

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

WRIT PETITION NO. 3788 OF 2019

Balasaheb Dattoba Pawar Decd.

Thru LR and Anr.

...Petitioners

vs.

Lalasaheb Dattoba Pawar and Ors.

...Respondents

Mr. V. S. Talkute – Adv. for the Petitioners

Mr. Sohil Gullabani i/by Pradeep S. Gole – Adv. for Respondent No. 1

Mr. Ajit J. Kenjale – Adv. for the Respondent No. 2

CORAM : S. M. MODAK, J.

RESERVED ON : 09th DECEMBER, 2021

PRONOUNCED ON : 13th JANUARY, 2022.

JUDGMENT :-

1. Rule. In this petition, the Petitioners/original defendant nos. 1 and 2 have requested this Court to exercise the supervisory jurisdiction under Article 227 of the Constitution of India. They have requested to modify the order passed by the trial Court thereby refusing to recast the issues already framed in the proceedings of Regular Civil Suit No. 449 of 2001.

2. The application to that effect is filed by the defendant no. 1- Balasaheb since deceased through his legal representative Mahesh B. Pawar in a pending suit. Defendant No. 2 – Mahesh is one of the legal representative of deceased Balasaheb & he is also defendant no. 2 in his individual capacity. The trial Court has already framed the

issues on 15/02/2013. It was a suit for partition filed by one Lalasaheb Dattoba Pawar present Respondent No. 1 against several defendants. Various properties were described in the schedule 'A' to schedule 'C' annexed to the plaint. It consists of immovable properties.

3. On one hand, the Plaintiff has contended that suit properties belongs to joint hindu family and hence liable to partition. Apart from other contentions, deceased defendant no. 1 – Balasaheb Dattoba Pawar and no. 2 – Mahesh Balasaheb Pawar have pleaded that some of the suit properties are self acquired whereas some of the properties were bequeathed by Dattoba Pawar comprising land and structures situated at Tal. Karad, District Satara and also movable properties to defendant no. 1 – Balasaheb Pawar. Said Dattoba testator is father of Balasaheb. Copy of the written statement is not filed on record. But we have said so on the basis wordings of issue nos. 4 and 5 framed to that effect by the trial Court on 15th February, 2013.

4. The trial Court has in all framed eight issues. (page 78) The additional issue no. 5-A (Whether the suit is hit by the principle of res judicata) was also framed on 28th January, 2015. Defendant No. 2 Mahesh vide his application at Exh. 299 has made following grievances:-

- (a) The grievance of the plaintiff “pertaining to execution and validity of the will dated 21/06/1996 of deceased Dattoba

Pawar” is finally concluded and as such issue No. 2 to that effect needs to be deleted.

(b) The issue of res-judicata No. 5-A should not be made applicable to entire grievances set out in the plaint; but it has to be restricted only to the plea of validity of the will.

(c) The description of the suit properties in the schedule is not proper and new issue ought to have been framed to that effect.

(d) Certain properties claim to have been purchased by the plaintiff out of income of joint hindu family and it is denied and hence issue to that effect ought to have been framed.

5. After hearing both the sides, the trial court was pleased to allow the application in part. The grievance about applicability of principle of res-judicata was accepted and issue no. 5A was order to be recasted (para 4 of the order dated 21/09/2018) as follows:

‘Whether the suit is hit by the principle of res-judicata in view of decision in probate proceedings?’

So also grievance relating to improper description of the property was also accepted and issue no. 9 to that effect is order to be framed. Rest of the prayers are rejected by the trial Court. That is why preset petition.

6. After hearing both the sides and going through the record, this Court find that the grievance made for recasting of issues is mainly based on the principles of law and less on question of facts. The trial

Court in para no. 3 of the impugned order (page 81) has opined that “the issuance of probate does not mean that Will is legal and valid. The question of legality of the Will, will be decided in the suit where same is challenged.” There is challenge to this findings on behalf of the Petitioners.

Previous litigation

7. My attention is invited to the order granting the probate, then the order passed by the Appellate Court and order passed by this Court in Second Appeal. After reading them we can gather following facts :-

(a) Miscellaneous Application 61 of 1997 filed by the deceased defendant no. 1 – Balasaheb Dattoba Pawar was allowed by the Court of Civil Judge Senior Division, Sangli on 16/01/2003 (page 11).

(b) The trial Court directed to issue probate in his name in respect of will dated 21/06/1996 but only in respect of properties described in para No. 1-A and 1-B.

(c) And The applicant was directed to prove the exclusive ownership of the testator Dattoba Pawar in respect of properties described in para 1-C and 1-D of the application.

(d) Out of four opponent from that Miscellaneous application three opponents (one of them is Lala Saheb i.e. Plaintiff in present partition suit) filed substantive Regular Civil Appeal No. 51 of 2003. Whereas the applicant Balasaheb therein (and present deceased defendant no. 1) filed cross objection.

(e) The appeal was dismissed on 27/09/2006. However the condition imposed by the trial Court (in respect of properties in para 1-C and 1-D) was set aside.

(f) Second appeal preferred by Lalasaheb was dismissed on 10.01.2013 by this Court (page 54).

8. This Court while disposing of Second Appeal observed :-

“It is well settled principle that the probate Court does not go into the question of title in regard to the various properties covered by the will.”

Averments in present plaint

9. On this background, it will be material to consider the averments in the plaint of RCS No. 449 of 2001, When the suit was filed, Miscellaneous Application for grant of probate was pending for adjudication. In para no. 9 of the plaint the Plaintiff Lalasaheb has pleaded about filing of that Miscellaneous application and challenge given by him to the validity of the will of the Dattoba. It is but natural for him at that time to make such grievance. Though copy of the written statement is not made available, it is but natural for the defendant to give a reply about the said averments. However, it is pertinent to note that the grievance about validity of the will taken by present plaintiff Lalasaheb came to be rejected by the probate Court on 16th January, 2003. Lalasaheb was opponent no. 1 in that proceedings. It is also true that though he carried the matter before the first Appellate Court and second Appellate Court, however he was not successful.

The learned advocate for the Petitioners is right in contending that the probate proceedings was contested proceedings. When paragraph no. 7 of the order dated 16/01/2003 thereby granting

probate is perused, there was opposition to the right to execute the will by Dattoba in respect of ancestral land. On further reading, we may also find that four witnesses were examined on behalf of the applicant – Balasaheb (on the point of will) and were cross examined at great length. Even opponent Lalasaheb gave evidence. In para no. 24 of the said order the probate Court had given reasoning for imposing the condition. It says:-

“I am holding that the testator had no right to execute the will exceeding his rights in the property described in application para 1-C and 1-D”

Mean to say, testator was not having right in respect of those properties that is why the condition was imposed. The first Appellate Court has set aside that condition. The conclusion find place in para no. 34 of judgment dated 27/09/2006. In Second Appeal this Court has confirmed those findings.

SCOPE OF INQUIRY BY PROBATE COURT

10. The law on the point of scope of inquiry in a probate proceedings and scope of inquiry in a substantive title suit is settled. The first Appellate Court has referred few judgments on this aspect. They are :

- (a) B. B. Paymaster and Ors. Vs. Mrs. Baurawa Sangappa Kadapatti and Ors. - 2005 (2) Mah. Law Journal 137,
- (b) Chandrakant Bajirao Shinde Vs. State of Maharashtra and Ors. - 2003 (2) Mah. Law Journal 446 and
- (c) Chiranilal Shrilal Goenka Vs. Jasjit Singh and Ors. -

(1993) 2 Supreme Court Cases 507.

11. On reading the observations in above judgments it can very well be said that the Probate Court is supposed to inquire only about validity of the will, competency of the testator at the time of executing the will (soundness of mind) and compliance of all necessary legal formalities. The probate Court is not expected to conduct the inquiry, whether the testator is having legal right to bequeath the property by will or not that is to say whether he is exclusive owner , co-owner or joint owner or holding the property in any other capacity. It will be material to consider relevant provisions of Indian Succession Act.

12. Section 2(f) lays down the meaning of probate. When copy of will is certified by Court under its seal, it becomes a probate. The purpose of granting probate is also mentioned therein. It is granted for the purpose of administration of the estate of the testator. Chapter I of part ix of the said Act contains the provisions relating to grant of probate and letter of administration. Section 295 of the said Act deals with the procedure to be followed when there is dispute about granting probate. In that case the procedure laid down for trial of Suit under the Code of Civil Procedure is to be followed. Section 283 of the said Act lays down the powers of District Judge while dealing with probate proceedings. Whereas Section 273 recognizes conclusiveness to the probate. The effect of granting probate can be summarized as follows:

- (a) It has brought effect all over the property and estate.
- (b) It is conclusive as to representative title against all the debtors of the deceased.
- (c) It is conclusive also against all persons holding property belonging to him/testator.
- (d) It indemnifies to all debtors paying their debts and all persons delivering up such property to the holder of probate.

13. It will also be material to consider the provisions of Section 41 of the Indian Evidence Act. A final judgment of the Competent Court in the exercise of probate jurisdiction which declares the holder to a character such judgment is relevant in two contingencies. When existence of such legal character or existence of title of such person then it is relevant.

14. From above provisions, one can understand that probate alongwith copy of the will can be granted for the purpose of administration of the property. Once granted, law attaches conclusiveness to certain facts. In the judgments mentioned above Hon'ble Supreme Court and this Court has clarified that probate Court has to inquire about the factum of the will and probate Court does not decide any question of title. It means the question of title of the testator is kept out of the purview of the probate Court. Does it mean to say that there is no forum for adjudicating title over the property?

15. The law has kept "the remedy of getting an adjudication from

the Court as to ownership of properties bequeathed by the testator” open. That is to say whether testator is exclusive owner or joint owner. A person having claim in the ownership of the property or person challenging the bequest can certainly approach the Civil Court for such proceedings.

16. The competent Court is bound to conduct an inquiry about ownership of suit properties including willed properties. On this background, in such substantive title suit whatever the party aggrieved by the will whether is entitled to make grievance about will also is a question. The answer is certainly no. Because the jurisdiction to adjudicate about the will is given to probate Court. There is clear cut division/bifurcation of jurisdiction. Hence, the competent Civil Court cannot adjudicate about the competency/soundness of the testator and validity of the will. This proposition of law is enunciated in set of present facts. Where there are two proceedings. One for grant of probate and another substantive title suit. And when probate Court has already adjudicated and the decision has attained finality, in such an eventuality, certainly Civil Court is not permitted to open already concluded findings. However Civil Court can certainly inquire over title of the suit properties (i.e. who is its owner).

CASE BEFORE US

17. In this case as said above, the probate Court has already issued a probate in favour of Balasaheb Dattoba Pawar i.e. deceased defendant No. 1 of present suit. It has been confirmed upto this Court. It has also been interpreted that probate is not only binding

on the parties to the probate proceedings but it is binding against entire world that is to say it is called as judgment in rem. For the above discussion, the trial Court committed wrong in observing “issuance of probate does not mean that will is legal and valid”. This observation cannot be justified and it was given by overlooking the interpretation of law and hence needs to be set aside.

CONCLUSION

18. For the above discussion, the certain issues needs to be re-casted. Issue No. 2 and 5 cast a burden on defendants to prove them. Though the trial Court was justified in framing those issues (because there were avarement in the plaint and denial by defendants) but considering the interpretation of the law as reiterated above, the trial Court ought to have deleted those issues particularly when one of the party has asked for the same. **Issue No. 2** reads as follows :

“Do defendant Nos. 1 and 2 prove that Will dated 21.01.1996 is legal and valid?”

This issue needs to be deleted in toto. Whereas **issue No. 5** reads as follows:

“Do defendant Nos. 1 and 2 prove that suit properties Schedule A(c), Sr. No. 6, 12 to 24, Schedule C(4) are bequeathed to defendant No. 1 by Dattoba.”

This issue needs to be retained. This issue can be proved by producing copy of probate and once the defendants will prove the title of testator to bequeath those properties by way of will issue

No.5 can be answered accordingly. Whereas issue no. 5A reads as follows:

“Whether the suit is hit by the principle of res judicata in view of decision in probate proceedings?”

This issue needs to be deleted in toto in view of above discussion.

19. At the same time, this Court also feels that the avernments in the plaint making grievance about the will needs to be stuck off because if those pleadings will remain in the plaint, the plaintiff will be tempted to give evidence and naturally defendants will be bound to give contra evidence. Power to stuck of pleadings is incorporated in Order 6 Rule 16 of the CPC. Clause (a) unnecessary pleading and clause (c) which is abuse of the process of the Court are relevant. It is necessary in order to save the time of the party as well as the Court. The provision is silent at whose instance this provision can be resorted to. This provision mean be resorted “at any stage of the suit”. Certainly it is a duty caste upon the Court to see that proceedings of the suit are not delayed or protected unnecessarily.

20. Because if the suit is allowed to be continued containing the grievance as to will, law on the point effect of judgment of probate Court will be overlooked. With these observations the trial Court can certainly pass an order to stuck of those avernments wherever found in the plaint and wherever found in the written statement.

21. With these observations, the following order is passed:

OPERATIVE ORDER

- (a) The Writ Petition is allowed.
- (b) The Order dated 21/09/2018 passed by the learned Joint Civil Judge Junior Division, Karad below Exhibit 290 in Regular Civil Suit No. 449 of 2001 is set aside.
- (c) The issues be re-casted as follows:
 - (i) Issue no. 2 and 5A be deleted.
 - (ii) Trial Court to consider the observations given herein above in respect of issue no. 5.
- (d) Trial Court to struck of the avernments in the plaint and in the written statement “pertaining to execution of the will dated 21/01/1996 of Dattoba Pawar (which makes grievance about that will).
- (e) With above observations, Trial Court to decide the Suit.

22. Rule is made absolute.

(S. M. MODAK, J.)