

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

WRIT PETITION NO.4375 OF 2016

Harsha Wd/o Dilipkumar Nachwani,
Aged about 35 years, Occ: Nil.
C/o. Shri Nandlal Hingorani,
Manjidana Colony in front of bus stop,
Gitti Khadan, Nagpur.
Tahsil and District Nagpur.

...PETITIONER

...V E R S U S...

1) Smt. Kanta Wd/o Gopichand Nachwani,
Aged about 60 years, Occ: Housewife,

2) Bhagchand s/o Gopichand Nachwani,
Aged 33 years, Occ: Business,

Both R/o Ward No.1, Ganesh Nagar,
Sindhi Camp, Paratwada, Dist. Amravati.

3) Smt. Meena W/o Rajesh Jagwani,
Aged 38 years, Occ: Household
R/o C/o Hirdamal Namumal,
Budhwari Bazar, Seoni (M.P.).

4) The Additional Commissioner,
Amravati Division, Amravati

...RESPONDENTS

Shri D.N. Dani, Advocate for petitioner.
Shri A.M. Kadukar, A.G.P. for respondent No.4.

CORAM:- V. M. DESHPANDE, J.
DATED :- 2nd FEBRUARY, 2021.

ORAL JUDGMENT

Rule. Rule is taken up for final hearing immediately.

(2) In this writ petition, on 17.10.2016, notices of final disposal were issued. Learned Assistant Government Pleader on the said date waived notice on behalf of the respondent no.4- Additional Commissioner, Amravati Division, Amravati, whose order is challenged in this writ petition. The respondent nos.1 to 3 were duly served. The respondent nos. 1 and 2 put their appearance through Advocate Shri J.B. Kasat. Attempt was also made during the pendency of this writ petition by sending writ petition for mediation. However, said attempt was failed.

(3) This matter was listed before the me on 15.01.2021, on the said day, Shri J.B. Kasat, learned counsel for respondent nos.1 and 2 filed a pursoris for discharge from the proceedings since the said respondents were not giving instructions to him and therefore he was required to issue notice for discharge to them and in spite of service they fail to give instructions to him.

(4) Right from beginning nobody is appearing on behalf of respondent no.3 though notice of final disposal was served. On 15.01.2021 the matter was adjourned for two weeks, in order to give one chance to respondent nos.1 and 2 to engage any other counsel. However, nobody appeared for them.

(5) Today, I have heard in extenso Shri Dani, learned counsel for the petitioner and Smt. Barabde, learned Assistant Government Pleader for respondent no.4- Additional Commissioner, Amravati Division, Amravati.

(6) This petition is filed challenging the order passed by the Additional Commissioner, Amravati Division, Amravati dated 08.04.2015 in Revision No.39/RTS-59/2011-12/Wadura, whereby the respondent no.4 allowed the revision filed on behalf of Gopichand and thereby set aside the order passed by the Sub-Divisional Officer and Additional Collector, Amravati and directed that the mutation No.648 recorded in the name of present petitioner be cancelled. Gopichand and present petitioner were directed to approach the Civil Court to submit the probate certificate in respect of Will.

(7) In order to test the correctness of the order passed by the respondent no.4, few fact will have to be enumerated giving rise to this writ petition.

(8) Gopichand Nachwani was the father-in-law of the present petitioner. Respondent no.1 is the widow of Dilip who was son of Gopichand, whereas respondent nos.2 and 3 are son and married daughter of Gopichand.

(9) Dilip purchased an agricultural property bearing field Survey No.357/3 admeasuring 1.62 Hecter of village Wadura by registered sale-deed dated 23.03.2005 from one Mohandas Ghanshyamdas Nachwani. Dilip was the sole vendee in the registered sale-deed.

(10) Dilip passed away on 07.09.2008 since he was suffering from HIV Aids. The petitioner also suffers from the said disease.

(11) Be that as it may, prior to his death, Dilip executed a Will on 08.08.2008. By said Will the agricultural property which he purchased from Mohandas was bequeathed by him to his wife i.e. present petitioner. The present petitioner is the only legatee of the said Will.

(12) The petitioner after the death of her husband, applied to record her name in place of her husband by giving the application to the Talathi of Warud along with the Will. The Talathi thereafter issued notice to all concerned. Gopichand (father-in-law of the petitioner) objected in respect of the certification of the mutation entry in the name of the petitioner. Therefore, the Talathi recorded the disputed entry in the concerned register and submitted the same to the Nayab Tahsildar, Achalpur for further action. Consequent to that, a case

was registered on the file of Nayab Tahsildar vide case No.RTS-59/Wadura/12/2008-09.

(13) From the impugned order itself it is clear that after hearing the parties the Nayab Tahsildar ordered that the name of the petitioner be recorded in the village Form 6 and 7 vide order dated 07.12.2009.

(14) Against this order, Gopichand (father-in-law of the petitioner) filed an appeal before the Sub-Divisional Officer, Achalpur and from the impugned order itself it is clear that the appeal filed by Gopichand was dismissed on 28.03.2011. Thereafter, Gopichand carried the said order in second appeal before the Additional Collector, Amravati, however, Additional Collector vide order dated 30.08.2011 dismissed the appeal and confirmed the order passed by the Sub-Divisional Officer.

(15) Against these concurrent orders, Gopichand approached to the Additional Commissioner by filing revision. Before the Additional Commissioner it was contended on behalf of Gopichand that the Will on the basis of which the name of the petitioner is recorded is a forged document. It was contended that though the sale-deed is executed in the name of Dilip alone, he purchased the said property in his name from joint family

properties fund. It was also contended that during the life time Dilip executed partition deed and the land in question was given to Gopichand.

(16) The respondent no.4 observed in the impugned judgment and order that since there is a dispute in respect of the Will executed by Dilip in favour of his wife i.e. present petitioner it would be appropriate on the part of Gopichand and present petitioner to file the suit and get the Will probated. Since the Will is not probated, the respondent no.4 cancelled the mutation entry by setting aside the concurrent orders of three revenue authorities, which were challenged before it.

(17) In my view, the observations of the Additional Commissioner that parties were required to get the Will probated cannot stand to the scrutiny law in view of law laid-down by this Court in Jyoti w/o Jagdish Singhai Vs. State of Maharashtra, reported in 1979 Mh.L.J. 308. The Will of Dilip was executed at Nagpur. Therefore, in view of law laid-down in Jyoti's case cited supra the observations of the Additional Commissioner that the Will is not probated, is required to be set aside.

(18) During the course of the hearing it was submitted on behalf of the learned counsel for the petitioner that after the

impugned order is passed, Gopichand filed a suit against the petitioner for declaration and perpetual injunction. Seeking declaration that on the basis of partition deed dated 11.09.2007 he is the exclusive owner and petitioner who was made defendant has no right in the said property.

(19) The learned counsel for the petitioner made available to me for my perusal the copy of the plaint. On perusal of the same would show that in the said suit Gopichand did not claim that the Will executed in favour of the petitioner be declared as null and void. The learned counsel for the petitioner submitted that in the said suit petitioner filed an application under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint that it is barred by limitation. As per submission of the learned counsel for the petitioner, learned Civil Judge Junior Division on 01.04.2017 allowed the application filed on behalf of the petitioner and rejected the application under Order VII Rule 11 of the Code of Civil Procedure. Against that the appeal is presented vide Regular Civil Appeal No.49 of 2017 and it is still pending. During this, Gopichand passed away and therefore the present writ petition was filed against Kantabai, the widow, Meena, the married daughter and Bhagchand, the son of Gopichand.

(20) Since probate is not necessary in view of the law laid-down in the case of Jyoti's cited supra order passed by the Additional Commissioner unsustainable and it is required to be side aside. Further, whether the Will is genuine or forged as contended by Gopichand was outside the jurisdiction of Revenue Authorities. Only Civil Court could give finding in that behalf in a suit filed for declaration that Will is bogus one. In my view, the revenue authorities were right in recording the name of petitioner on the basis of will in her favour. This could not have been set aside without a decree from Civil Court by the Additional Commissioner.

(21) The writ petition is allowed. The order passed by the Additional Commissioner, Amravati Division, Amravati in Revision No.39/RTS-59/2011-12/Wadura dated 08.04.2015 is hereby quashed and set aside. The order of the Sub-Divisional Officer, Achalpur dated 28.03.2011 and order passed by the Additional Collector, Amravati dated 30.08.2011 are restored. Mutation entry No.648 recorded in the name of present petitioner is restored.

Rule is made absolute in above terms. No order as to costs.

JUDGE

Wagh