

Nikita

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

WRIT PETITION NO.10902 OF 2016

Deepak Tryambak Punde ... Petitioner

V/s.

Sopanrao Pandharinath Nikam and Ors. ... Respondents

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KAILAS
DARADE

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NIKITA KAILAS
DARADE
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Mr. Omkar S. Paranjape, for the Petitioner.

Mr. Abhijit B. Kadam, for the Respondent No.7.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 22, 2023

P.C.:

1. Challenge in this petition is to the order passed by the Trial Court rejecting application for appointment of hand writing expert in a suit for possession based on title. Respondent No.1 and Respondent No.7 filed Special Civil Suit No.142 of 2011. Initial suit was filed by plaintiff No.1, however during pendency of suit, plaintiff No.2 was transposed. The suit is for declaration that plaintiffs have become a owner of suit property based on will and consequential relief of possession of suit property.

2. It is also undisputed that plaintiff No.2, has filed MCA No.58 of 2009, seeking grant of probate in relation to will based on which, Special Civil Suit No.142 of 2011 is filed. It is also undisputed that probate proceedings and suit proceedings are

directed to be heard jointly.

3. The examination of applicant in probate proceedings, is over. After examination is over, the defendant in suit for possession filed an application for sending will to hand writing expert. Said application came to be rejected by impugned order based on following reasons:

(a) The defendant No.1 has not raised objection regarding difference in signature of deceased in probate proceedings.

(b) In the cross-examination, no dispute is raised regarding signature of deceased in probate proceedings.

(c) Evidence on the point of will is completed in the probate proceedings.

(d) Genuineness of the will is to be contested based on evidence adduced in probate proceedings.

(e) Right accrued to the plaintiff by not challenging the signature in the will in the probate proceedings would be taken away.

4. Learned advocate for the applicant submitted that the application for seeking the will to appoint hand writing expert was filed before the completion of cross-examination in probate proceedings. According to him, in view of prayers in the suit, the validity of the will is certainly an issue which requires to be decided independently in a suit for possession. Therefore, he submitted that impugned order deserves to be set aside.

5. Per contra, learned advocate for the plaintiff submitted that the issue of execution of will deed in question is to be adjudicated in probate proceedings. The probate Court has exclusive jurisdiction to decide validity of execution of will. The probate proceedings are directed to be decided along with the suit for possession. Therefore, Trial Court's exercise of power is legal and proper.

6. Having considered the probate proceedings and proceedings in suit for possession, following factual scenario emerges.

(a) Plaintiffs have already filed probate application seeking declaration of execution of will deed.

(b) On the date of passing of impugned order, the evidence of applicants/Plaintiffs in probate proceedings was over.

7. In probate proceedings, present petitioner has not raised objections regarding signatures of deceased.

8. Power exercised by the Trial Court while deciding the suit for possession would be that of Civil Court. The judgment of Trial Court in the proceedings arising out of probate jurisdiction, is conclusive proof under Section 43 of Evidence Act, 1872. The finding recorded in the suit for possession will have status of such judgment being relevant under Section 41 of Evidence Act, 1872. Therefore, in my opinion, considering nature of power exercised by the Trial Court while adjudicating the probate proceedings as judgment in such proceedings are being conclusive under Section 43 of Evidence Act, 1872, the refusal to sent application for appointment of expert as regards signatures on the will cannot be

faulted.

9. Therefore there is no merit in the petition. The writ petition is dismissed. No costs.

(AMIT BORKAR, J.)