

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

WRIT PETITION NO.7503 OF 2022

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Bharat Balarm Thakur

..... Petitioner

Vs.

Mr. Pradip Ambaji Gharat Alias
and Ors.

....Respondents

Mr. Harshad Inamdar i/by Mr. Yogesh B. Dandekar for the
Petitioner.

Mr. N.V.Walawalkar, Senior Advocate with Mr. Jeetendra Sachdev
i/by S.M.Sabrad for Respondents.

CORAM: SANDEEP K. SHINDE, J.

DATED : AUGUST 22, 2022

ORAL ORDER:

1. On 9th September, 2020, Petitioner filed an application under Section 2(First) of the Bombay Regulation VIII Act of 1827 ('Regulation' for short) for grant of certificate of heir-ship to administer and deal with the estate of the deceased, Balaram Dharma Thakur (Deceased) being Miscellaneous Application No.441 of 2020, in the Court of Civil Judge, Senior Division, Panvel.

. Upon issuing proclamation in the form contained in Appendix "A" by the learned Judge, on 15th January, 2021, respondents enter their objection, to grant of heir-ship.

2 On 10th December, 2020, Respondent No.9- Bhagwan Balaram Thakur (Respondent No.7) herein, filed Civil Miscellaneous Application No.811 of 2020 under Section 276 of the Indian Succession Act, 1925 in the Court of Civil Judge, Senior Division, Panvel for grant of probate of the will dated 19th March, 2018 executed, by late Balaram Dharma Thakur (deceased).

3 Having noted the application for grant of probate, on 12th March, 2021, Petitioner moved an application below Exhibit 22 contending that since his application for grant of certificate of heir-ship has been objected to by the respondents, his Civil Miscellaneous Application No.441 of 2020 be converted and tried as a suit.

4 Anyhow, on 26th November, 2021, Petitioner moved the Court of Civil Judge, Senior Division, Panvel with the prayer that Miscellaneous Civil Application No.441 of 2020 (for certificate of heir-ship) and Miscellaneous Application No.811 of 2020 (for grant of probate of deceased) be clubbed and tried, together.

5 The learned Judge vide order dated 8th October, 2021 directed to decide both the applications, preferably within six months.

6 It appears from the proceedings that the Petitioner's application seeking to try Civil Miscellaneous Application No.441 of 2020 as Suit, was rejected by the learned Trial Court vide order dated 21st April, 2022 and thereafter proceeded to frame the following issues on 3rd March, 2022;

“1] Whether the deceased Balaram Dharma Thakur executed the Will Deed dated 19/03/2018 in favour of Bhagvan Balaram Thakur ?

2] Whether the Bhagvan Balaram Thakur is entitled for the probate certificate as prayed ?

3] Whether Bharat Balaram Thakur is entitled for heirship certificate as prayed ?

4] What order and decree ?”

7 Feeling aggrieved by the order dated 21st April, 2022, inter-alia, refusing to convert Civil Miscellaneous Application No.811 of 2020 into the civil suit, Petitioner has filed this Petition under Article 227 of the Constitution of India.

8 Heard Mr. Inamdar, learned counsel for the Petitioner, Mr. N.V.Walawalkar, learned Senior Counsel for the Respondents.

9 Bombay Regulation VIII of 1827 is a Regulation to provide for the formal recognition of heirs, executors and administrators, and for appointment of administrators and managers of the property by the Courts. Whenever a person dies, leaving property, whether movable or immovable, the heir or executor, may assume the management, or sue for the recovery, of the property, in conformity with the law of usage applicable to the disposal of the said property without making any previous application to the Court to be formally recognized. However, if a heir desirous of having his right formally recognized by the Court; may make an application under Regulation 2. Whereupon the Judge shall issue proclamation in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court and enter their objections. If no sufficient objection, is offered, Judge is empowered to receive proof of right of the applicant and if satisfied, grant him certificate of heir-ship. However, any objection is made to the right of the person claiming as heir, the Judge shall summarily investigate, the grounds of the objections on one hand and of the right claimed on the other, examining such witnesses or other evidence as may be adduced by the

parties and thereafter may grant or refuse certificate as the circumstances of the case may require.

10. In terms of provisions of Section 7 of the Regulation, grant of certificate to heir, executor or administrator confers no right to the property and does not finally determine nor injure the rights of any person. Second clause of Section 7 provides that certificate so granted could be annulled by Zilla Court upon a proof that another person has a preferabel right. Section 8 of the Regulation, provides that the refusal of certificate by the Judge shall not finally determine the right of a person whose application is refused and it shall still be competent to him to institute a suit for the purpose of establishing his claim.

11. Therefore, scheme of the Bombay Regulation VIII of 1827, does not suggest that grant of certificate of heir-ship, executor-ship or administrator-ship is initiated by filing a plaint. The suit is not defined under Code of Civil Procedure, 1908 but Section 26 of the Code of Civil Procedure, 1908 provides that every suit shall be instituted by presentation of plaint or in such other manner as prescribed. As such, it is clear, under the Code of Civil Procedure, 1908, presentation of plaint is an institution of

suit; whereas under the Regulation, proceeding is initiated by filing 'application'. Section 2 of the Bombay Regulation VIII of 1827, says that if no sufficient objection is offered, the Judge will proceed to receive the proof of right of the applicant and if satisfied by order, grant him certificate of heir-ship, executorship or administrator-ship. Therefore, it is, an order and not a 'decree'. In fact, provisions of Clause (2) of Section 7 and Section 8 of the Bombay Regulation VIII of 1827 make it abundantly clear that certificate confers no right to the property of the deceased and refusal of a certificate does not finally determine the right of a person whose right is refused. Therefore, application moved by the Petitioner to convert Civil Miscellaneous Application No.441 of 2020 in a suit has been rightly rejected by the Court as the order does not determine the rights of the parties. For these reasons, no interference is called for in the said order.

12. Mr. Walawalkar, learned Senior Counsel for the Respondents, would contend that Section 295 of the Indian Succession Act, 1925 regulates the procedure in contentious cases. Provisions of this Section provide that in cases, where there is contentious proceedings, proceedings will take, "as

nearly as may be”, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant. In the case at hand, Civil Miscellaneous Application of the Respondents for grant of probate under Section 276 of the Indian Succession Act, 1925 became contentious proceedings on account of filing of the caveat by the Petitioner. Mr. Walawalkar, the learned Senior Counsel, therefore, submitted that Civil Miscellaneous Application No.811 of 2020 is required to be treated as suit, in form only. Mr. Walawalkar submitted that contentious proceedings for grant or refusal of probate and letter of administration is not a suit in substance and the order in the said proceedings is not a decree as it does not fulfill ingredients of the decree as defined in the Code.

13. The words “As nearly as may be” and “The form of a Regular Suit” in Section 295 of the Indian Succession Act, 1925 even where probate proceedings became contentious, they merely to assume form of regular suit though in reality not in the nature of regular suit under the Civil Procedure Code as held in

Fm. V.M.Skaria AIR 1999 Kerala 320. Therefore, proceedings under Section 385 of the Indian Succession Act, 1925 take the 'form' of the regular suit and the proceedings became the suit in the 'form' only and not in substance. In the case of **Sidhanath Bhati v. Jai Narayan Bharti AIR 1994 Patna 144**, it was held that contentious proceedings under the Indian Succession Act, 1925 is not a suit in point of fact and such final orders passed in such final proceedings is not a decree. Section 299 of the Indian Succession Act, 1925 provides Appeals from every orders, which includes orders passed in contentious proceedings also and thus, concluded that the order in the said proceedings is not a decree.

14. Therefore, neither application under Bombay Regulation nor application under Section 276 of Indian Succession Act, 1925 nor contentious proceedings under Section 295 of the Indian Succession Act, 1925 culminates into decree. They merely assume form of suit but not a suit in substance.

15. In the case at hand, vide order dated 26th November, 2021, the learned Civil Judge, Senior Division, Panvel had directed to decide both the applications together within six months. Although the probate application became contentious

proceedings on account of filing of caveat by the petitioner till date, petitioner has not filed his defence/written statement. Be that as it may, Mr. Walawalkar, learned Senior Counsel for the Respondents fairly submitted that let Petitioner file his defence/written statement within reasonable time along with the draft issues, so that the Trial Court can proceed to decide both the applications simultaneously in terms of the order dated 26th November, 2021.

16. In consideration of the facts of the case, Petition is dismissed and hence, following order;

(a) Challenge to order dated 21st April, 2022 fails;

(b) Petitioner shall file his defence/written statement in Miscellaneous Application No.811 of 2022 within three weeks from today;

(c) Learned Trial Court shall endeavour to dispose of the Miscellaneous Application No.441 of 2020 and Miscellaneous Application No.811 of 2020 expeditiously.

17. Petition is disposed of in aforesaid terms.

(SANDEEP K. SHINDE J.)

