

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

26 WRIT PETITION NO. 5886 OF 2022

SACHIN PURBHAJI GAIKWAD
VERSUS
SUDIPA SUDHIR GAULKAR

...
Advocate for Petitioner : Mr. Gandhi Amol S.
...

CORAM : MANGESH S. PATIL, J.

DATE : 13 JUNE 2022

PC :

Heard learned advocate Mr. Gandhi for the petitioner.

2. The petitioner is the defendant in a suit filed by one Gayabai - his step mother. She had claimed a declaration that the registered gift deed got executed from her in favour of the petitioner in respect of the suit property was null and void. She having died during pendency of the suit, the respondent submitted the application (Exhibit - 17) in that suit seeking to come on record as her legal representative by propounding her registered will deed dated 15-09-2012.

3. The petitioner opposed the request and by the order under challenge, the respondent's application has been allowed.

4. Learned advocate Mr. Gandhi would submit that whether the respondent is able to prove the will or otherwise cannot be

considered at this juncture. He should have been directed to first obtain a probate as was the course adopted by the Supreme Court in the case of **Suresh Kumar Bansal Vs. Krishna Bansal and another; 2010(2) SCC 162**. Without establishing the will, the respondent could not have been allowed to come on record as legal representative.

5. Obviously, if a party is claiming to come on record as the legal representative, the court is expected to undertake an enquiry under Order XXII Rule 5 of the Code of Civil Procedure. Similarly, if the respondent is propounding the registered will of deceased plaintiff - Gayabai, his right to participate would be contingent upon the proof or otherwise of the will. Apparently, the trial court seems to be alive to such state-of-affairs, as mentioned in the paragraph no. 9 of the impugned order wherein he has specifically mentioned that the genuineness or otherwise of the will could be decided while deciding the suit on merits.

6. Needless to state that, once the respondent is allowed to come on record as legal representative of the original plaintiff - Gayabai, he would have to not only take upon himself the burden of proving the challenge put forth by her to the registered gift deed executed by her in favour of the petitioner but also he will have to discharge the burden of proving the will within the contemplation of section 63 of the Indian Succession Act read with section 68 of the Indian Evidence Act. This can happen only at a full fledged trial.

Obviously, he may have to amend the plaint and even the petitioner would be entitled to take whatever stand he intends to, by filing appropriate pleadings by amending the written statement. Even the trial court would thereafter be obliged to frame appropriate issues and decide them on their own merits by extending opportunity to both the sides to lead evidence.

7. The impugned order does not finally decide anything. No prejudice would be caused to the petitioner, if the afore-mentioned course is followed by the trial court.

8. The dispute in the matter of **Suresh Kumar Bansal** (supra) was altogether different. The owner of the property had filed a suit for eviction and the dispute was between his biological heirs and the person who was propounding his will. In the light of such peculiar state-of-affairs that it was directed the person propounding the will of the original plaintiff to obtain a probate. The petitioner is not entitled to take benefit of the decision in **Suresh Kumar** (supra).

9. There is no merit in the writ petition. Writ petition is dismissed.

[MANGESH S. PATIL]
JUDGE

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