

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 806 OF 2019

Sau. Ujwala S. Pagar .. Petitioner
vs.
Digambar R. Mahale (Shimpi)
(Deceased through L.Rs. and ors.)
and ors. .. Respondents

Mr. G.R. Agrawal a/w. Mr. Sachin Padaye for the Petitioner.
Mr. Satyajeet H. Joshi for Respondent No.2
Mr. S.D. Kadam for Respondent No.4.

CORAM : M. S. SONAK, J.
DATE : 9 APRIL 2019.

ORAL JUDGMENT :-

1] Heard Mr. G.R. Agrawal for the petitioner. He states that service is effected upon all the respondents and even affidavit of service is filed.

2] Mr. Satyajit Joshi appears for respondent No.2, at whose behest, the impugned order dated 19th October 2018 came to be made. Mr. Sachin Kadam appears for respondent No.4.

3] Rule. Rule is made returnable forthwith, with the consent of and at the request of learned counsel appearing for respondent Nos.2 and 4. In fact, respondent No.2 is the contesting respondent.

4] The challenge in this petition is to the order dated 19th October 2018. The operative portion of which reads thus:

“The application is allowed as follows:

(i) Judgment debtor no.2 and legal -heirs of judgment debtor no.1 shall provide the names of private handwriting expert having necessary qualification and experience in the field.

(ii) After getting consensus of the decree holder and the judgment debtors upon the name of handwriting expert, the Wills of deceased judgment debtor no.3 be sent for expert opinion alongwith contemporaneous documents having admitted signatures of judgment debtor no.3.

(iii) Before sending the documents to the expert, judgment debtor no.2 and legal-heirs of judgment debtor no.1 shall get approximate quotation or expenses from the concerned handwriting expert and those shall be deposited int eh court. After compliance of the above order, letter be issued to the concerned handwriting expert for his opinion as to the signatures of deceased judgment debtor no.3 on the Wills.”

5] The record indicates that during pendency of the suit or for that matter even during pendency of most of the execution proceedings, there was never any objection raised that the Will dated 10th January 2012 does not bear the true and correct signature of the deceased. It was only the execution proceedings were at its conclusion that respondent No.2 raised such objection and applied for having the Will send to Handwriting Expert for his opinion. On the basis of

this application, the aforesaid impugned order came to be made.

6] The record indicates and in fact, even the impugned order takes cognizance of the fact that the deceased had filed an affidavit in the Court confirming that he had in fact signed and executed the Will dated 10th January 2012. Besides, the deceased had also filed an affidavit in the execution proceedings, stating that share should be given to the petitioner who was her daughter. According to me, this material was sufficient to conclude that the Will was indeed executed by the deceased. In any case, such an issue could not have been raked up almost at the conclusion of execution proceedings. If respondent No.2 was indeed serious about this contention, it is reasonable to proceed on the basis that some proceedings have been taken out by respondent No.2 in respect of Will which was registered in the year 2012. Thereafter, it was accepted that atleast some issues in this regard should have been raised during pendency of the suit. Such a suit was not even raised during most part of the execution proceedings.

7] Mr. S.H. Joshi, learned counsel for respondent No.2, however, submits that no prejudice will be caused to the petitioner if the impugned order is allowed to stand. He submits that depending upon the opinion of the Handwriting Expert, the parties can always be granted an opportunity to contest such opinion. He points out that if the Executing Court was of the view that the opinion of the Handwriting Expert is necessary, it cannot be said that there is any error of jurisdiction.

8] According to me, prejudice is writ large because the execution proceedings, which have almost reached conclusion, are sought to be protracted and delayed. The Executing Court has not at all laid sufficient emphasis upon the affidavit filed by the deceased in the Court accepting execution of the Will. The Executing Court has also not laid sufficient emphasis on the affidavit filed by the deceased in the execution proceedings (Exhibit-46), which also supports the case, though indirectly that the deceased had indeed executed the Will in-question. Failure to take into account

such relevant and vital material, amounts to failure to exercise jurisdiction in accordance with law.

9] For the aforesaid reasons, the impugned order is vulnerable and is required to be set aside. This is more so because execution proceedings cannot be permitted to protracting in this manner. The Hon'ble Supreme Court in ***Satyawati vs. Rajinder Singh and anr. - (2013) 9 SCC 491***, has made strong observations with regard to raising of frivolous objections in the course of execution proceedings and thereby denying parties the fruits of the decree which obtained by them.

10] Applying the aforesaid principles, the impugned order is liable to be set aside and it is hereby set aside.

11] Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

12] All concerned to act upon an authenticated copy of this order.

(M. S. SONAK, J.)