

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 9603 OF 2021
WITH
WRIT PETITION 9604 OF 2021

Smt. Pushpa Shantaram Nimbalkar
and Ors.

..Petitioners

V/s.

Dinesh Shantaram Nimbalkar and Ors

..Respondents

Mr. Prathamesh Bhargude a/w Sumit Sonare for the Petitioners.

Mr. Niranjana Mogare for the Respondents.

CORAM : ROHIT B. DEO, J.

DATE : 15 JUNE 2022

PC:

1. These petitions involve similar facts and issues, and can be conveniently disposed of by a common order.
2. The Respondents 1 and 2 are the Plaintiffs and the Petitioners are the Defendants 1, 2 and 3. Respondents 3 and 4 are the purchasers of part of the suit property.
3. The Plaintiffs initially based their claim to the suit property on the basis of Will dated 07.12.1984 executed by their grandfather Mr. Shivba Arjun Nimbalkar. Suffice it to note, that

SNEHA
NITIN
CHAVAN

Digitally signed
by SNEHA NITIN
CHAVAN
Date: 2022.06.17
14:44:36 +0530

in an earlier suit, in which the entitlement of the Plaintiffs on the basis of the Will was in issue, the Plaintiffs partly succeeded in the Trial Court. However, the First Appellate Court reversed the Judgment and Decree of the Trial Court, and the High Court and the Apex Court refused to interfere. The Apex Court, while disposing of the Special Leave Petition observed that in view of concurrent findings that the Partition dated 16.09.1985 supersedes the Will dated 07.12.1984, the Court finds no reason to exercise jurisdiction under Article 136 of the Constitution of India. The present Petitioners preferred an application seeking clarification of the said order on the premise that subsequent to the Partition Deed dated 07.12.1984 another Partition Deed dated 07.04.1989 was executed which holds the field. The Apex Court disposed of the application seeking clarification observing that since the Apex Court had not interfered with the Judgments of the First Appellate Court and the High Court, no clarification as such was necessary.

4. The Respondents 1 and 2, who as noted supra, are the Plaintiffs in the litigation which reached the Apex Court, preferred an application in both the suits seeking amendment of the plaint on the basis that under the Partition Deed, the Plaintiffs are entitled to share and interest in the suit property. In both the suits, similar applications were made, and allowed by the orders impugned.

5. The Petitioners, who are the Defendants 1, 2 and 3 in the suits assail the order impugned contending that the nature of the suit is changed and in that any event proviso to order VI Rule 17 of CPC is triggered and in the absence of due diligence such amendment could not have been allowed.

6. In my considered view, neither of the submissions merit acceptance.

7. The Plaintiffs were justified in approaching the High Court and then the Apex Court challenging the Judgment and Decree of the First Appellate Court, which rejected their claim on the basis of the Will. It is when all the remedies, which the Plaintiffs were obviously entitled to exercise, were exhausted that the Plaintiffs gave up the claim resting on Will Deed and sought share in the suit property on the basis of Partition Deed. Notably even according to the Petitioners, there is a Partition, although according to the Petitioners, the relevant partition Deed would be that executed on 07.04.1989. Considering the facts, there is no lack of due diligence as such. I am also not inclined to accept the submission that there is a change in the structure of the suit. It is not that the Plaintiff is precluded from staking claim on the basis of alternative theories which may as well be inconsistent. Obviously, the stands cannot be mutually exclusive or mutually destructive. However, that is not the case in the factual matrix.

The claim on the basis of Will and the claim on the basis of the partition are not mutually destructive.

8. While I see no reason to interfere in the order impugned, it is clarified, that nothing is observed on the merits of the issue and every contention, raised by the Petitioners herein and then in rebuttal, it kept expressly open.

9. Subject to the aforesaid observations, the petitions are dismissed.

10. At this stage, the learned counsel for the Petitioners-Defendants 1 to 3 points out that during the pendency of the petitions, the Plaintiffs amended the plaint and the learned Trial Court has proceeded in the absence of written statement.

11. The Petitioners-Defendants 1 to 3 shall move an appropriate application seeking permission to file the written statement within the next two weeks, and if such application is preferred, the learned Trial Court is expected to consider the same in the backdrop of the pending petition.

(ROHIT B. DEO, J.)