



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6180 OF 2020

Harjit Singh Tirath Singh Sawhney

VERSUS

Paramjit Singh Tirath Singh Sawhney And Another

- Mr. H. S. T. S. Sawhney, Petitioner in person
- Mr. M. R. Sonawane, Advocate for the Respondent No. 1

CORAM : R. M. JOSHI, J

DATE : AUGUST 13, 2025

PER COURT :

1. This Petition takes exception to the order passed by the Execution Court dated 13.11.2017 in Special Darkhast No. 62/2011 seeking execution of an order of probate, wherein a warrant of attachment to be issued against Respondents. This Application came to be rejected essentially on the ground that the Respondents were not party to the proceedings of MARJI No. 701/2009.

2. On the last date of hearing, Petitioner in-person and learned Counsel for Respondent No. 1 were heard.

3. On that day, an issue was raised on behalf of

Respondents with regard to the tenability of the execution proceedings itself against the order of grant of probate, it being not a decree. In order to enable the party in-person to respond to the said query, time was granted. Today again, party in-person so also Counsel for Respondent are heard.

4. It is the contention of the Petitioner in-person that the grant of probate is a judgment in rem and it binds not only the parties to the case but even others as it conclusively determines the legal character of the executor. He placed reliance on the judgment of the Hon'ble Supreme Court in case of Chiranjilal Shrilal Goenka (Deceased) through Lrs. vs. Jasjit Singh, 1993 (2) SCC 507 to argue that the probate Court decides the executors authority. It is sought to be argued by relying upon Section 36 of the Code of Civil Procedure that the order of probate can be executed. He made reference to the judgment of this Court in case of Balasaheb Dattoba Pawar Decd. Thru Lr vs. Lalasaheb Dattoba Pawar, 2022 (2) AllMR 189 to contend that the grant of probate solicits the legal basis for the executor to act. He further relied upon

the judgment of Allahabad High Court in case of *Indra Dev vs. The Goods of Late Bhakt Ratan, 2006 AHC 4260*, which deals with the Court's role in granting the party to the executor. He placed reliance on the judgment of Patna High Court in case of *Ramcharan Singh VS. Dharohar Kuer, 1954 AIR (Pat) 175* to contend that grant of probate proves the title of executor to administer the estate and if someone else is in wrongful possession the civil suit for recovery is appropriate remedy. He placed reliance on following judgments in order to argue that the proceedings of execution are tenable on the basis the order of grant of probate: *Kapildeo Prasad Sah and Others vs. State of Bihar, 1999 AIR (SC) 3215*, *Anil Ratan Sarkar and Others vs. Hiral Ghosh and Others, 2002 AIR(SC) 1405*, *Mohan and Ors, vs. Rohitas and Ors, 1990 (2) RLR 357* & *Balai Lall Banerjee and Others vs. Debaki Kumar Ganguly and Others, 1984 AIR(Cal) 16*.

5. Learned Counsel for Respondent opposes the said submissions by contending that unless there is a decree, question of its execution under Order XXI of Code of Civil Procedure would not arise. To support his

submission that order of probate is not decree, reference is made to the judgment of the Coordinate Bench of this Court in case of *Bharat Balarm Thakur vs. Mr. Pradip Ambaji Gharat alias and Ors, Writ Petition No. 7503 of 2022*. It is his further submission by relying upon the judgment cited in case of *Balai Lall Banerjee and Others* (supra) by the Petitioner in-person that even in the said judgment it is held that the order of grant of probate is not a decree and hence, question of formal decree being drawn does not arise. In substance it is his contention that no execution proceedings could have been filed against the order of grant of probate and entertained by executing Court.

6. Since, the issue of maintainability of the execution proceedings goes to the root, parties were given an opportunity to make submissions. As recorded above, they were heard on this issue at length.

7. There is no dispute about the fact that the Petitioner has filed proceedings for obtaining probate in respect of will dated 30.08.2008 in MARJI No. 701/2009. By order dated 12.08.2010, CJSD, Aurangabad

issued probate certificate in favour of the Petitioner. Petitioner on the basis of probate certificate filed Special Darkhast No. 62/2011 for attachment of the properties in custody of the Respondent nos. 1 and 2. In this proceeding, Application came to be filed for issuance of warrant of attachment. This Application came to be rejected. This order was challenged by filing M.A. No. 211/2018. Since the District Court had no jurisdiction to entertain any such Appeal, Petitioner filed an Application for return of memo of M.A. No. 211/2018 for its presentation before competent Court. During the pendency of the said M.A., an application was filed on 05.07.2018 seeking direction to the Respondent No. 2 to sale the revolver of the deceased, which is in the custody of the Respondent No. 2 and deposit sale amount in the Court. This Application too came to be dismissed by the execution court.

8. In order to file execution proceedings under Order XXI of Code of Civil Procedure, there ought to be a decree within the meaning of Section 2(2). The definition of decree means formal expression of an

adjudication so far it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. In order to form an order as a decree, such order must be passed in a suit. The proceedings of grant of probate is not a suit. Though in case of contest thereof, it has to be decided like a suit, but it does not become a suit by itself. It would be relevant to take note of order of Coordinate Bench of this Court in case of Bharat Balarm Thakur (supra). In paragraphs 13 and 14 thereof, this Court has made following observations:

13. *The words "As nearly as may be" and "The form of a Regular Suit" in Section 295 of the Indian Succession Act, 1925 even where probate proceedings became contentious, they merely to assume form of regular suit though in reality not in the nature of regular suit under the Civil Procedure Code as held in Fm. V.M.Skaria AIR 1999 Kerala 320. Therefore, proceedings under Section 385 of the Indian Succession Act, 1925 take the 'form' of the regular suit and the proceedings became the suit in the 'form' only and not in substance. In the case of Sidhanath Bhati v. Jai Narayan Bharti AIR 1994 Patna 144, it was held that contentious proceedings under the Indian Succession Act, 1925 is not a suit in point of fact and such final orders passed in such final proceedings is not a decree. Section 299 of the Indian Succession Act,*

1925 provides Appeals from every orders, which includes orders passed in contentious proceedings also and thus, concluded that the order in the said proceedings is not a decree.

14. Therefore, neither application under Bombay Regulation nor application under Section 276 of Indian Succession Act, 1925 nor contentious proceedings under Section 295 of the Indian Succession Act, 1925 culminates into decree. They merely assume form of suit but not a suit in substance.

9. Similarly, even in the judgment cited on behalf of the Petitioner in case of Balai Lall Banerjee (supra), it is held that the grant of probate is not decree and hence, question of formal decree being drawn would not arise. The other judgments cited supra on behalf of the Petitioner are not relevant to decide the issue of tenability of the execution proceedings on the basis of order of grant of probate.

10. Provisions of Code of Civil Procedure make a decree or an order having force of a decree, executable. Thus, only in these two situations an execution proceeding would lie. As discussed above, the order of grant of probate is mere recognition of the grantee to represent estate of the deceased and it does

not became a decree. Similarly, such order does not have force of decree in order to seek execution thereof.

11. In such circumstances, leave apart application filed for attachment, the question of tenability of the execution proceedings itself needs to be decided against the Petitioner. Needless to say that it would be open for the Petitioner to seek recovery of the articles/properties if in possession of Respondents by adopting appropriate legal proceeding.

12. In view of above, there is no substance in challenge to the order impugned. Moreover, the execution proceeding itself is held to be not maintainable. Execution Court to pass formal order of disposal of the execution proceedings.

13. Petition stands dismissed in above terms.

(R. M. JOSHI, J.)