

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 2241 OF 2017

Vijaykumar s/o Bhaiyyalal Parate and anr.

Vs.

Champalal s/o Bansilal Parate and Ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. P.V. Vaidya, Advocate for petitioners.

Mr. A.M. Quazi, Advocate for respondent Nos.1(A to C), 4 to 6.

Mr. Anand Joshi, Advocate for respondent Nos.18 to 20.

CORAM : MANISH PITALE J.

DATE : 18.04.2022.

By this writ petition, the petitioner has challenged order dated 17.03.2017, passed by the Court of 8th Joint Civil Judge Senior Division, Nagpur, whereby certain applications filed on behalf of the petitioners stood disposed of.

2. It is the contention of the petitioners that the Court below committed a grave error in passing the impugned order and rejecting prayer made on their behalf, calling for the record of Civil Suit No.404/1997, as also original Will dated 13.03.1990, which was subject matter of the said suit. It was further contended that according to the petitioners,

the aforesaid Will Deed is a crucial document required to be proved in the proceedings pending before the Court below in order to determine as to whether the preliminary decree of partition passed by the Competent Court needs to be modified.

3. Attention of this Court was invited to points that were framed in the application filed for modification of the preliminary decree. By emphasizing on one of the points framed by the Court below, it was submitted that the application filed by the petitioners, *inter alia*, for production of the original Will and for proving the same, ought to have been granted by the Court below.

4. A perusal of the impugned order shows that the said application stood rejected for the reason that according to the Court below, the record of the aforesaid Civil Suit bearing No.404/1997 was not required to be called. It was further observed that the question regarding the Will was being raised after a period of about thirteen years and more importantly the proceedings in the aforesaid suit pertained to validity of the very same Will Deed and that therefore, there was no propriety on the part of the petitioners to call for the original Will Deed and for

seeking an opportunity to examine witnesses to prove the said Will Deed .

5. Mr. Vaidya, learned counsel appearing for the petitioners informed this Court that subsequent to the passing of the impugned order, it was an admitted position that the aforesaid Civil Suit No.404/1997 was dismissed and the aforesaid Will Deed was held to be valid. It was also an admitted position that an appeal against the said judgment and decree is pending before the concerned appellate Court. But, it was submitted that despite the aforesaid subsequent event, the petitioners were entitled to examine witnesses to prove the said Will and even if the prayer for calling for the record of Civil Suit No.404/1997 had become irrelevant, it was necessary for the petitioners to be permitted to examine witnesses to prove the validity of the said Will.

6. On the other hand, Mr. Quazi, learned counsel appearing for the contesting respondents, submitted that the subsequent event ought to be taken into consideration by this Court. It is further submitted that another Civil Suit was filed by the contesting respondents challenging the validity of the very same Will Deed. It was then submitted that the

question regarding validity of the Will could not be raised and/or examined in the proceedings pending before the Court below, for the reason that the preliminary decree could not be modified as sought by the petitioners.

7. It is further submitted that due to such tactics adopted by the petitioners, although shares of the respective four branches of the family had been determined many years ago, even till date actual execution of the decree and finalization of decree proceedings could not be accomplished. It was submitted that even if the points framed by the Court below were to be taken into consideration, the question regarding validity of the Will could certainly not be the subject matter before the Court below.

8. This Court has perused the impugned order. It is found that the prayer for calling the record of Civil Suit No.404/1997, was correctly rejected by the Court below. In fact, to be fair to the petitioners, in view of the subsequent developments, the prayer for calling for the aforesaid record was not seriously pressed before this Court.

9. Nonetheless, it was argued vehemently on behalf of the petitioners that in view of the points framed by the Court below in the context of the application seeking modification of the preliminary decree, opportunity ought to be granted to the petitioners to prove the Will Deed in question. It was submitted that the observations made by the Court below in the impugned order that the petitioners cannot be allowed to prove the said Will Deed by examining witnesses, is wholly unsustainable and therefore, the impugned order deserves to be interfered with.

10. It is an admitted position that as on today Civil Suit No.404/1997 has been decided and it has been held in the said proceedings that the Will Deed in question is valid. There is no dispute about the fact that an appeal against the said judgment and decree has been preferred and the same is pending. It is also brought to the notice of this Court that the contesting respondents had also filed another Civil Suit challenging the validity of the very same Will Deed. In these circumstances, although it cannot be disputed that the proceeding concerning final decree proceeding or even modification of the preliminary decree have remained pending for a long period of

time, but the reason for the same is the multifarious proceedings initiated by the parties in the context of the preliminary decree of partition passed years ago.

11. In view of the aforesaid Will Deed, being put to test in the aforesaid Civil Suit bearing No.404/1997 and a view already taken by the competent Court, this Court does not find any reason to interfere with the impugned order. This Court is of the opinion that the insistence of the petitioners on proving the validity of the Will before the Court below would amount to replication of the very exercise undertaken before the Competent Civil Court where the Will has been already held to be valid. Notwithstanding that an appeal against the judgment and decree holding the validity of the Will is pending, the findings rendered in the judgment and decree upholding the validity of the Will can be taken into consideration by the Court below. No case is made out by the petitioner for replicating the very same exercise regarding proving the aforesaid Will in the context of points framed by the Court below.

12. In view of the said subsequent event, this Court is not inclined to interfere with the impugned order. At the same time the parties would be at liberty

to place the judgment and decree disposing of Civil Suit No.404/1997, before the Court below and to raise submissions on the basis of the said judgment and decree, in the context of the points already framed by the Court below in M.J.C. No.350/2014.

13. With these observations, the writ petition stands disposed of.

JUDGE

Prity
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by PRITY S
GABHANE
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