



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

CIVIL APPLICATION (CAF) NO.2407 OF 2024 IN
FIRST APPEAL NO.225 OF 2002

Union of India .Vs. Shri Mohd. Samad s/o Mohd. Isak and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri N.S. Deshpande, DSGI for appellant.

Shri C.B. Balimare, Advocate for applicant Nos.1 to 4.

Shri T. Mirza, Adv. h/f Shri A.M. Quazi, Adv. for respondent No.1C(V),
1(A) (i,ii,iii).

CORAM : SANJAY A. DESHMUKH, J.

DATED : 20/12/2024

1. This Court had passed an order dated 03.09.2024 and directing both the parties to argue on the point as to whether the application is maintainable, when there is finding of Civil Judge, Senior Division, as well as this Court in Writ Petition No.5766 of 2019 and whether the filing of such writ petition amounts to waiver or not. Thereafter, by order dated 18.09.2024, this Court held that, application is maintainable. Both the parties were directed to argue this application with regard to the Will, as per Order XXII Rule 5 of the Code of Civil Procedure, 1908 (For short "CPC").

2. Perused the application and reply filed by the contesting respondents.

3. Heard the learned advocates for both sides.

4. The learned advocate for the applicant pointed out the genealogy of the respondents/claimants and submitted that, Mohammad Yusuf had a son Mohammad Shafi, predecessor on 27.09.2001. The applicant Nos.1 to 4 are wife, son and daughter. His mother Anis Begum, and sisters Abeda Begum and Asma Begum are opposing a Will/Vasiatnama, which is registered. The learned advocate for the applicants submitted that, there is limited scope for this Court to consider the status of the applicants and determine whether they have the right to proceed further with the appeal in the capacity of legal representatives of the claimants as defined in Section 2(11) of the CPC. He is relying upon the following precedential laws :-

- (a) ***Smt. Sarmishtha Devi Surve and others .vs. Lal saheb Surve and others***, reported in AIR 1996 M.P. 13, in which it was held that, genuineness of the Will cannot be decided while deciding application under Order 22 Rule 5 of the CPC and it can be decided in the probate proceedings.
- (b) ***Charanjit Singh and anr. .vs. Bharatinder Singh and ors.***, reported in 1987 SCC OnLine P & H 95, in which it was held that, if such application under Order 22 Rule 5 of the CPC is decided does not party and it has to be decided by the separate proceedings.

- (c) *Parwatibai W/o Namdeo (Thru LRs.) .vs. Ramrao Barikrao Lahane*, reported in 2002(2) ALL MR 788, enquiry under Order 22 Rule 5 of the CPC, the Court should refrain from going into the question of genuineness of the Will in such type of enquiry. Because the question of validity of Will is not in issue in such type of summary enquiry.
- (d) *Jaladi Suguna (Deceased) through LRs. .vs. Satya Sai Central Trust and others*, reported in (2008) SCC 521, in which it was held that, respondent-plaintiff died and his/her estate remained unrepresented, it cannot be said that the appeal was heard. When the respondent – plaintiff died, the legal representatives who succeeded to her estate will have to be brought on record and they should be heard in their capacity as persons representing the estate of the deceased plaintiff. If they are not heard, there is no ‘hearing’ of the appeal in the eye of law.
- (e) *Mahanth Satyanand Alias Ramjee Singh .vs. Shyam Lal Chauhan*, reported in (2018) 18 SCC 485, in which it was held that, determining a particular person as legal representative has no effect of final decision or operates as res judicata between the legal representatives as to the question of who should ascend as guru. At the cost of repetition, we may not that the determination by the High Court would be

limited to the question, as to who should be brought on record in the place of the deceased for the purposes of continuing the suit alone, and nothing beyond that.

- (f) ***Roni Adi Tarapurwala and another .vs. Dinshaw Adarji Tarapurwala since deceased through LRs***, reported in **2012 SCC OnLine Bom 552**, in which it was held that, whether any person is or is not a legal representative, it is the duty of the Court to determine the issue in terms of the Proviso to said Rule 5.
- (g) ***Mt. Dhapu .vs. Ramavtar***, reported in **1923 NAGPUR 209**, in which it was held that, conclusively establish his right to do so if his legal position is one of the main issues in the suit itself. But, the decision that a person is a legal representative only to a limited extent does not preclude him from proving in the suit what his full rights are.
- (h) ***Chhabil Das .vs. Pappu***, reported in **(2006) 12 SCC 41**, in which it was held that, If the respondent could represent the estate of original plaintiff and despite the fact that the appellant had an opportunity to raise the said issue at the stage of determination of the question as envisaged under Order 22 Rule 5 of the Code of Civil Procedure, the same having not been

done, such a question cannot be permitted to be raised in the second appeal or before us for the first time.

- (i) ***Dulari Bai and Ors. .vs. Umesh Kumar and Ors,*** reported in **MANU/CG/0295/2019**, The start line of provision of Order 22 Rule 5 of C.P.C., which says that “where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff” is not at all an issue here, for the simple reason that respondents have not raised any question on the point of entitlement of the appellants, their question is based on validity of execution of Will. Any question based on validity can not be determined under Order 22 Rule 5 of C.P.C. Therefore, the objection raised is without any substance, which is rejected and both the appeals are taken up for decision.
- (j) ***Pradeep Kumar .vs. Vijay Kumar sharma,*** reported in **2009 0 Supreme (P&H) 1617**, in which it was held that, the applicant can only be made a party, on the basis of the registered Will, copy whereof, is R1/1, to represent the estate of the deceased person, or as an intermeddler. From the copy of the Will, this Court, is satisfied, that the applicant, is a necessary party to represent the estate of Savitri, in these proceedings. The legality and validity of the Will may be got

decided by the applicant, in an appropriate forum. In these circumstances, no inquiry, is essential, in the matter, at this stage. The application, deserves to be allowed.

5. He further submits that, merely because the term “future property” is used in a Will/Vasiatnama, it cannot be stated as the future property, on the contrary, it refers to property that is in existence. Shri Balimare, learned advocate for the applicant submitted that the application should be allowed for limited purpose of bringing the applicants on record as legal representative.

6. Shri Mirza, learned advocate for the respondent, strongly opposed the application and submitted that, the issue of Will should be decided on its merit, because applicants are not legal representatives. They had filed Writ Petition No.5766 of 2019 which was decided against them and they have preferred a Review application against the said judgment, which is pending before this Court. Therefore, this application is not maintainable. He is relying upon the following precedential law :-

i) ***Shankar Ramchandra Abhyankar Vrs. Krishnaji Dattatraya Bapat, AIR 1970 SC 1.*** Para No.7 is as under :

“7. It may be useful to refer to certain other decisions which by analogy can be of some assistance in deciding the point before us. In U.J.S. Chopra v. State of Bombay, AIR 1955 SC 633 the principal of merger was considered with

reference to Section 439 of the Criminal Procedure Code which confers revisional jurisdiction on the High Court. In the majority judgment it was held, inter alia, that a judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing, in the presence of both the parties would replace the judgment of the lower court thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the court below. In Chandi Prasad Chokhani v. The State of Bihar, (1962) 2 SCR 276 = (AIR 1961 SC 1708) it was said that save in exceptional and special circumstances this Court would not exercise its power under Article 136 in such a way as to bypass the High Court and ignore the latter's decision which had become final and binding by entertaining an appeal directly from orders of a Tribunal. Such exercise of power would be particularly inadvisable in a case where the result might lead to a conflict of decisions of two courts of competent jurisdiction. In our opinion the course which was followed by the High Court, in the present case, is certainly one which leads to a conflict of decisions of the same court."

7. Nobody will dispute the ratio laid down in the above precedential laws cited on behalf of both sides. However, it is well settled that facts of the case are always decisive.

8. Perused the impugned order passed by the learned Civil Judge, Senior Division, Nagpur dated 09.01.2018. On perusal of the reasons, it appears that, in paragraph No.14 of the said order, the important contents in a Will/Vasiatnama are reproduced.

9. The learned Court held that a Will/Vasiatnama, as per Mohammedan law, in respect of

future property, is not valid and property must be in existence and capable of transfer. On perusal of a Will/Vasiatnama particularly Page No.4, the testator Mohammad Yusuf, had stated that, his brother Mohammad Samad S/o Mohammad Isak is no more and whatever, he will receive from the property of his brother during his lifetime, he will be entitled for it but, after his death, his wife and two daughters will receive 25% each and daughter in law, grand daughter and grandson will receive 25% each.

10. The learned Civil Judge, Senior Division held that, the property is not specified and therefore, a Will is not valid. In the present case, the dispute concerns the amount of acquisition of land belonging to Mohammad Samad, who was brother of Mohammad Yusuf. The amount under award has been deposited in this Court. Since, the entitlement of the applicants to the particular amount has not been specified in this appeal with respective shares of the respondents/claimants and the appeal has been preferred by the Union of India, it is necessary to ascertain the exact nature of the share of the respondents in the amount of compensation as per the award. Therefore, considering all the facts and circumstances of the case as well as recital in a Will/Vasiatnama, the amount of compensation that Mohammad Yusuf will receive is not specific and certain but it is certainly a property. The learned advocate for the respondents submitted that the Mohammedan can execute a

Will/Vasiatnma to 1/3rd of his property. However, that issue cannot be decided now at this stage. The concerned party relying upon Will may proceed in the civil Court for determination of their rights/share, either on the basis of Will/Vasiatnama or on the basis of right to succession as per Mohammedan law if it is available to them.

11. Considering all these aspects, it would be proper to allow the applicants to agitate their claim against the appellant in capacity of the legal representatives of Mohammad Yusuf S/o Mohammad Isak. if any party wishes to challenge or rely on a Will/Vasiatnama to determine their rights, either in affirmative or negative, they must proceed according to the provisions of law through litigation in Civil Court.

12. At this stage, this Court is not deciding the rights of the parties on merit. This Court is only deciding as to whether applicants have right to proceed in the appeal as legal representatives of Mohammad Yusuf. Therefore, the legality and validity of the Will / Vasiatnama cannot be decided in this Court and concerned parties are expected to proceed further before the appropriate forum for establishing their rights.

13. Considering all these reasons, the argument of learned advocate for the respondents, is not acceptable. The

findings of the learned Civil Judge Senior Division that, the compensation amount is future property, it is certainly not legal and correct, it is not sustainable in the eyes of law, especially when the amount of compensation had been determined by the Reference Court and it is challenged in this Court.

14. It is clarified that, the entitlement of the share of parties cannot be decided at this stage because, it is matter of evidence and for that purpose, the Will/Vasiatnama is decisive and must be decided on merit by the Competent Court.

15. The argument of learned advocate Shri Mirza, for the appellant is not acceptable, that a Will/Vasiatnama does not disclose the survey / block no. of the property acquired and also the fact that the first appeal is pending in this Court.

16. The application is **allowed**. The impugned order dated 09.01.2018 in M.J.C. No.277 of 2011 by the Civil Judge Senior Division, Nagpur, is partly set aside.

17. The learned advocate for this applicants No.1 to 4 is directed to carry out the amendment in the cause title of this appeal on or before 10.01.2025 by adding applicants and the contesting respondents as legal representatives.

18. Shri Mirza, learned advocate for the respondents, seeks stay to the execution of this order. The learned advocate for the appellant strongly opposed the respondent's prayer.

19. Considering the peculiar set of facts, it would be proper to grant stay to the execution of the said order for six weeks.

20. This Court has decided application No.2407/2024. The appeal has been pending for more than 22 years. The next generation has been impleaded in this appeal as legal representatives. Considering this fact, it would be proper to expedite the hearing of this appeal.

21. The appeal is expedited. Considering all these aspect, it would be proper to fix the matter for final hearing on **07.02.2024 at 02.30 p.m.**

22. Application is **disposed**.

(SANJAY A. DESHMUKH, J.)