

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9087 OF 2011

Ramchandra Tatyaba Ingale	]	
Age – 65 yrs, Occ : Retired	]	
R/o. Koregaon, Tal. Koregaon	]	 Petitioner.
Dist. Satara	]	(Org. Defendant No.2)

versus

1]	Mugutrao Balasaheb Ingale	]	
	Since deceased through his legal heirs	]	
		]	
a]	Malini alias Malan Mugutrao Ingale	]	
	Age – adult, Occ : Household	]	
		]	
b]	Ashok Mugutrao Ingale	]	
	Age – adult, Occ : Service	]	
	Since deceased through his legal heirs	]	
		]	
	(i) Meena Ashok Ingale	]	
	Age Adult, Occ : Household	]	
	R/o. Lake town Building	]	
	No.-E-3, Flat No.702,	]	
	Bibwewadi, Pune 411 037	]	
		]	
	(ii) Abhijeet Ashok Ingale	]	
	Age Adult, Occ : Service	]	
	R/o. Lake town Building	]	
	No.-E-3, Flat No.702,	]	
	Bibwewadi, Pune 411 037	]	
		]	
	(iii) Snehal Ravindra Mhaske	]	
	Age – Adult, Occ : Household	]	
	R/o. “Balaji Niketan”, near	]	
	Seva Niketan School,	]	
	Kopergaon, Tal. Kopergaon	]	
	Dist – Ahmednagar – 423 601	]	
		]	

- c] Ajit Mugutrao Ingale]
 Age – Adult, Occ : Service]
]
 1A to 1C R/o – 63 Deshmiukh Colony]
 “Malini”, Sadarbazar, Satara 01]
]
- d] Shubhada Vasantrao Patil]
 Age – Adult, Occ : Household]
 R/o – 254, Budhwar Peth Satara]
]
- e] Manda Balasaheb Garud]
 Age – Adult, Occ : Household]
 R/o – at post Belsar]
 Tal. Purandar, Dist. Pune]
]
- f] Rohini Bhagwanrao Katkar]
 Age – Adult, Occ : Household]
 R/o – 1130, Hari Om Apartments,]
 Sai-ex Extension, Kolhapure 06]
]
- 2] Hanmant Baburao Ingale]
 Age – 54 yrs, Occ : Agri.]
 R/o – Koregaon Tal. Koregaon]
 Dist. Satara.]
]
- 3] Tatyaba Balasaheb Ingale]
 since deceased through his legal heirs]
]
- a] Vimal Kashinath Pawar]
 Age – Adult, Occ : Household]
 R/o – C/o Kashinath Gopal Pawar]
 Budhwar Peth, in fornth of]
 Bhairoba Temple, Phaltan]
 Tal. Phaltan, Dist. Satara]
]
- 4] Prabhakar Tatyaba Ingale]
 Age – 63 yrs. Occ : Agri.]
]
- 5] Suresh Tatyaba Ingale]
 since deceased through his legal heirs]
]
- a] Shalan Suresh Ingale]
 Age – 46 yrs, Occ : Household]
]

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|----|---------------------------------|-----------------------------|
| b] | Jyoti Suresh Ingale |] |
| | Age – 18 yrs, Occ : Student |] |
| | |] |
| c] | Vishal suresh Ingale |]..... Respondents |
| | Age – 15 yrs, Occ : Student |] (Original Plaintiff and |
| | No.3C through his guardian |] Defendant Nos.1, 3, 4 and |
| | mother – Respondent No.5a. |] 5A respectively) |
| | All R/o Koregaon, Tal. Koregaon |] |
| | Dist. Satara. |] |

Mr. Manmath S Athalye for the Petitioner.

Mr. R A Thorat i/by Mr. P B Gujar for the Respondent Nos.1A, 1C to 1F and 1(b)(i) to 1(b)(iii).

CORAM : R. M. SAVANT, J.

DATE : 02nd March 2015

ORAL JUDGMENT

1 Rule with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order dated 19/10/2011 passed by the learned District Judge-1, Satara by which order the Application (Exhibit 73) filed by the Respondent-original Plaintiff came to be allowed and the Respondent No.1-original Plaintiff was allowed to adduce additional evidence at the appellate stage by having recourse to Order LXI Rule 27 of the Code of Civil Procedure.

3 Shorn of unnecessary details a few facts can be stated thus. The Petitioner herein is the original Defendant No.2 to the suit in question being

Regular Civil suit No.274 of 2000. The Respondent No.1 is the original Plaintiff who has filed the suit in question for a declaration in respect of the suit property as also a declaration that the sale deed executed in favour of the Petitioner herein i.e. the Defendant No.2 is illegal and void and not binding on the Plaintiff. The said sale deed has been executed by one Hausabai who was the sister of the Plaintiff and the paternal aunt of the Defendant No.2, and the sister and paternal aunt of the other Defendants. The Plaintiff lays a claim to 1/3rd share out of the suit property on the basis of the Will executed by the said Housabai dated 12/7/1971 whereas the Petitioner herein i.e. the Defendant No.2 lays a claim to the entire suit property on the basis of the registered sale deed dated 28/8/1990 allegedly executed by Housabai. In so far as the Plaintiff is concerned, he has set up his case on the basis of the Will and it is the case of the Plaintiff that there were two attesting witnesses i.e. one Hanmant Nana Barge and one Tukaram Bandu Jagdale. It seems that the said case of the Plaintiff was sought to be controverted by the Defendant No.2, who as indicated above, lays a claim on the basis of the registered sale deed dated 28/8/1990, having questioned the said Will. However, it appears that during the cross examination of the Plaintiff a suggestion has been put up to the Plaintiff that the signature is not of the said Hanmant Nana Barge but of one Hanmant Narayan Barge. It appears that to the said suggestion the Plaintiff answered in the affirmative that the signature is of Hanmant Narayan Barge. The suit in question came to be decreed by the Trial Court i.e. the learned

learned Joint Civil Judge Junior Division Koregaon by the judgment and order dated 2/12/2003. In the context of the legality of the Will, the Trial Court observed that it was possible for the Defendant to bring the witness named as Hanmant Narayan Barge in the witness box to prove the fact that the attesting witness was alive on the day when the Plaintiff closed his evidence. This observation the Trial Court seems to have made in view of the fact that it is the Plaintiff's case that he could not lead the evidence of the attesting witnesses as by then both the attesting witnesses were no more.

4 Against the decree dated 2/12/2003 passed by the Trial Court, the Defendant No.2 has filed an Appeal being Regular Civil Appeal No.132 of 2004. It seems that in the Appeal also a ground has been taken by the Defendant No.2 in respect of the alleged admission which has come in the evidence of the Plaintiff in the cross examination. It appears that the said Appeal was argued in the year 2008 and thereafter again in the year 2011. It is thereafter in the year 2011 i.e. on 28/9/2011, to be precise, that the instant Application (Exhibit 73) came to be filed by the Plaintiff who is the Respondent in the said Appeal for being permitted to lead additional evidence so as to explain the statement which has come in his cross examination that the signature is that of Hanmant Narayan Barge as an attesting witness. It seems that though the Plaintiff was alive at the time of filing of the Application (Exhibit 73), he has passed away during pendency of the present Petition. The

Application (Exhibit 73) is founded on the fact that the Plaintiff was 77 years old when he was cross examined and being short of hearing, it is the case of the Plaintiff that he was not able to understand the import of the question and therefore answered that the signature is of Hanmant Narayan Barge as an attesting witness. It is further averred in the said Application (Exhibit 73) that the said Hanmant Narayan Barge was the Sarpanch of the concerned village from the year 1972-1978 and that when shown a copy of the Will, the son of the said Hanmant Narayan Barge by name Dilip informed the Plaintiff that the signature on the said copy of the Will is not that of his father. The Plaintiff therefore seeks to rely upon the documents relating to the Gram Panchayat of the contemporaneous time when the said Hanmant Narayan Barge was the Sarpanch to demonstrate that the signature on the Will is not that of Hanmant Narayan Barge. The Plaintiff therefore in essence wants to adduce the additional evidence to explain the statement which has come on record in his cross examination.

5 The said Application (Exhibit 73) was replied to on behalf of the Defendant No.2 i.e. the Appellant in the said Appeal. The Application was opposed on various grounds which have been mentioned in the reply (Exhibit 75). The objection is on the ground that there is a delay in filing the Application (Exhibit 73) and that inspite of opportunity the Plaintiff has not led the evidence of the said Hanmant Narayan Barge. The Defendant No.2 has also

relied upon the statement made in the Application on behalf of the Plaintiff that whilst the suit was pending, the Plaintiff and his advocate did not deem it appropriate to lead the evidence which is now sought to be led in respect of explaining away the statement.

6 The Lower Appellate Court considered the said Application (Exhibit 73) and has by the impugned order dated 19/10/2011 allowed the same. The gist of the reasoning of the Lower Appellate Court as can be seen from the impugned order is that the evidence as regard the execution of the Will has been recorded almost 25 years thereafter. The Lower Appellate Court has observed that the admissions are not conclusive proof and can be proved to be wrong or could be very well be explained. The Lower Appellate Court observed that the exercise of leading additional evidence would assist the Court to enable it to pronounce judgment. The Lower Appellate Court observed that the same evidence which is sought to be produced may reinforce the Defendants' stand, if on comparison of signatures it turns out that the will has been attested by Hanmant Narayan Barge. The Lower Appellate Court observed that the alleged admissions given by the Plaintiff would also there for the Court's consideration while appreciating the evidence. The Lower Appellate Court lastly observed that since the execution of the Will has been proved in the Trial Court, the question whether both the attesting witnesses were not alive for being examined in proof of the Will or whether one of them

was very much there but has not been examined can be decided with the additional evidence, which is sought to be adduced. The Lower Appellate Court has also observed that the signature of the 2nd attesting witness is in “Modi” script and neither the Court, nor the advocates appearing for the parties could state that the middle name in the signature is “Nana” or “Narayan”. Hence what flows from the impugned order passed by the Lower Appellate Court is that the exercise of permitting the Plaintiff to lead additional evidence would assist the Court and enable it to pronounce judgment. As indicated above, it is the said order dated 19/10/2011 which is taken exception to by way of the above Writ Petition.

7 The learned counsel appearing on behalf of the Petitioner herein i.e. the Defendant No.2 Shri Athalye would contend that it is only if the conditions mentioned in Order XLI Rule 27 of the Code of Civil Procedure are satisfied, that a party would be entitled to lead additional evidence. The learned counsel would contend that the conditions stipulated in Order XLI Rule 27 of the Code of Civil Procedure have to be strictly complied with by the party and it is only thereafter that the party would be entitled to adduce the additional evidence. The learned counsel would contend that the time lag between the Appeal being heard and the Application being filed by the Plaintiff is also a relevant consideration and in the instant case according to the learned counsel for the Petitioner, the Appeal being heard on two occasions i.e. in the

year 2008 and thereafter in the year 2011, the Application filed in the year 2011 was therefore belated and hence there is remiss on the part of the Plaintiff and therefore the Lower Appellate Court had erred in allowing the Application (Exhibit 73). The learned counsel for the Petitioner sought to place reliance on the judgments of the Apex Court reported in (1974) 2 SCC 741 in the matter of The Official Liquidator v/s. Raghawa Desikachar & ors. and (2012) 8 SCC 148 in the matter of Union of India v/s. Ibrahim Uddin and another and lastly (2001) 7 SCC 503 in the matter of N Kamalam (Dead) and anr v/s. Ayyasamy and anr. The said judgments of the Apex Court are the expositions on Order XLI rule 27 of the Code of Civil Procedure and can be said to cover different facets of Order XLI Rule 27 of the Code of the Civil Procedure.

8 Per contra, the learned Senior Counsel Shri R A Thorat appearing for the Respondent No.1 i.e. the original Plaintiff would support the impugned order. The learned Senior Counsel would contend that in the instant case the Lower Appellate Court having observed that the additional evidence was required for it to pronounce judgment, this Court would not interdict in its writ jurisdiction under Article 227 of the Constitution of India. The learned Senior Counsel would contend that in fact if the additional evidence is led, it would enure to the benefit of both the parties as the same would result in the Lower Appellate Court coming to a definite conclusion as to whether the signature is

or not that of Hanmant Narayan Barge who was alive at the time of the evidence being adduced before the Trial Court. The learned Senior Counsel would contend that the paramount consideration is as regards the need of the Lower Appellate Court to permit additional evidence so as to pronounce judgment.

9 Having heard the learned counsel for the parties, I have considered the rival contentions. In the instant case, as indicated in the earlier part of this judgment, the suit in question has been decreed in favour of the Plaintiff, and in fact the observation which has been adverted to herein above has been recorded by the Trial Court as to why the Defendant No.2 did not adduce the evidence of the said Hanmant Narayan Barge who according to the Defendant No.2 is the attesting witness and who was very much alive. It is the Defendant No.2 who is in Appeal against the decree passed by the Trial Court. No doubt the Appeal was heard on two occasions i.e. in the year 2008 and thereafter in the year 2011 and it is on 28/9/2011 that the instant Application (Exhibit 73) came to be filed. The Application as indicated above is founded on the fact that the Plaintiff at the relevant time when he was cross examined was 77 years old and it was his case that he was not able to understand the import of the question and therefore answered to the effect that the signature on the Will is that of Hanmant Narayan Barge. It is further the case of the Plaintiff that the person by name of Hanmant Narayan Barge was the Sarpanch of the

concerned village from 1972-1978 and that the signature on the copy of the Will was shown to his son Dilip who denied that the signature was that of his father. The Plaintiff therefore wants to adduce the evidence in respect of the said signature being not of Hanmant Narayan Barge so that the document of the contemporaneous time of Gram Panchayat wherein the signature of said Hanmant Signature was appearing can be compared with the signature on the Will. It is trite that in so far as the admissions are concerned, they are not conclusive and that they can be explained away. It is required to be noted that the signature of the 2nd attesting witness i.e. either Hanmant Narayan Barge or Hanmant Nana Barge is in “Modi” script and it is difficult for the parties to state as to whether the middle name is either “Nana” or “Narayan”. It is to elucidate the aforesaid aspect that the additional evidence in that respect becomes crucial. It is also required to be borne in mind that the Application has been filed by the Plaintiff who has succeeded in the Trial Court and therefore the Application is not by a party who has lost in the Trial Court. The Lower Appellate Court as can be seen from the impugned order has after considering the case laws cited before it, held that to pronounce judgment that the additional evidence can be let in. This is one of the circumstances covered by Order XLI Rule 27 of the Code of Civil Procedure and more precisely Order XLI Rule 27(1)(b) of the Code of Civil Procedure. At the appellate stage therefore it seems that the dispute in a way has crystallized as to whether the signature is that of Hanmant Nana Barge who was no more at the time when

the evidence was led by the Plaintiff or, whether it is the signature of Hanmant Narayan Barge who was very much alive at the time when the Plaintiff led the evidence. The said aspect therefore would have an impact on the decision that would have to be rendered in the Appeal. Once the Appellate Court deems it appropriate to let in evidence which it feels would help it in pronouncing judgment, the question is whether this Court should interfere with the order passed by the Lower Court. The principles of law as laid down by the Apex Court in the judgments (supra) which have been cited on behalf of the Petitioner original Defendant No.2 cannot be said to have been violated by the Lower Appellate Court in any manner in allowing the Application (Exhibit 73). In all the judgments the Apex Court has in the context of Order XLI Rule 27 of the Code of Civil Procedure mentioned the circumstances in which the additional evidence can be led. The Apex Court though observed that the Courts shall have to be cautious and must act with great circumspection in dealing with the claims for letting in additional evidence has held that additional evidence can be allowed to be led if it removes the cloud of doubt over the case and the evidence has a direct bearing on the main issue in the suit. The Apex Court has also held that the additional evidence can be allowed to be led if the same is required for pronouncement of judgment by the Lower Appellate Court. In fact in the instant case, if the said additional evidence is allowed to be led, it may happen that the issue in so far as whose signature it is on the Will can be decided with some certainty.

10 In that view of the matter, it cannot be said that there is an error of jurisdiction committed by the Lower Appellate Court in allowing the Application (Exhibit 73). In my view, the impugned order does not suffer from any other illegality or infirmity for this Court to exercise its writ jurisdiction. The above Writ Petition is accordingly dismissed. Rule discharged. Needless to state that the observations made in the instant order are only for considering the order passed on the Application (Exhibit 73), the Appeal in question would undoubtedly be tried on its own merits and in accordance with law uninfluenced by them.

[R.M.SAVANT, J]