

R.C.S. No. 88/2017
(Dattatray & Ors. Vs. Maruti & Ors.)

Order below Exh.70
(Passed on 21st March, 2023)

This is an application filed by the plaintiffs for deletion of Issue No.1A. It has been contended by the plaintiffs that this Court has altered Issue No.1A is under:

“Do defendant No.2 & 3 prove their possession over the suit property on the basis of “Will Deed” dtd.16.05.2008?”

2. The plaintiffs have submitted that in fact, said issue is not required for the just decision of the present suit. The plaintiffs are owner of the suit property, which has been decided in the previously instituted suit. In that suit, it was decided by the concerned Court that deceased Maruti is in illegal possession of the suit property and the plaintiffs can recover said possession by following due process of law. The defendant No.1 is a legal heir of deceased Maruti. Defendant No.2 & 3 are also claiming their rights in the suit property by virtue of “Will Deed”, which has been allegedly executed by deceased Maruti in their favour. If the issue regarding possession of defendant No.2 & 3 on the basis of “Will Deed” dtd.16.05.2008 has been kept as it is and if the evidence on it is permitted, it will amount to decide the legality of the “Will Deed”. It will also take time to decide said issue as well. In fact, said issue is material in a proceeding between defendant No.1 & 2 to 3. The plaintiffs are legally entitled to recover possession of the suit property and therefore, defendant No.1 to 3 are not required to prove anything. The defendants can lead separate evidence in the probate proceeding, which has been going on between defendant No.1 & 2 to

3. Ultimately, the plaintiffs prayed to allow the application and to delete the Issue No.1A.

3. Said application has been formally resisted by the defendant No.1A. She submitted that said issue is not necessary for the decision of the present suit.

4. Defendant No. 2 & 3 have also replied the present application by filing their say at Exh.72. They submitted that the defendant No.1 in collusion with the plaintiffs teased deceased Maruti Garde. After the death of deceased Maruti, defendant No.1 has been brought on record as his legal heir by the plaintiffs, themselves. The plaintiffs are maternal uncles of defendant No.1 and they tortured deceased Maruti Garde by joining hands with the defendant No.1.

5. Further, they submitted that previously defendant No.1 filed applications at Exh.59 & 60 with the malafide intentions. Said applications were replied by the defendant No.2 & 3 and accordingly those were rejected by this Court. The decision of Hon'ble First Appellate Court has been challenged before the Hon'ble High Court and said fact has been mentioned in the written statements at Exh.15 & 41. Already, this Court has held that said issue is important in the present proceeding as during the lifetime of deceased Maruti, defendant No.1 filed civil suit against him in respect of "Will Deed" executed by him in favour of defendant No.2 & 3. The defendant No.2 & 3 are in possession and cultivation of the suit property since long. Therefore, they are the necessary parties to the present suit. Even, they are entitled for the said property by virtue of the "Will Deed" executed by deceased Maruti. The present issue is very well required

for the just decision of present suit on merit. Previously, the applications Exh.59 & 60 were filed by the defendant No.1 in collusion with the plaintiffs just to prolong the matter and to keep away the present defendant No.2 & 3 from the present proceeding and the suit property. Ultimately, they prayed to reject the application.

6. Perused the application and say along with the entire record. Heard both the sides, at length. Learned Advocate Mr. R.M. Chavan appearing for the plaintiffs argued that the Issue No.1A has been altered by the Court *sou moto*. Already, defendant No.2 & 3 filed probate application before the Hon'ble Civil Judge Senior Division Satara, in which the legality of the "Will" can be decided. If the genuineness of the "Will" has been decided by this Court, there might be conflicting decisions. Further, he submitted that this Court has no jurisdiction to decide the genuineness of "Will". Ultimately, he prayed to allow the application.

7. Learned Advocate Mr. U.H.Sanas appearing for the defendant No.1 argued that the right of plaintiff has been decided by the Appellate Court. Already, the probate application has been pending before the Hon'ble Civil Judge Senior Division, Satara in respect of the "Will" alleged executed by deceased Maruti in favour of defendant No.2 & 3. Therefore, the said issue is not required for the just decision of the present suit.

8. On the other hand Mr. A.K.Shinde appearing for defendant No. 2 & 3 argued that the earlier application for deletion of the issue in respect of burden of proof of defendant No.2 & 3 to prove their ownership and possession over the suit property has been

decided by this Court, itself. Therefore, no such similar application can be filed again. This Court has rightly altered said issue. Therefore, he prayed to reject the application.

9. Perused the record. It is pertinent to mention here that the defendant No.1 had filed application (Exh.64) for deleting the Issue No.1A. Said application came to be decided by this Court on 23.11.2022 on merit. Accordingly, the application was disposed of and the Issue No.1A was altered.

10. The defendant No.2 & 3 have been brought on record as per order of this Court, passed on 06.04.2021 below Exh.35. Thereafter, defendant No.1 filed an application at Exh.60 for deleting them from the suit. Even, said application has been decided on merit by this Court vide order dtd.23.11.2022 and it was accordingly rejected.

11. This Court while passing the orders below Exh.60 & Exh.64 has observed that defendant No.2 & 3 have been brought on record by virtue of the "Will Deed" dtd.16.05.2008 which has been allegedly executed by deceased Maruti Garde in their favour. Importantly, said original "Will Deed" is filed on record and the defendants have also started their evidence on it. Previously, the issue No.1A was regarding the burden of proof of defendant No.2 & 3 to prove their ownership and possession over the suit property. However, vide order dtd.23.11.2022 passed below Exh.64, this Court has come to the conclusion that the issue of ownership has already been decided in R.C.A.No.132/2011 by the Hon'ble First Appellate Court and therefore, said issue No.1A was altered and restricted to the extent of

possession, only. This being a suit for simplicitor possession and the defendant No.2 & 3 are claiming to be in possession of the suit property, therefore the issue No.1A which has been altered vide order dtd.23.11.2022 passed below Exh.64 is necessary to determine the real controversy between the parties. It is pertinent to mention that, said issue is not in respect of proving the ownership of concerned defendants. As the parties have already started their evidence on the said issue and the original "Will Deed" is filed on record, the matter has to be decided by taking into consideration all these aspects. This Court has already discussed regarding the pendency of probate proceeding and its impact on the present suit, as well. Said probate proceeding is a different matter and mere its pendency will not restrict the present proceeding. In view of this discussion, the present application is liable to be rejected. Hence, the following order.

Order

The application (Exh.70) is hereby rejected.

(Dictated and pronounce in open court)

Date:-21/03/2023

(R. M. Bhende)
2nd Jt. Civil Judge, Jr. Dn., Wai