

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

919 WRIT PETITION NO.6976 OF 2012

PARVATI UTTAM KURDULE
VERSUS
MAHADEO DNYANDEO ZAMBARE AND ORS

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Advocate for Petitioner : Mr. N. V. Gaware
Advocate for Respondent nos.1,2,4 & 5 : Mr. S. S. Thombare

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CORAM : AVINASH G. GHAROTE, J.
DATED : 1st JULY, 2021.

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PER COURT :

1. Heard Mr. N.V. Gaware, learned counsel for petitioner, who attacks the impugned order dated 2/03/2012, whereby, the application under Section 10 of CPC, filed by the defendant in RCS No. 927 of 2011 has been allowed in view of an earlier suit bearing RCS No. 54 of 2011 being pending between the parties and consequently, the proceedings in RCS No. 927 of 2011, has been stayed.

2. Mr. N.V. Gaware contends that the earlier suit i.e. Special Civil Suit No. 54 of 2011 was a suit for declaration of ownership and cancellation of sale deeds, which was filed by one Dnyandeo Dhondiba Zambare, through the present petitioner.

Dnyandeo Zambare having passed away, the petitioner being his daughter, has been permitted to be added as a plaintiff in Special Civil Suit No. 54 of 2011.

3. The present petitioner has also filed RCS No. 927 of 2011, a suit for partition and separate possession.

4. What is material to note is that the parties to both the suits are the same. The subject matter in both the suits are the same. Only the nature of reliefs sought in the suits are different. Whereas in Special Civil Suit no.54 of 2011, a relief is claimed for declaration of title with an additional relief of cancellation of sale deeds and permanent injunction, in the subsequent suit RCS No. 927 of 2011, a relief of partition has been claimed of the properties left behind by late Dnyandeo Dhondiba Zambare. In both the suits, the son of Dnyandeo Dhondiba Zambare, namely Mahadeo Dnyandeo Zambare, the brother of the petitioner, is the defendant no.1, against whom title in respect of the suit property is claimed in the previous instituted suit and partition is claimed in the subsequently instituted suit.

5. It is axiomatic to note, that unless and until the sale deed in respect of the suit properties, which have been executed in favour of defendant nos. 2 & 3 which are challenged in the previously instituted suit bearing Special Civil Suit No. 54 of 2011 are set aside, the claim for partition in the subsequent suit would not be entertainable. That being the position, I do not see any infirmity in the impugned order as passed by the learned trial court, whereby the subsequently instituted suit RCS No. 927 of 2011 is stayed.

6. Mr. N.V. Gaware, relies upon ***Dwarka Trading Corporation vs. Cheema Paper Mills (P) Ltd. AIR 2007 UTR 83*** to contend, that Section 10 does not require that the matter in issue in both these suits should be the same and what is necessary to be looked into, is whether the decision in the earlier suit, would operate as *res judicata* in the subsequent suit. Principally there cannot be any quarrel with the proposition. However, on the facts of the present case, the decision in Special Civil Suit No. 54 of 2011, viz the title of the plaintiff / petitioner to the suit properties, and also the decision as to the legality and validity of the sale deeds in respect of the suit properties which documents are in favour of defendant nos.

2 & 3, would operate as *res judicata* in the subsequent suit RCS No. 927 of 2011, in which these defendant nos. 2 & 3 in Special Civil Suit No. 54 of 2011 are also parties.

7. The petition therefore does not have any merit and is accordingly dismissed. In the circumstances, there shall be no order as to costs.

(AVINASH G. GHAROTE, J.)

vsm/-