

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 4277 OF 2013

Narayan Tukaram Shirke (Since deceased)
through LRS. and Ors.

... Petitioner

Versus

Shri Balkrishna Laxman Shirke

... Respondent

Mr. S. V. Pitre for the Petitioner.

Mr. B. G. Tangsali for the Respondent 1.

CORAM: ROHIT B. DEO, J.

DATE : 7th JULY, 2022

P.C. :-

1. With consent, the Writ Petition 4277 of 2013 is finally heard.
2. The Petitioners are the original Defendants in R.C.S. 3 of 1991 which is brought by the Respondents seeking decree of perpetual injunction restraining the Defendants from creating 3rd party interest in the suit property on the premise that the suit property is joint family property in which both the Plaintiffs and the Defendants have share and interest.
3. During the course of trial, the Defendants preferred an Application - Exh. 218 seeking permission to adduce secondary evidence to prove the registered Sale Deed executed by Tukaram Shirke, father of the original Defendant 1. It is the case of the Defendants that the suit property was self acquired property of Tukaram Shirke and that by Will, he bequeathed the same in favour of

his son – Narayan.

4. The Application seeking permission to adduce secondary evidence was opposed by the Plaintiffs, who pointed out that in R.C.S. 2 of 1990 which is decided by the Judgment and Decree dated 30.11.1999, it is already held that the suit property is ancestral property and that the Will purportedly executed by Tukaram Shirke in favour of his son - Narayan Shirke is not proved.

5. The response of the learned counsel for the Defendants was to argue that in the earlier decided suit, the finding that the Will is not proved is recorded due to the failure of the Defendants, who were the Plaintiffs in that suit, to bring on record the Will and such findings cannot constitute *res judicata*.

6. The Trial Court has held that there was a judicial determination qua an issue which did directly rise for determination and since the findings in the earlier Civil Suit attained finality, the findings shall attract the doctrine of *res judicata*.

7. It is on this premise that the Petitioners are not permitted to adduce secondary evidence of the Will.

8. My attention is invited to the issues framed by the Trial Court in Regular Civil Suit 3 of 1991, the issues read thus :-

- “1) Whether suit property is joint family property of plaintiff and defendant No.1?
- 2) Whether the possession of plaintiff over S.No. 83/3 & 85/1 is permissive possession?
- 3) Do the defendants prove that around 1935-1940 the partition had taken place and thereby Rajaram, Laxman Jairam were allotted separate shares?

- 4) *Do they further prove that after said partition at about year 1945-46 defendant No.1 and Tukaram had acquired some lands as a tenant?*
- 5) *Do the defendants also prove that Tukaram through a registered Will-deed bequeath his tenanted lands i.e. S.No. 136/B-7, 128/9, 49/4, 136/B-6, 83/3 & 85/1 to defendant no.1? Whether defendant no.1 illegally & without any authority trying to sell out suit property 1-B?*
- 6) *Whether plaintiff is entitled for relief of injunction, as is prayed for?*
- 7) *What order & decree?”*

9. Issue 5 obligates the Defendants to prove that Tukaram Shirke executed registered Will deed bequeathing the property in favour of Defendant 1. While the learned Trial Judge has declined permission to the Defendants to adduce secondary evidence to prove the Will, the learned Trial Judge lost sight of issue 5 which is already framed and which casts the burden to prove the registered Will deed on the Defendants. In this view of the matter, the reasons recorded by the learned Trial Judge for declining permission to adduce secondary evidence are not entirely satisfactory.

10. However, whether the principle of *res judicata* would apply is contentious. It is common ground that in the earlier decided suit, the property is held to be ancestral property and the Will executed by deceased Tukaram Shirke is held not proved. In this view of the matter, the Trial Court shall have to frame an issue on the aspect of the principle of *res judicata* in view of the findings recorded in the earlier decided suit i.e. RCS 2 of 1990.

11. The order impugned is set aside.

12. Application – Exh. 218 preferred by the Defendants seeking permission to adduce secondary evidence is allowed in terms of prayer in the said application.

13. The learned Trial Court shall frame an additional issue to the effect whether the suit is barred by the principle of *res judicata* and the said issue shall be decided along with the other issues arising in the suit.

14. Needless to observe that every contention is left expressly open.

15. The Petition is disposed of in the aforestated terms.

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[ROHIT B. DEO, J.]