE : APRIL 10, 2019

P.C.:-

Heard Mr.Koregave, learned counsel for the applicants and Mr.Patil, learned counsel for the respondent.

2. Challenge in the application is to the order dated June 19, 2018 made by learned District Judge, Kolhapur in Regular Civil Appeal No.120/2015 instituted by the respondent therein.

3. By the impugned judgment and order, learned Appeal Court has set aside the judgment and order dated January 29, 2015 in Misc. Civil Application No.296/2012 made by the Second Joint Civil Judge, S.D. Kolhapur by which the learned trial Judge had granted probate in favour of the applicant.

4. Mr.Koregave, learned counsel for the applicants submits that learned District Judge had no jurisdiction to entertain Regular Civil Appeal No.120/2015 against the grant of probate by learned trial Judge. Mr.Koregave clarifies that it is not as if he is giving up any challenge on merits but points out that the impugned judgment and order is, for the present required to be set aside only on the ground that learned District Judge had no jurisdiction to entertain the appeal. In support of his contention, he relies upon the decision of a Division Bench of this Court in '*Smt. Nola Jonathan Ranbhise V/s. The Union of India & Ors.*'¹ on an identical issue.

5. Mr.Patil, learned counsel for the respondent agrees that the issue now raised by Mr.Koregave stands covered by the decision of the Division Bench of this Court in *Smt. Nola Jonathan Ranbhise (supra)*. However, Mr.Patil submits that the said decision is *per incuriam*, because, it failed to note the most crucial words in section 217 of Indian Succession Act, 1925 which are as follows:-

“ Save as otherwise provided by this Act or by any other law for time being in force”

6. Mr.Patil submits that section 217 is part of Chapter 9 of the Act of which section 299 is a component. He submits that from the

¹ 2014(4) All MR 181

reading of the opening words of section 217 of the Act, it is quite clear that in case of any conflict between the provisions of Indian Succession Act and the Bombay Civil Courts (Amendment) Act, 1912, it is the latter which will prevail. He submits that this provision was not noticed by the Division Bench, therefore, the Division Bench judgment is *per incuriam*. He relies on the judgment of the Supreme Court in *Jayant Verma and others V/s. Union of India and others*² to point out that if the judgment is *per incuriam*, then, the same will not be binding.

7. Mr.Patil has pointed out that as against the decision of *Smt. Nola Jonathan Ranbhise (supra)*, special leave has already been granted by the Hon'ble Supreme Court on October 27, 2014.

8. At this stage, based upon the provisions of section 217 of the Indian Succession Act, 1925, it is not possible to hold that the decision of the Division Bench is *per incuriam* and, therefore, should not be followed. The Division Bench has considered in some details the provisions of the Indian Succession Act. It is not as if the decision proceeds without consideration of the provisions of the Indian Succession Act. In fact, there is a reference to the provisions of Indian Succession Act as well as Bombay Civil Courts (Amendment) Act. Accordingly, it is not possible to accept the contentions based upon *per incuriam*.

² (2018) 4 Supreme Court Cases 743

9. The issue stands admittedly covered by the decision in *Smt. Nola Jonathan Ranbhise (supra)*, which is a decision of the Division Bench. The decision binds me since, till date the same has neither be set aside nor even stayed by the Hon'ble Supreme Court though the Special Leave against the same has been granted. Therefore, following the decision of *Smt. Nola Jonathan Ranbhise (supra)* the impugned judgmentr and order made by the District Court lacks jurisdiction to entertain the appeal. The appeal should have been instituted in this Court in terms of the decision of the Division Bench in *Smt. Nola Jonathan Ranbhise (supra)*.

10. However, setting aside of the impugned judgment and order will not preclude the respondents from instituting an appeal in this Court since in *Smt. Nola Jonathan Ranbhise (supra)*, it has been held that the proper forum for instituting the appeal against an order granting a probate will be this Court and not the District Court.

11. Accordingly, this revision application is allowed. The impugned judgment and order dated June 19, 2018 passed by the learned District Judge-7, Kolhapur is set aside, not on merits but on the ground that the District Court lacked jurisdiction to entertain the appeal.

12. It is once again made clear that the setting aside of the

impugned order will not preclude the respondent from instituting an appeal against the judgment and dated January 29, 2015 passed by the trial Judge, before this Court in terms of the decision in the case of *Smt. Nola Jonathan Ranbhise (supra)*.

13. In the facts of the present case, there shall be no order as to costs.

14. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)