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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8103 OF 2020

Paramjitsingh s/o Tirathsingh Sawhney ... **PETITIONER**

VERSUS

1. The State of Maharashtra
2. Harjeetsingh s/o Tirathsingh Sawhney
... **RESPONDENTS**

.....
Shri A.R. Rathod, Advocate for petitioner
Shri A.B. Chate, A.G.P. for respondent No.1
Respondent No.2 present in person
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 15th January, 2021

Date of pronouncing order : 20th January, 2021

ORDER :-

The challenge in this Writ Petition is to the order passed by 9th Jt. Civil Judge, Senior Division, Aurangabad on 9/1/2020 on application Exh.76 in Misc. Application, requiring judicial enquiry (MARJI) No.1084/2010. By the impugned order, the proceedings (MARJI No.1084/2010) initiated for grant of a probate has been stayed till decision of First Appeal (No.1117/2006) pending before this Court. The petitioner is the applicant in MARJI No.1084/2010.

FACTS

2. The petitioner and respondent No.2 are the brothers inter-se. They have one sister. Their mother – Smt. Gurubachan Kaur passed away on 9/12/1993. According to the petitioner, the mother executed her last Will on 23/6/1993 in his favour, bequeathing house property and moveables as well. The petitioner found the Will with the City Survey Office. He filed a proceeding (MARJI No.1084/2010) for grant of probate of the Will dated 23/6/1993.

3. The respondent No.2 came with a case that mother, late Gurubachan Kaur executed a Will on 16/11/1992, bequeathing the very house property and other moveables in favour of the petitioner and himself. He, therefore, preferred MARJI No.218/1996 for grant of a probate of the Will dated 16/11/1992. The petitioner appeared in the said proceedings. On hearing the parties concerned, the Court dismissed the application for grant of probate on 25/4/2003. The respondent No.2 has preferred the appeal thereagainst, which is pending before this Court.

4. In MARJI No.1084/2010, the respondent No.2 preferred application (Exh.76) for stay of hearing of MARJI No.1084/2010. On hearing the parties, the learned Judge allowed the application with the following observations :

“4. After gone through the record it appears that subject matter that is House No.5-1-55 CTS No.17016 is one and same and also both the parties are same in MARJI No.218/1996. It is also not disputed that MARJI No.218/1996 decided by the court but first appeal is pending before Hon’ble High Court that is 1117/2006. Therefore, admittedly MARJI No.218/1996 and appeal pending against that proceeding is previous suit or proceeding. It is not disputed that pendency of appeal is continuation of suit. The issues involved in both the proceedings are same therefore in order to avoid complications in future, it is just and proper to stay this proceeding til decision of first appeal.”

5. Learned counsel for the petitioner would submit that, it is only the last Will of the testator that prevails. The matter directly and substantially in issue in both the applications for grant of probate are two different Wills allegedly executed by mother, late Gurubachan Kaur. As such, the matters directly and substantially in issue in both the proceedings are quite different from each other. The respondent No.2 has already been unsuccessful in his proceedings initiated for grant of probate. If the impugned order is allowed to stand, hearing of the application for grant of probate of the last Will of the testator would be delayed indefinitely. He, therefore, urged for setting aside the impugned order.

6. The respondent No.2 appeared as a party-in-person. He would submit that, in the earlier proceedings

initiated by him for grant of probate, the petitioner admitted execution of the Will by the deceased mother on 16/11/1992. Had the alleged subsequent Will been executed by the mother, the petitioner would have come with the said case while he appeared in the earlier proceedings and contested the same. According to the respondent No.2, the petitioner was involved in criminal activities. Number of crimes have been registered against him. The respondent No.2 made submissions as regards the family affairs, behaviour of the petitioner etc. He ultimately urged for rejection of the Writ Petition.

7. Section 10 of the Code of Civil Procedure (C.P.C.) reads as under :

“10. Stay of suit.—No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

8. Section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in previously instituted suit. Both the applications for grant of probate are contentious. The

proceedings therein, therefore, are governed by the procedure as is applicable to hearing of a suit. Even otherwise, if Section 10 is not strictly applicable, applying the analogy thereunder, in exercise of jurisdiction under Section 151 of the C.P.C., trial in the subsequent proceeding/ suit can be stayed.

9. The question is whether provisions of Section 10 do really attract in the given case. The matter directly and substantially in issue in a former proceeding in the nature of an application for grant of probate, is the Will, allegedly executed by late Gurubachan Kaur on 16/11/1992. Whereas in the subsequent proceeding (MARJI No.1084/2010), the matter directly and substantially in issue is a Will executed by the very testator on 23/6/1993. As such, matter directly and substantially in issue in both the proceedings are quite different. It may be mentioned that, in a proceeding for grant of probate, issue as to title of the testator to the property comprised in the Will/s cannot be gone into. The aforesaid observations made by the Court in the impugned order are contrary to the settled proposition of law.

Needless to mention, it is the last Will of the testator that prevails. The Court seized of the matter (MARJI No.1084/2010) shall not be influenced by these observations. The case of the respondent No.2 that the petitioner could

have come with a case of execution of subsequent Will by mother in the earlier proceeding can very well be addressed by the trial Court. Whether the subsequent Will is really the Will executed by late Gurubachan Kaur could only be decided in the proceeding initiated by the petitioner for grant of probate of the said Will. If the impugned order is allowed to stand, it is not known how long it would take for commencement of hearing of MARJI No.1084/2010 and giving decision therein.

10. It is reiterated that, the matter directly and substantially in issue in MARJI No.218/1996 is not the matter directly and substantially in issue in a subsequent proceeding, MARJI No.1084/2010. Section 10 of the C.P.C. or its analogy, therefore, could not have been invoked. The impugned order, therefore, needs to be set aside. Writ Petition thus succeeds. Hence the following order :

ORDER

The Writ Petition is allowed in terms of prayer clause (B).

(R. G. AVACHAT)
JUDGE

fmp/-