

Nikita

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

WRIT PETITION NO.12574 OF 2023

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Rahul Shankar Koushik

... Petitioner

V/s.

Shankar Narayan Koushik and Ors.

... Respondents

Mr. Tejas Desmukh a/w Ms. S.S. Mahanty a/w Mr.
Anshuman Deshmukh for the Petitioner.

Mr. Abhijit Sarvate a/w Mr. Prasad Jadhav i/b Mr.
Ajinkya Udane for the Respondent.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 9, 2023

PC.:

1. The challenge in this petition under Article 227 of the Constitution of India is to the order passed by the Trial Court directing the plaintiff to pay proper court fees on the valuation of the suit properties in the exercise of powers under order 7 rule 11 of CPC.

2. The facts relevant to the adjudication of the issue involved are as follows:

3. The petitioner claims that his mother executed Will on 6th June 2017, in his favour. On 20th November 2019, the petitioner filed Civil Miscellaneous Application No.1463 of 2019 seeking probate of the Will. The respondent contested the application on

merits. By order dated 25 November 2020, the Trial Court converted the civil miscellaneous proceedings into Special Civil Suit No.1369 of 2020.

4. After converting the proceedings into suit, respondent Nos.1 and 2 applied to Order 7 Rule 11 (c) seeking direction against the petitioner to pay deficit Court fees. The petitioner contested the application by filing a reply. By order dated 12th July 2023, the Trial Court directed the petitioner to pay the proper Court fee stamp on the valuation of the suit property, failing which the plaint shall stand rejected on the ground of non-compliance under Order 7 Rule 11 (c). Said order is the subject matter of challenge in this petition.

5. Learned advocate for the petitioner submitted that under Section 29, read with Clause 10 of Schedule (1) of the Bombay Court Fees Act, 1959, the application for probate is made chargeable on payment of fixed court fees. Ad-valorem court fees stamp needs to be paid only after the grant of probate and not before such adjudication. In support of his contention, he relies on the Judgment of this Court in the case of **Shashikant Gangadhar Thorat and Anr. Vs. Punja Gangadhar Thorat and Ors.** reported in 2011 (5) Mh. L.J. 245 and **Thrity Sam Shroff Vs. Shiraz Byramji Anklesaria and Anr.** reported in 2007 (4) Mh. L.J. 56.

6. Per contra, the learned advocate for the respondents submitted that as per Clause 10 of Schedule (1), the petitioner is required to pay the maximum Court fee as per the Court Fees Act. According to him, under Clause 10 of Schedule (1), the present

petitioner must pay the requisite Court fee before adjudicating his claim on merits. In support of his contention, he relied on the Judgment of the Karnataka High Court in the case of **Anthony Swamy Vs. Chowramma** LAWS (KAR) 1988 (7) 2017 and **Miss Pressy Pinto vs. Rony Maxim Pinto and Ors.** AIR 2009 Karnataka 157.

7. Having heard the advocates for the parties, for the adjudication of the issue involved, it is necessary to cull out relevant provisions of the Act, which are as follows:

“29. Payment of court fees in respect of probate and letters of administration.-- (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form outlined in the Third Schedule. The Court is satisfied that the fee mentioned in No. 10 of the First Schedule has been paid on such valuation.

(2) The grant of probate or letters of administration shall not be delayed because of any report made by the Collector under section 28, sub-section (3)."

Clause 10 Schedule 1 of the Bombay Court Fees Act, 1959.

10. Probate of a will or letters of administration with or without will annexed.	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the amount or value up to fifty thousand rupees	Two per cent.
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When the amount or value of the property in respect of which the grant of probate or letters is made exceeds fifty thousand rupees, on the part of the amount or value in excess of fifty thousand rupees up to two lakh rupees. Four per cent.

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakh rupees, on the part of the amount or value more than two lakh rupees up to three lakh rupees. Six per cent.

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds three lakh rupees, on the part of the amount or value more than three lakh of rupees : Seven and a half per cent, subject to a maximum of 75,000 rupees.

Provided that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925, or under Bombay Regulation VIII of

1827 or any corresponding law for the time being in force, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the later grant shall be reduced by the amount of the fee paid in respect of the former grant.

8. On a conjoint reading of Section 29 read with Clause 10 Schedule (1), in my opinion, it is evident that Clause 10 of Schedule (1) makes probate of a Will or letters of administration with or without will chargeable for Court fees. Section 29 is couched for negative language. It restrains the Court from granting probate or letters of administration until the petitioner files a valuation of property in the form set out in the third Schedule, and it is only after the Court is satisfied that such Court fee has been paid that the Court will grant probate or letters of Administration.

9. Therefore, the stage when Section 29 gets attracted is before the issuance of probate or letters of Administration. Unless and until the Court concludes that the petitioner is entitled to probate, in my opinion, there is no question of such petitioner paying the Court fee on probate. As held earlier, clause 10 of Schedule (1) makes only probate or letters of Administration chargeable for

Court fees. Pertinently, neither the application for probate nor the suit subsequently converted has been made chargeable under Section 29 of the Maharashtra Court Fees Act, 1959, to pay Court fees.

10. The observations derive support from the Judgment of this Court in the case of **Shashikant Gangadhar Thorat** (supra). This Court was concerned with proceedings where the petitioner filed a miscellaneous application for issuance of probate, which was contested. In such proceedings, the opponent filed an application raising the issue of maintainability of such an application for want of requisite Court fees. The Trial Court, after framing necessary issues, concluded that the applicants therein had not paid sufficient Court fees. It is not clear from the facts recorded by the Court whether it was converted into a suit. However, in my opinion, observations made in paragraphs 8 to 11 are instructive for a decision on the point raised. This Court considered the scheme of the Maharashtra Court Fees Act, 1959. After taking into consideration Section 29 and Clause 10 of Schedule (1), this Court held that payment of Court fees would have to be made only when the Court is to pass an order entitling the petitioner to grant probate. This Court observed that the Act nowhere contemplates payment of court fees on an application for grant of probate. In a contentious matter, it is observed that if the Court concludes that an order of grant of probate is not to be made in such circumstances, no court fees are required to be paid or payable.

11. I am in agreement with the observations made by this Court in the case of **Shashikant Gangadhar Thorat** (supra). Therefore, in

my opinion, even in relation to a suit converted from an application for probate, relevant provisions which require a petitioner to pay court fees are Section 29 of the Act read with Clause 10 of the Schedule (1). As held earlier, Such eventuality will arise only after the Court, considering the merits of the suit, concludes that the plaintiff is entitled to probate. Therefore, in my opinion, the Appellate Court is not justified in directing the petitioner to pay the court fees as per the valuation of the suit property.

12. For the reasons stated above, the impugned order cannot be sustained. Hence, the following order.

13. The impugned order is set aside.

14. It is clarified that the petitioner will be required to pay necessary court fees if the Court concludes that the petitioner is entitled to probate.

15. The writ petition stands disposed of in the above terms. No costs.

(AMIT BORKAR, J.)