

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

WRIT PETITION NO.8486 OF 2022

(Suryakant s/o Janardan Patil Vs. Late Smt. Kamlabai w/o Namdeo Ugale thr. his legal heirs and others)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. A. R. Deshpande, Advocate for Petitioner.
Mr. M. S. Sharma, Advocate for Respondent Nos.2 to 10.

CORAM: N. R. BORKAR, J.

DATE: 19th SEPTEMBER, 2024.

One Kamlabai had filed a suit against the respondent Nos.2 to 9 herein for partition and separate possession of the suit properties. The trial court decreed the suit vide judgment and decree dated 05.03.1993.

2. Being aggrieved, respondent Nos.2 to 5 herein have filed the first appeal against the judgment of the trial court and the same is pending on the file of District Court, Khamgaon. During the pendency of the said appeal the original plaintiff – Kamlabai expired on 18.10.2010.

3. The petitioner herein had filed an application in the said first appeal and sought his impleadment on the ground that the original plaintiff – Kamlabai has executed a Will in his favour in respect of her share in the suit properties. The learned first appellate court has rejected the said application by the order impugned in this petition.

4. I have heard the learned counsel for the petitioner and the learned counsel for the contesting respondents.

5. The learned counsel for the petitioner submits that the issue involved in the present petition is no more *res integra* and is covered by the judgment of the Hon'ble Supreme Court in ***Suresh Kumar Bansal v. Krishna Bansal and another*** reported in ***(2010) 2 SCC 162*** and the judgment of the Rajasthan High Court in ***Radhey Shyam v. Radha Mohan Paliwal & Ors.*** reported in ***2012 SCC OnLine Raj 2208***. The learned counsel for the petitioner submits that the learned first appellate court has erred in rejecting the application by examining the issue whether Will is valid or not. It is submitted that the order impugned thus needs to be set aside.

6. On the other hand the learned counsel for the contesting respondents supported the order impugned. It is submitted that to examine the claim of the petitioner, the learned first appellate court has rightly examined the issue of validity of the Will for the limited purpose to ascertain whether petitioner is entitled to represent the estate of deceased or not. In support of the submissions that the same is permissible, the learned counsel for the contesting respondents has relied upon the judgment of the Hon'ble Supreme Court in ***Jaladi Suguna (Dead) through L.Rs. v. Satya Sai Central Trust & Ors.*** reported in ***2008 AIR(SC) 2866***.

7. The Hon'ble Supreme Court in **Suresh Kumar Bansal v. Krishna Bansal and another** has held:

20. It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.

21. In order to shorten the litigation and to consider the rival claims of the parties, in our view, the proper course to follow is to bring all the heirs and legal representatives of the deceased plaintiff on record including the legal representatives who are claiming on the basis of the will of the deceased plaintiff so that all the legal representatives, namely, the appellant and the natural heirs and legal representatives of the deceased plaintiff can represent the estate of the deceased for the ultimate benefit of the real legal representatives. If this process is followed, this would also avoid delay in disposal of the suit.

8. Relying upon the above judgment of the Hon'ble Supreme Court the Rajasthan High Court in **Radhey Shyam v. Radha Paliwal** has held:

8. In view of the above settled legal

position, the legatee under the Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative. In the instant case, the petitioner who was the legatee under the Will executed by the deceased defendant No. 1, being an intermeddler with the estate of the deceased, would be the legal representative of the deceased. Though the trial court was required to determine as to who was the legal representative of the deceased in the enquiry under Order XXII Rule 5 CPC, such determination was only for a limited purpose and it would not confer on the person held to be legal representative, any right to the property which was the subject matter of the suit. As per the above stated legal position, such a legal representative, who is the legatee under the Will would be only entitled to represent the estate of the deceased testator and he could not be said to have any right in the suit property vis-a-vis the other rival claimants to the estate of the deceased. Thus, in the opinion of this court, the trial court has clearly exceeded its jurisdiction in determining the question as to the legality and the validity of the wills relied upon by the petitioner for the purpose of representing the estate of the deceased Chand Narain while conducting the enquiry under Order XXII Rule 5 CPC, and in holding that the petitioner had legally failed to prove the said Wills. The trial court was not at all called upon to examine the validity of the said Wills in the enquiry to be conducted under Order XXII Rule 5 of CPC, which was only for the purpose of determining as to whether the petitioner was the legal representative of the deceased or not. The impugned order thus suffers from legal infirmity and deserves to

be set aside. The petitioner being the legatee of the Will of the deceased, deserves to be permitted to represent the estate of the deceased as his legal representative in the suit.

9. In view of the above legal position, the order impugned can not be allowed to stand. The order impugned is thus set aside. The petitioner shall be impleaded as party respondent to the appeal.

10. The petition is disposed of in the aforesaid terms.

(N. R. BORKAR, J.)