

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

928 WRIT PETITION NO. 5179 OF 2017

DHARMARAJ S/O MAHADEO BIRAJDAR AND OTHERS
VERSUS
SMT. RUDRABAI W/O MAHADEO BIRAJDAR AND OTHERS

.....

Advocate for Petitioners : Mr. S. N. Lale Yelwatkar
Advocate for Respondent Nos. 1 to 4 : Mr. A. T. Kanawade

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CORAM : V. K. JADHAV, J.
DATED : 25TH FEBRUARY, 2021

PER COURT :-

1. By consent, heard both sides finally at admission stage.
2. Learned 3rd Joint Civil Judge Senior Division, Latur has decided Misc. Application No. 353 of 2014 filed by the other side for legal heirship certificate *ex parte*. Though learned counsel for the respondents has vehemently submitted that the said order is not *ex parte* order and the petitioners herein have appeared in those proceedings, however, in the order passed by learned 3rd Joint Civil Judge Senior Division, Latur, I do not find any reference to the petitioners though the petitioners were party to the said proceedings. Apart

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from this, being aggrieved by the same, the petitioners preferred appeal before the District Court along with Civil Misc. Application (Delay) No. 194 of 2015 for condonation of delay. There was delay of 39 days caused in filing the appeal against the judgment and order of the 3rd Joint Civil Judge Senior Division, Latur in Misc. Application No. 353 of 2014 dated 29.07.2015. Learned District Judge-4, Latur, by the impugned order passed on 13.07.2016 below Exhibit 1 in Civil Misc. Application (Delay) No. 194 of 2015, has rejected the said application. Hence this Writ petition.

3. Learned counsel for the petitioners submits that learned District Judge-4, Latur has rejected the application seeking condonation of delay mainly on the ground that the appeal is not maintainable and therefore, the delay application too is not maintainable. Learned counsel submits that the entire approach of the District Judge is erroneous. Learned counsel submits that though learned District Judge has referred the provisions of Sections 390, 384 of the Indian Succession Act, 1925, however, learned District Judge

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has ignored the provisions of Section 388 of the Indian Succession Act, 1925.

4. Learned counsel for the respondents submits that even if the provisions of Section 388 are attracted and made applicable to the facts and circumstances of the present case, in terms of Sub-section (3) of Section 388, revision is maintainable before this Court. However, the petitioners have filed Writ Petition.

5. I have carefully perused the impugned order passed by District Judge-4, Latur on 13.07.2016 below Exhibit 1 in Civil Misc. Application (Delay) No. 194 of 2015.

6. Rules 1 and 2 of the Bombay Regulation VIII of 1827 are reproduced herein below:

“1. Whenever a person dies leaving property, whether movable or immovable, the heir or executor, or legal administrator, may assume the management, or sue for the recovery, of the property, in conformity with the law of usage applicable to the disposal of the said property,

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without making any previous application to the Court to be formally recognized.

2. First. - But if an heir, executor or administrator is desirous of having his right formally recognized by the Court; for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation, in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court within one month from the date of the proclamation and enter their objections, and declaring that, if no sufficient objection is offered, the Judge will proceed to receive proof of the right of the applicant, and, if satisfied, grant him a certificate of heirship, executorship or administratorship.”

7. In terms of the provisions of Rule 1 of the Bombay Regulation VIII of 1827, whenever a person dies leaving property, whether movable or immovable, the heir or executor, or legal administrator, may assume the management, or sue for the recovery, of the property, in

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conformity with the law of usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognized. However, in terms of Rule 2 of the Bombay Regulation VIII of 1827, if an heir, executor or administrator is desirous of having his right formally recognized by the Court; for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation and if satisfied after considering the objections, if any, grant him a certificate of heirship, executorship or administratorship.

8. In the instant case, learned District Judge, by referring the provisions of Section 374 of the Indian Succession Act, 1925, erroneously observed that legal heirship certificate cannot be granted as these provisions are applicable only to debts and securities i.e. movable property and not in concern of immovable property. Learned District Judge has ignored the provisions of Rules 1 and 2 of the Bombay Regulation VIII of 1827.

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9. Furthermore, though Section 388 read with Section 390 of the Indian Succession Act, 1925 prescribes the jurisdiction of inferior courts along with the jurisdiction of District Court for the purpose of this Act, the learned District Judge has not considered the same. In terms of the proviso to Sub-section (2) of Section 388, an appeal from any such order of an inferior court as is mentioned in Sub-section (1) of Section 384 shall lie to the District Judge, and not to the High Court, and the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge. In view of the same, I find the order passed by the District Judge as not only improper, incorrect and illegal, but the learned District Judge has refused to exercise the jurisdiction though entrusted to him in terms of the provisions of Section 388 of the Indian Succession Act, 1925.

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10. Learned counsel for the respondents though vehemently submitted that the alternate remedy of filing a revision is available, however, considering the glaring illegality committed by the learned District Judge, I am inclined to partly allow the Writ Petition to the extent of remanding the matter to the learned District Judge to decide Civil Misc. Application (Delay) No. 194 of 2015 on its own merits. Hence the following order:

ORDER

- I. The Writ Petition is hereby partly allowed.
- II. The impugned order dated 13.07.2016 passed by the learned District Judge-4, Latur in Civil Misc. Application (Delay) No. 194 of 2015 is hereby quashed and set aside.
- III. The matter is remanded to the learned District Judge with the following directions;

The Learned District Judge shall decide the
Civil Misc. Application (Delay) No. 194 of 2015

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on its own merits, as expeditiously as possible,
preferably within a period of three months
from the date of appearance of the parties
before him.

IV. The parties shall appear before the learned District
Judge on 11.03.2021.

V. The Writ Petition is accordingly disposed off.

(V. K. JADHAV, J.)