

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.4910/2017

Kamalkishor S/o Motilal Agrawal

..Vs..

Riddhi D/o Kamalkishor Agrawal and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri V.R. Borkar, Advocate for the petitioner.
Shri Anant Dixit, Advocate for respondent Nos.1 to 3.

CORAM : Z.A. HAQ, J.

DATED : 24.7.2019.

Heard.

2] Original defendant No.1 - Shakuntalabai had filed application (Exh. No.164) before the trial Court praying that the further proceedings of Regular Civil Suit No.138/2012 be stayed till the decision of Regular Civil Appeal No.155/2013 pending before the District Court. This application is dismissed by the impugned order.

3] The petitioner claims that the defendant No.1 - Shakuntalabai had executed will in his favour and, therefore, he succeeded to her share and has right to step in her shoes and, therefore, he has the right to challenge the impugned order.

4] In Regular Civil Suit No.201/1995 which is decided by the judgment dated 19th September, 2013 and

which judgment and decree is challenged in Regular Civil Appeal No.155/2013, following issues were framed:

“ISSUES

1. Does the plaintiff prove that he is adopted son of defendants No.1 & 2 ?
2. Does he prove that the defendants have no right to adopt defendant No.4 as adoptive son ?
3. Whether plaintiff is entitle for injunction against defendants ?
4. Does defendants prove that suit is not maintainable ?
5. What order and decree ?

ADDITIONAL ISSUES

1. Is forcible possession of the suit premises was obtained on 29.11.95 by plaintiff Radheshyam as alleged ?
2. Is the plaintiff Radheshyam in illegal occupation of premises ?
3. Is plaintiff Radheshyam liable to pay damages at the rate of Rs.18/- per day towards wrongful use and occupation as alleged ?
4. Are defendants Mangalchand, Sakuntala entitle for possession of suit premises as alleged ?
5. What relief and costs ?”

5] In present civil suit i.e. Regular Civil Suit No.138/2012 (Special Civil Suit No.51/2009), the

following issues are framed:

“ISSUES

1. *Does the defendant No.9 prove that the suit property is already partitioned between the heirs of deceased Badriprasad on 10.4.1988 ?*
2. *Whether the suit suffers for non-joinder of necessary parties ?*
3. *Are the plaintiffs entitled to partition and separate possession of their 1/48th share each in the suit property ?*
4. *What order and decree ?”*

6] On comparing the issues framed in the two civil suits, it is clear that Section 10 of the Code of Civil Procedure would not be attracted inasmuch as the matter in issue in the two civil suits is not directly and substantially same. Apart from this, the observations made by the learned trial Judge in paragraph No.10 of the impugned order are relevant and the effect of judgment which would be delivered in Regular Civil Appeal No.155/2013 can be taken care of at the time of passing of final decree in Regular Civil Suit No.138/2012.

In view of the above, I see no reason to interfere with the impugned order. Hence, the writ petition is **dismissed**. In the circumstances, the parties to bear their own costs.

JUDGE