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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7899 OF 2014**

Aanandi Bahubali Upadhaye and Anr. Petitioners.

V/s

Ajit Nabhiraj Upadhaye

(Since deceased through legal heirs)

1a. Smt. Seema Ajit Upadhaye and Ors. Respondents.

Mr. Abhijeet A. Desai a/w Amol B. Jagtap & Karan Gajra for the
Petitioners.

Mr. Ashutosh Kulkarni a/w Sarthak S. Diwan for Respondent Nos. 1 to
4.

CORAM: NITIN W. SAMBRE, J.

DATE : APRIL 13, 2022

P.C.:-

1] This Petition is by the Petitioners who are Defendant No.2(i) and Defendant No.3 to RCS No. 291 of 1999. Petitioners in the said suit moved an Application under Section 68 pursuant to the provisions of Section 10 of the Civil Procedure Code seeking stay to the hearing of the said suit in view of the issues and findings recorded on the same in RCS No.230 of 1994 which is a subject matter of challenge in Second Appeal No.266 of 2009 which is informed to have been admitted and interim stay granted on 31/07/2009 was confirmed on 11/3/2011 by this Court. Prayer for grant of stay under Section 10 of

the Civil Procedure Code came to be rejected by the Court of Joint Civil Judge, Junior Division, Jaysinghpur vide impugned order dated 04/07/2014. As such, this Petition.

2] Facts necessary for deciding present Writ Petition are as under:-

3] RCS No.291 of 1999 i.e. one in which impugned order is passed was initiated by Respondent/Defendant for possession of the suit properties. Details of the suit properties are as under:

Details of the Suit Properties:

(A) That the details of the open space according to the revenue record maintained by the Zilla Parishad Jaysinghpur is described herein below;

C.T.S. No. : 1034

Admeasuring: 35.9

Category: A(1)

Towards East: C.T.S. No. 1029 open land

West: C.T.S. No. 1029 Open Space

North : C.T.S. No. 1030

South: C.T.S. No. 1035

(B) That the details of the house property according to the revenue record of the Zilla Parishad Jaysingpur is mentioned hereinbelow;

C.T.S. No.: 1035

Area Admeasuring: 70.2 sq.mtrs

Category: A(1)

Towards East: C.T.S. No. 1035 the open space of land possessed by the Plaintiff

West: open space of lane at C.T.S. No. 1039

North: land at C.T.S. No. 1034

South: Road

In the said suit, Petitioners vide their respective Written Statement denied title and interest of the Plaintiff i.e. Respondent to the Petition over the suit properties.

4] Kanchanmala Upadhaye and Akkatai Upadhaye initiated Civil Suit No. 230 of 1994 as against the present Petitioners who are Defendants in the said suit in possession of the suit properties viz City Survey No.1033 and part of City Survey No. 1029 admeasuring 120 ft. In the said suit, Shantinath Upadhaye and Ajit Upadhaye were impleaded as Defendant Nos. 1 and 2 respectively. Said suit is based on the fact that predecessor-in-title Duryodhan was owner of the suit

properties and in partition said suit properties have come to the share of the Plaintiff in the said suit. Said suit came to be partly decreed by learned Civil Judge, Junior Division, Jaysinghpur on 31/08/2004 to the extent of part of the suit properties i.e. CTS No.1033. The claim for open space out of CTS No.1029 which is situated on the Southern side of CTS No.1033 was rejected. While recording findings in the said suit, findings which are recorded in Regular Civil Appeal No.57 of 1982 are relied i.e. Will executed by deceased Duryodhan propounded by Shantinath was not legal and valid Will. As a sequel of above, it is observed that Shantinath was not the heir and legal representative of said Duryodhan and as such consequential findings were recorded that Plaintiff was the only heir and legal representative of deceased Duryodhan.

5] As far as above referred Akkatai and Kanchanmala are concerned, they are wife and daughter respectively of deceased Duryodhan. Duryodhan was born to Jambu Upadhye. Similarly, Shantinath was also born to Jambu Upadhye. Petitioners to the present Petition are grandsons of brother-in-law Parshwanath.

Nabhiraj was also son of Jambu Upadhaye and Respondents to the present Petition viz Ajit, Abhay, Pushpa and Abhinandan are sons and daughter of Nabhiraj.

6] Second Appeal No.266 of 2009 is preferred by Bahubali Parshwanath Upadhaye, Mrs. Anandi Bahubali Upadhayue, Pritam Bahubali Upadhaye and Pravin Bharat Upadhaye. In the said Second Appeal, Kanchanmala, daughter of deceased Duryodhan and Ajit i.e. son of Nabhiraj i.e. Defendant No.1 are Respondents. In the said Second Appeal, challenge is to the findings recorded by District Judge-1 in Regular Civil Appeal No.209 of 2004 (Old Regular Civil Appeal No.377 of 2004) which was preferred by the Appellant in the said Second Appeal. RCS No. 230 of 1994 was initiated by Kanchanmala and Akkatai, alleging that Jambu Upadhaye was owner and in possession of Plot No.227 at Village Jaysinghpur which was given City Survey Nos. 1029 and 1033. According to the Plaintiffs in the said suit, Duryodhan died on 20/1/1987, Shantinath son of Jambu Upadhaye died during pendency of the said suit. According to the Plaintiffs in the said suit, in partition the said properties were received by Duryodhan. Shantinath and Nabhiraj sons of Jambu Upadhaye

taking disadvantage of simplicity of Duryodhan got executed documents such as Sale Deed and Will Deed so as to grab the said properties. It is claimed that Sale Deed and Will Deed were got executed by Nabhiraj from Duryodhan which were declared as sham and bogus documents in RCA No.57 of 1982 and declaration is given that Plaintiffs Kanchanmala and Akkatai are owners of the suit properties. Alleging that suit properties remained in possession of Shantinath, in response to the said suit, Shantinath filed Written Statement denying description of the suit properties. However, he has not disputed relationship between the parties. He has further pleaded that Duryodhan has admitted his ownership.

7] In the said suit, issues were accordingly framed and answered in favour of the Plaintiffs. Plaintiffs therein were held to be heirs of deceased Duryodhan and Defendants to the said suit i.e. Shantinath and Ajit were held to have not proved that the suit properties were bequeathed in their favour by deceased Duryodhan vide Will Deed dated 06/04/1984. In the said proceedings, it has been specifically held that suit claim was barred by the principle of *res judicata* to the

extent of suit property bearing City Survey No.1033 and suit came to be decreed to the extent of possession of part of the suit properties.

8] When the Second Appeal No.266 of 2009 questioning the findings recorded in the said RCS No.230 of 1994 came to be preferred, following questions of law were framed by this Court:

“(1) Whether the present suit of the Plaintiffs’ for possession to the extent of C.T.S. No.1033 is barred by the principles of res judicata in view of the fact that a competent Civil Court in Regular Civil Suit No.159 of 1972 had held that the predecessor in title of the appellants i.e. Shantinath Upadhye had become the owner of the property by adverse possession which was admitted by the predecessor in title of the Plaintiffs’ i.e. Duryodhan Upadhye?

(2) Whether the appellate Court has ignored the documents on record and recorded a factually incorrect statement that there is no record as to what happened in Regular Civil Appeal No.57 of 1982, especially when the certified copy of judgment in Regular Civil Appeal No.57 of 1982 has been produced before the appellate Court at Exh.41 and the production was subsequently allowed by order dated 23.7.2007 passed by the learned District Judge-1, Jaysingpur passed on application filed at Exh. 33 in Regular Civil Appeal No.209 of 2004.

The said Second Appeal No.266 of 2009 was admitted and interim

relief was granted. Needless to clarify that said Second Appeal was at the behest of Bahubali Parshwanath Upadhye, Mrs. Anandi Bahubali Upadhye, Pritam Bahubali Upadhye and Pravin Bharat Upadhye against Kanchanmala Vijaykumar Upadhye and Nabhiraj Upadhye. As far as RCS No.291 of 1999 is concerned, same is for possession of suit properties referred to above.

9] In the aforesaid backdrop, contentions of the Counsel for the Petitioners are, following relevant dates and events are required to be taken into account for deciding the issue raised in the present Petition.

RELEVANT DATES AND EVENTS:

Sr. No	Dates	Events
1.	05.09.1946	Gajanan Upadhye (Cousin of Plaintiff in R.C.S. NO. 291/1999) mortgaged suit property (C.T.S. No. 1034 and 1035) with Padmana Kurhade vide registered mortgaged deed.
2.	02.08.1948	The said property was released by father of the plaintiff. (Nabhiraj Upadhye) from Kurhade Family by paying the mortgaged amount. Therefore, the plaintiff claiming the right, title and interest over the suit

		property.
3.	11.03.1955	Shantinath Upadhye purchases suit property from Gajanan Upadhye.
4.	06.08.1984	Shantinath Upadhye got suit property in first Suit bearing R.C.S. No. 230/1994 (C.T.S. No. 1033 and 1029) from Duryodhan by Will dated 06.08.1984.
5.	26.05.1993	Shantinath Upadhye vide the Will dated 26.05.1993 bequeaths properties bearing C.T.S. Nos. 1029, 1032, 1033, 1034 and 1035. These suit properties are subject matter of challenge in both the suits.
6.	1994 (FIRST SUIT)	R.C.S. No. 230/1994 filed by the descendants of Duryodhan i.e. Akatai and Kanchanmala against descendant of Shantinath (petitioners herein) and Nabhiraj (Respondents herein) for possession of property bearing C.T.S. No. 1029, 1032 and 1033.
7.	31.08.2004	The Suit is partly decreed.
8.	06.04.2009	First appeal bearing no. 2094/2004 and 214/2004 against decree passed by the Learned trial court dismissed.
9.	31.07.2009	The Second appeal bearing no. 266/2009 gets admitted and the judgment and decree passed by the learned trial court confirmed by the first appellate court is stayed.
10.	1999	Descendants of Nabhiraj (Plaintiff) files

	(SECOND SUIT)	suit against the descendants of Shantinath for possession of property bearing C.T.S. No. 1034 and 1035.
11.	15.06.2011	Application under Section 10 of Code of Civil Procedure filed by petitioner/original defendant in R.C.S. No. 291/1999 for stay of the suit.
12.	04.07.2014	Application under Exhibit 68 under Section 10 of the Code of Civil Procedure gets dismissed by the learned trial court. The same is subject matter of challenge in the instant Writ Petition.

10] It is claimed that the Will Dated 26/05/1993 executed by Shantinath is of vital importance, as by the Said Will suit properties were bequeathed in favour of the Petitioners. Based on the above, Petitioners are asserting their right including title and interest over the suit properties. As such, it is claimed that since the properties mentioned in both the suits i.e. RCS No.291 of 1999 and RCS No.230 of 1994 are same i.e. Issue No.5 in RCS No.291 of 1999 and Issue No.9 in RCS No.230 of 1994, Trial Court has failed to consider that requirement under Section 10 of the Civil Procedure Code is very much established. According to the Counsel for the Petitioners, in RCS No.230 of 1994 findings are recorded in regard to the Will dated

26/05/1993 which are stayed by this Court in Second Appeal No.266 of 2009 and as such issue as to the legality of Will is subjudice before this Court. In view of above, it is claimed that *ex facie* it can be inferred that issue which is to be decided in RCS No.230 of 1994 is also subjudice in the Second Appeal. Based on the above, it is claimed that findings to that extent will operate *res judicata* in the subsequent suit i.e. RCS No.291 of 1999. It is further claimed that Duryodhan has executed Will dated 06/04/1984 bequeathing suit property viz CTS No.1033 in favour of Shantinath Upadhye which fact is expressly incorporated in the Will dated 26/05/1993 which fact ought to have been taken into account by the Trial Court. A specific reference is made, so as to substantiate aforesaid contention, to the following findings recorded by the Court below while deciding RCS No.230 of 1994. Para 15 of the Trial Court Judgment reads as under.

“Para 15 : As it is heard and finally decided that the will executed by deceased Duryodhan in favour of Shantinath is not legal and void will. Deceased Shantinath do not acquired any right, title and interest in the suit properties on the strength of First Will. Said Shantinath has executed the will dated 26.05.1993 thereafter referred to as (‘Second Will’) in favour of the Defendant Nos. 1 (a) and 1 (b) who are sons of

his Father in laws. As the First Will is not proved, I do not feel it necessary to consider evidence in respect of Second Will. As the First Will is not legal and Valid, deceased Shantinath has no right to take the Will (Second Will) in favour of defendant Nos. 1 (a) and 1 (b) in respect of suit properties. Thus defendant Nos. 1 (a) and 1 (b) do not acquire any right, title or interest in the suit properties on the strength of second Will. Hence, I answered issue no. 1 in the affirmative and issue Nos. 6 and 9 in the negative”

So as to substantiate aforesaid contention reliance is placed on the judgment of the Apex Court in the matter of *Bajrang Factory Ltd & Anr vs. University of Calcutta and Others* reported in **(2007) 7 SCC 183**, so also on the judgment of the Apex Court in the matter of *K.S. Palanisami (Dead) Through Legal Representative vs. Hindu Community in General and Citizens of Gobichettipalayam and Others* reported in **(2017) 13 SCC 15**. As such, it is claimed that the order impugned is not sustainable and same is liable to be quashed and set aside. Para 42 of the judgment of the Apex Court in the matter of *K.S. Palanisami*, cited supra, reads thus:

“42. Justice B. K. Mukherjea J., speaking for this court in Gnambal Ammal Vs. T. Raju Ayyar and others, AIR 1951 SC 103, on construction of the Will laid down the following in paragraph 10:

(AIR pp. 105-06)."

"10. The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. In construing the language of the will as the Privy Council observed in Venkata Narasimha Appa Row Vs. Parthasarathy Appa Row, (S.C.C. OnLine PC : I.A. pp. At p.70-71)"

11] While countering aforesaid submissions, Counsel for Respondents would urge that Trial Court has duly considered rival submissions and by well reasoned order rejected the contentions. It is claimed that Petitioners have not satisfied very test of Section 10 of the Civil Procedure Code. So as to substantiate the said contention, support is drawn from the judgment of the Apex Court in the matter of *Aspi Jal and Another vs. Khushroo Rustom Dadyburjor* reported in **(2013) 4 SCC 333**. Counsel for Respondents would further urge that there is a vast difference in the claim and pleadings in RCS No.230 of

1994 and later suit i.e. RCS No.291 of 1999 which Trial Court had regard to. It is claimed that this Court must be sensitive to the fact that Plaintiffs in both the suits are different so also subject properties. As such, it is claimed that issues in the present suit cannot be compared with issues which are decided in the earlier suit. It is further urged that Court must had regard to other issues framed in the respective suits and as such it is claimed that in both the suits, matter in issue is altogether different. He would further urge that Will dated 26/05/1993 was not proved by Shantinath needs to be taken into account, particularly in view of the findings recorded to that effect in the earlier suit. Counsel for Respondents has tried to canvass the claim that basic difference in both the suits are in respect of source of title of Shantinath to the respective properties. It is claimed that in the old suit Will dated 06/04/1984 by Duryodhan is sought to be relied on, whereas in subsequent suit, Will Dated 11/03/1955 executed by Gajanan is sought to be appreciated. As such, it is claimed that suit is not exclusively based on the Will dated 26/05/1993 and Petition is liable to be dismissed.

12] I have appreciated the aforesaid submissions in the backdrop of the facts which are already narrated hereinabove.

13] If we appreciate very scheme of Section 10 of the Civil Procedure Code, this Court is required to be sensitive to the two principles viz (a) matter in issue in later suit needs to be directly and substantially in issue in previously instituted suit and suit should be between the same parties or parties must be litigating under the same title. Fact remains that Will dated 26/05/1993 is relied in both the suits by respective parties. Aforesaid fact can be established from Issue No.5 in RCS No.291 of 1999 i.e. present suit and Issue No.9 in earlier RCS No.230 of 1994. Findings recorded in earlier suit are stayed by this Court as is apparent from the order referred to hereinabove which is delivered in Second Appeal No.266 of 2009. Questions of law based on which Second Appeal is admitted, as are reproduced hereinabove, sufficiently establish the fact as to the matter directly and substantially decided in earlier suit.

14] The fundamental test as has been laid down by the Apex Court

in the matter of satisfaction of provisions of Section 10 of the Civil Procedure Code is, whether final decision being reached in the previous suit, would operate as res judicata in the subsequent suit. Aforesaid test is laid down by the Apex Court in the matter of *National Institute of Mental Health and Neuro Sciences vs. C. Parameshwara* reported in **AIR 2005 SC 242**. Fact remains that the parties hereto are litigating under the same title viz Will dated 26/05/1993. In that view of the matter, considering nature of issue decided in earlier suit which led to admission of Second Appeal before this Court on the questions of law which relate to the Will which is also canvassed in the later suit, it has to be inferred that parties are litigating under the same title. The object of Section 10 is to prevent the Courts of concurrent jurisdiction from trying two parallel proceedings in respect of the same matter in issue i.e. to say in the present case validity of the Will dated 26/05/1993.

15] It is an undisputed position of law that appeal is a continuation of suit and as such pendency of Second Appeal will definitely attract provisions of Section 10, provided fundamental test referred to above

is satisfied. For the reasons referred to above, it can be inferred that fundamental test is very much satisfied as parties are litigating under the same title.

16] As such, what can be observed is, even if properties referred to in both the suits are different, however findings on validity of Will cannot be based on properties mentioned therein. Validity of the Will can be segregated, as is claimed by the Respondents based on properties as such cannot be accepted as findings as regards validity of the Will goes to the root of the matter in later suit also. Merely because properties in both the suits are different that by itself will not decide whether Will will be valid for a particular property or not. In the earlier suit, specific findings are recorded by the Trial Court that Will executed by Duryodhan in favour of Shantinath is not legal and is void Will. As such, sequel is, deceased Shantinath cannot be said to have acquired any right, title and interest in the said properties on the strength of the first Will dated 06/04/1984. As far as second Will dated 26/05/1993 is concerned, same refers to earlier Will dated 06/04/1984 executed by Duryodhan in favour of Shantinath. In this

backdrop, it cannot be said that issue of validity of Will in the later suit is hardly of any consequence. Validity of the Will cannot be tested in parallel proceedings as same may lead to recording contradictory findings on the same issue which is against the principle of judicial discipline. As such, in my opinion, claim put-forth by the Petitioners that the issue is covered by the judgments of the Apex Court in the matter of *Bajrang Factory Ltd and K.S. Palanisami*, cited supra needs to be accepted. In the aforesaid backdrop, contention raised by Counsel for the Respondents that other issues in both the suits particularly in earlier suit are required to be appreciated will have hardly any bearing over the issue of deciding Section 10 Application. Reliance placed by Counsel for Respondent on the judgment of the Apex Court in the matter of *Aspi Jal*, cited supra will be of hardly any support.

17] In this backdrop, this Court is of the view that Court below has committed an error in rejecting prayer of the Petitioners. As such, order impugned dated 04/07/2014 passed by the Trial Court below Exhibit-68, thereby rejecting the prayer of the Petitioners is hereby

quashed and set aside. Application Exhibit-68 stands allowed. It is directed that proceedings in the later suit i.e. RCS No.291 of 1999 shall remain stayed till decision on Second Appeal No.266 of 2009.

18] Petition stands allowed in the above terms and disposed of.

[NITIN W. SAMBRE, J.]