

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

41 WRIT PETITION NO.451 OF 2023

**JIJAMATA VIDYAPEETH ALIAS JIJAMATA FOUNDATION
THROUGH ITS PRESIDENT PANDURANG EKNATH PATIL
VERSUS**

SURESH MURLIDHAR WANI AND OTHERS

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Advocate for Petitioner : Mr. Anand P. Bhandari

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 17-01-2023

PER COURT :

. Heard.

2. By this petition, the petitioner challenges the order dated 23.09.2022 passed below Exh.280 in Special Civil Suit No.227 of 2012, wherein the application of the petitioner for stay of the suit under Section 10 of the Code of Civil Procedure (for short, 'the Code') till the final disposal of the First Appeal No.213 of 2002 pending before this Court came to be rejected.

3. Special Civil Suit No.227 of 2012 was initially instituted as Regular Civil Suit No.261 of 1993 by the respondent no.1 seeking an injunction restraining the defendants from alienating the property. Proceeding seeking probate of Will of Yashodabai Murlidhar Wani executed on 17.12.1995 by way of Probate Application No.4 of 1996

was filed under Section 276 of the Indian Succession Act, which came to be allowed and the probate certificate was issued by order dated 12.10.2001, as against which the First Appeal is pending before this Court.

4. The facts of the case are that the Regular Civil Suit No. 261 of 1993 was instituted by the respondent no.1, who was adopted son of the respondent no.2 - Yashodabai Murlidhar Wani. During the pendency of the Regular Civil Suit No.261 of 1993, the respondent no.2 executed her Will directing the executors to execute the registered sale-deed in favour of the present petitioner. Subsequent to the grant of probate, registered sale – deed was executed in favour of the petitioner and R.C.S. No.261 of 1993 was amended and the present petitioner was impleaded as the defendant and the prayer clause was also amended to seek declaration as far as the validity of the Will executed by respondent no.2 - Yashodabai Murlidhar Wani is concerned.

5. Learned counsel for the petitioner relying upon the issues which were framed in the Probate Application No.4 of 1996 by the Court exercising the probate jurisdiction and the issues which are framed in R.C.S. No.261 of 1993, submits that as the issues framed in

RCS NO 261 of 1993 were directly and substantially in issue in the Probate Application and were decided as against which the first appeal is pending, till the decision of the first appeal, Regular Civil Suit No.261 of 1993 which was renumbered as the Special Civil Suit No.227 of 2012 ought to be stayed. Upon the query by this Court regards the institution of Regular Civil Suit No.261 of 1993, which was instituted prior in point of time of the probate application, Learned Counsel submits that the petitioner was impleaded subsequently and as far as the Petitioner is concerned, the date of institution of the suit would be the date on which the suit was amended and he was impleaded as party. He also relies upon the provisions of the Order-IV, Rule-2 of the Code and submits that under the said provision the particulars of every suit are entered into a register of a civil suit and in the present case after the amendment the civil suit has been renumbered as Special Civil Suit No.227 of 2012 and hence instituted subsequent to the probate application. He would rely on provisions of Section 295 of Indian Succession Act and submit that the proceedings in the probate petition take the form of regular civil suit and as such the provision of Section 10 of the Code will apply even in case where one of the proceedings is a probate petition.

6. I have considered the submissions raised. The settled position is that the only issue in probate proceeding is the genuineness and due existence of the Will and the probate Court does not decide the issue of title of the property sought to be bequeathed by Will. In the present case, while deciding the issue of genuineness and due execution of the Will of Yashodabai , the issues have been framed as regards the authenticity of the Will of the Yashodabai and the competency of the Yashobai to execute the Will. Considering the jurisdiction of the Probate Court, it cannot be held that the issues framed and decided by the Probate Court were directly and substantially in issue for the purpose of Section 10 of the Code of Civil Procedure, 1908.

7. The grant of probate in a probate petition cannot be construed as the adjudication as to the title of Yashodabai in the suit property which will be the subject matter of R.C.S. No.261 of 1993. As far as the submission of the learned counsel for the petitioner as regards the Special Civil Suit No.227 of 2012 being subsequent to probate application as it was amended upon impleadment of the Petitioner and was renumbered as Special Civil Suit No.227 of 2012, it is trite that amendment relates back to the date of institution of suit unless otherwise provided. As such, the contention of the petitioner

is liable to be rejected.

8. The reliance placed by the learned counsel for the petitioner upon Order-IV, Rule-2 of the CPC is misplaced as in the present case suit has been instituted in the year 1992 i.e. prior to the probate petition filed in the year 1996 and merely because by reason of the subsequent amendment Regular Civil Suit was converted into the Special Civil Suit and renumbered in the year 2012, it cannot be said that the suit has been instituted subsequently, considering the provisions of Order-IV, Rule-2 of the Code. The reliance placed on Section 295 of the Indian Succession Act by the petitioner does not assist the case of petitioner, in view of the aforesaid discussion that in a probate application the right, title and interest in the property is not the subject of adjudication. It cannot be said that the issue in the Regular Civil Suit is directly and substantially is the issue in the probate application.

9. In view of the above, I do not find any infirmity in the impugned order. Writ Petition stands dismissed.

(SHARMILA U. DESHMUKH, J.)