

HIGH COURT OF MADHYA PRADESH: BENCH AT

INDORE

M.P. No.1099/2018

(M/s Shriram Builders Vs. State of M.P. & others)

Indore, dated 26.03.2018

Shri Vijay Assudani, learned counsel for the petitioner.

Shri Deepesh Joshi, learned counsel for the respondent

No.3.

The petitioner before this Court has filed the present petition being aggrieved by order dated 05/01/2018 passed by 16th ADJ, Indore in Civil Suit No.975-A/2017.

The facts of the case reveal that the petitioner has filed a civil suit against the respondents including Indore Development Authority and the Indore Development Authority has filed an application preferred under Order 7 Rule 11 of CPC.

The trial Court has passed the impugned order and it has been held that the Indore Development Authority is not a necessary party to the suit and there is no cause of action against the Indore Development Authority. Being aggrieved by the order passed on an application preferred under the Indore Development Authority by which the proceedings against the Indore Development Authority has come to an end, the present writ petition has been filed.

Shri Deepesh Joshi, learned counsel for the respondent has argued before this Court that the present writ petition is not maintainable. He has placed reliance upon a judgment delivered by this Court in the case of **Ambika Prasad Vs. Prabhudayal, 2004(3) M.P.L.J. 596** and also the judgment delivered in the case of **Jamshedji Dubash Vs. Meharbai, 2003(3) M.P.L.J.** He has prayed for dismissal of the petition, which is not maintainable.

On the other hand learned counsel for the petitioner have been relied upon the judgment delivered by Nagpur High Court in the case of **Baliram Ganpatrao Bhoot Vs. Manohar Damodhar Bhoot, AIR 1943 Nag 204** and his contention is that the order passed on an application preferred under Order 7 Rule 11 is not a decree.

This Court has carefully gone through the judgment relied

upon by learned counsel for the parties. As per definition clause under the Code of Civil Procedure, 1908, the decree is defined under Section 2 (2) and the same reads as under:-

“**Section 2(2) “Decree”** means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.”

Section 96 of CPC reads as under:-

“**Section 96 : Appeal from original decree – (1)** Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of small Causes, when the amount or value of the subject-matter of the original suit does not exceed.”

In the present case so far as the Indore Development Authority is concerned, the proceedings have come to an end, even if, the suit is pending, the trial Court cannot pass any order against the Indore Development Authority, meaning thereby, so far as the Indore Development Authority is concerned, the suit has finally been decided. Similar problems arose before this Court in case of **Jamshedji Dubash Vs. Meharbai (Supra)** and this Court in paragraph 8, 9 and 10 of the aforesaid judgment reads as under:

“**8.** The institution of the suit is not barred in the absence of the probate. Sometime it may become necessary for the executor to institute the suit and request for time to produce the probate. For example, if the limitation is running

out the suit has to be instituted and the plaintiff can request the Court to give time for production of the probate. In this manner the plaintiff can avoid the suit being barred by limitation. Such a situation arose in Ramcharan vs. Dharohar, MANU/BH/0067/1954 : AIR 1954 Pat 175 and it has been held that the suit can be instituted and the probate can be produced subsequently before the passing of the decree.

9. The Division Bench in the earlier case was bound to follow the law laid down by Privy Council in the two decisions referred above. The Division Bench has made a reference to the decision of the Supreme Court in Hem Nolini vs. Isolyne, MANU/SC/0399/1962 : AIR 1962 SC 1471 in which it has been held that section 213 creates a bar to the "establishment" of any right under the Will by an executor or a legatee unless probate or letters of administration of the Will have been obtained, whether that right is claimed by the person as a Plaintiff or defendant. This decision of the Supreme Court does not lay down that the institution of the suit is barred. Therefore, view taken by the Privy Council in the two decisions referred above has to prevail. In the case before the Supreme Court a person claiming as legatee under a Will of which she had obtained letters of administration filed a suit for declaration of her title in regard to a property included in the Will. She sought to establish that the ownership of that property vested in her testator as a legatee under a Will executed in favour of her testator by another person. No probate or letters of administration had however been obtained in regard to that Will. On these facts it was held that section 213 barred the plaintiff from "establishing" the right of her testator as a legatee under the alleged Will as no probate or letters of administration had been obtained. Therefore, on the basis of this decision of the Supreme Court it cannot be held that section 213 of the Indian Succession Act, 1925 bars the very institution of the suit. As already stated the law is well settled that a probate can be produced before the decree is passed in the suit. Recently in Clarence Pais vs. Union of India, AIR 2001 SC 1151 the Supreme Court has observed that the scope of section 213 of the Act is that it prohibits recognition of rights as an executor or legatee under a Will without production of probate and sets down a rule of evidence and forms really a

part of procedural requirement of the law of forum. It is further stated in this judgment that the bar that is imposed by this section is only in respect of the "establishment" of the right as an executor or legatee. From this judgment it is also clear that the production of probate is only a rule of evidence and part of the procedural requirement. It implies that the institution of the suit for which cause of action has already arisen is not barred. If the probate is produced during the pendency of the suit before its disposal that would serve the purpose.

10 . The present two appeals are against the two suits which were in respect of different properties in which the plaintiff claimed certain rights as legatee. The property which was involved in Civil Suit No. 11-A of 1986 giving rise to M.P. No. 103 of 1990 was different. For the foregoing reasons these two appeals are allowed. Impugned orders dated 15-9-1992 of the 1st Additional District Judge, Mudwara, Katni in Civil Suits No. 30-A of 1986 and 49-A of 1986 are set aside. The parties are directed to appear before the trial Court on 6-1-2003.”

In the light of the aforesaid, rejection of claim to the extent Indore Development Authority is concerned, is certainly a decree keeping in view of the definition of decree under Section 2(2) of CPC, and therefore, the proper course of action available to the petitioner is to prefer an appeal as provided under Section 96 of CPC.

This Court in the case of **Ambika Prasad Vs. Prabhudayal**, (*supra*) in paragraph 4 has observed as under:-

“4. Firstly, it may be seen whether the order passed by the Trial Court may be challenged in appeal or revision or the only remedy is petition under [Article 227](#) of the Constitution of India. The order passed by the Trial Court dismissing the suit of the plaintiff under Section 9 of CPC on the ground that suit is barred by principle of res judicata comes within the purview of 'adjudication/determining the rights of parties conclusively with regard to matter in controversy'. The order passed by the Trial Court comes within the definition of decree and is appealable before the District Court. The judgment relied upon by the petitioner in Ratan Singh (*supra*) is a case where application for condonation of delay and consequently dismissal of the appeal as barred

by time was under consideration. The Apex Court while considering the aforesaid held that there is no adjudication in the suit and rights of the parties were not determined and the rejection of application for condonation of delay will not amount to a decree. The aforesaid judgment is based on entire different set of facts and is not applicable in the present case. In the present case, the Trial Court-found that the present suit is barred by the principle of res judicata and the controversy between the parties has already been decided. The petitioner is claiming his rights through Gokul Prasad and Sardar Bahu, whose matter was already decided by the Apex Court. The Trial Court after considering the objection of the petitioner has determined rights of the parties and the matter in controversy has been decided. In the circumstances, the order passed by the Trial Court is a decree within the meaning of Section 2(2) of CPC and is appealable before the District Court. In the circumstances, the petitioner is having efficacious alternative remedy by filing appeal against the impugned order and at this stage, this petition can not be entertained. Consequently, this petition is dismissed with liberty to the petitioner to file appeal against the order (Annexure P-1). As the petitioner has filed this petition within a period of 30 days from the date of passing order (Annexure P-1), in the circumstances, the petitioner is allowed 30 days' time from today to file appeal before the Appropriate Court, and if such an appeal is filed within a period of 30 days from today, the Appellate Court shall entertain and decide the appeal in accordance with law without going into the question of limitation.”

In light of the aforesaid judgments, the petitioner does have efficacious remedy to prefer an appeal under section 96 of CPC. The writ petition is certainly not maintainable and the admission is declined.

(S. C. Sharma)
Judge