

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

**WRIT PETITION NO.13580 OF 2017
WITH
INTERIM APPLICATION NO.3433 OF 2022**

Shashikant Shamrao Mane & Anr. Petitioners

Vs.

Dhairyasheel Bhimrao Ghadge & Ors. Respondents

Mr. S. C. Mangle for the Petitioners.

Mr. Manoj Patil for Respondent Nos.1 and 2.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 13 JULY 2023.

P. C.

1. Heard Mr. S. C. Mangle for the petitioners and Mr. Manoj Patil for respondent Nos.1 and 2.

2. At the outset learned counsel appearing for the petitioner submits that he does not press his challenge to the order dated 29/7/2017 passed below Exhibit 129 seeking striking of portion from the pleadings of the application and confines his submissions to the order dated 2/2/2015 passed below Exhibit 95 (d) rejecting his application for framing additional issue.

3. The question which arise in the present case is whether

the issue as regards capacity of the testator to bequeath the tenanted property in lieu of the provisions of section 27 of the Bombay Tenancy And Agricultural Lands Act 1948 can be framed in the application seeking letters of administration with Will annexed thereto. By the impugned order the application seeking framing of the issue has been rejected by holding that in the testamentary proceedings, the Court is not concerned with title or even the existence of the property but only determines whether the Will was executed by the testator of his own free Will.

4. Learned counsel for the petitioner has invited attention of this Court to the averment made in the petition seeking letters of administration and his reply in the written statement in which specific defence is taken that the property which was bequeathed by the deceased Bajrang Mahadev Mane was tenanted property and as such under the provisions of section 27 of the Bombay Tenancy And Agricultural Lands Act 1948 the property is not assignable. In support of his submission he relied upon the decision of the Apex Court in the case of *Jayamma v. Mardia Bai Dead by proposed LRS., 2004 (5) Supreme 766*.

5. *Per contra*, learned counsel appearing for the respondent raises preliminary objection on the ground of delay inasmuch as interim order was passed on 2/2/2015 and the present petition has been filed after a gap of almost 2 years. He would further contend that as the petitioners have given up the objection to the order passed below Exhibit 129 seeking striking of portion of the pleadings the present order passed under section 95(d) also cannot be considered. He seeks to rely upon the case of *Shrimantibai Ramu Nargude & Anr. vs. Bhimrao Appa Nargude, 2008 (6) Mh. L.J. 807* in which it is held that the tenancy rights in agricultural land can be Willed away.

6. Considered the submissions.

7. The averment in the petition seeking letters of administration specifically states that the property which are described in para 1(a) were exclusively in possession of Mahadev Mane in which he had acquired tenancy right and this tenancy right are transferred to his heir including the testator i.e. Bajarang. In light of this averment in the petition, specific objection has been taken in the written statement that by virtue of the provisions of

section 27 of the Bombay Tenancy And Agricultural Lands Act 1948, the property is not assignable.

8. The Apex Court in the case of *Jayamma vs. Mardia Bai (supra)* was considering the provisions of sections 21 and section 61 of the Karnataka Land Reforms Act, 1961 which is *para materia* with section 27 of the Bombay Tenancy And Agricultural Lands Act 1948. The facts of the case are identical and the Apex Court in paragraph No.15 and 16 have held thus:

"15. The Court empowered to grant a letter of administration although ordinarily may not go into the question of title in respect of property sought to be bequeathed by the testator; the situation would be different where the authority of the testator to execute a Will in relation to the subject matter thereof is in question. When a statutory embargo exists on execution of a Will, the court shall not refuse to determine the question as regard validity thereof, as in terms of the provisions of a statute, the same would be void ab initio.

16. We would discuss the construction of the provision of Section 61 of the said Act, a little later, but we have no hesitation in holding that in the event if it be held that the testator could not have executed the Will in favour of a person who could not be declared to be a tenant having occupancy right such a Will would be void ab initio and, therefore, non est in the eye of law. The court in such an event would not be determining a disputed question of title but would be considering the effect of the statute vis-a- is the Will in question."

9. The issue raised in the present petition is settled by the above decision of Apex Court which has held that when a statutory embargo exists on execution of a Will, the Court shall not refuse to determine the question as regard validity thereof as in terms of the provisions of statute, the same would be *void ab initio*. Considering the decision of the Apex Court which is squarely applicable to the facts of this case which is binding on this Court, it is not necessary to consider the decision of this Court in ***Shrimantibai vs. Bhimrao Appa Nargude, 2008(6) Mh. L. J.*** . As far as the delay aspect is concerned, even though there is no explanation provided in the petition, learned counsel for the petitioner pointed out that initially two orders came to be challenged and second order is of the year 2017.

10. Considering the issue involved in the present case, I do not deem it fit to dismiss the petition only on the ground of delay. The law laid down that by the Apex Court being clear, in my opinion, the impugned order deserves to be quashed and set aside and is hereby quashed and set aside. The trial Court is directed to frame the issue as sought in the application dated 26/3/2014 filed

by defendant.

11. The petition stands allowed.

SHARMILA U. DESHMUKH, J.