

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

WRIT PETITION NO. 12384 OF 2015

Mohd.Yakob Thakor, since
deceased through L.Rs
1A. Smt.Prabhavati Mohan
Thakor and Ors.

..Petitioners

Vs

Ashok Yakob Thakor and Ors.

.. Respondents

Mr. Dilip Bodake, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 11/12/2015

PC:

1. Not on Board. At the request of Mr. Bodake, taken for admission. Heard Mr. Dilip Bodake, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged order dated 28.10.2015 passed by the learned trial Judge, below Exhibit-246 in Regular Civil Suit No.43 of 2001. By that order, the learned trial Judge exhibited Will dated 27.6.1988 executed by one Yakob Devid Thakor.
3. In support of this Petition, Mr.Bodake strenuously contended that before executing the Will, the learned trial Judge did not give any opportunity to the petitioners for raising

objection. He submitted that the Full Bench of this Court in the case of Hemendra Rasiklal Ghia Vs. Subodh Mody, 2008 (6) ALL MR 352 has held that objection relating to proof of document of which admissibility is not in dispute, must be taken and determined when it is marked as exhibit. In other words, objection relating to proof of the document of which admissibility is not in dispute, has to be determined before it is marked as exhibit. He also relied upon the following decisions:

- (i) Jyoti Vasatrao Butle Vs. Varsha Aniruddha Bansod, 2008 (6) ALL MR 217;
- (ii) Dr.Charusheela Devidas Doifode Vs Suresh Daulatrao Virulkar, 2015(1) ALL MR 108,
- (iii) Devakshai Walmik Patil Vs. Shaikh Sayan Shaikh Gulab, 2011(7) ALL MR 637;
- (iv) Rekha Ramrao Bhujang Vs Subhadrabai Keshavrao Bunage, 2012(3) ALL MR 509;
- (v) Purushottam Shankar Ghodgaonkar Vs. Gajanan Shankar Ghodgaonkar, 2012(7) ALL MR 609;
- (vi) Anantrao Krishnaji Kulkarni Vs. Vaishali Renukadas Vaidya, 2012(1) ALL MR 695.

4. It is not possible to accept any of the submissions advanced by Mr. Bodake. It is not in dispute that Mr.Yakob David

Thakor executed Will on 27.6.1988 and D.V. Mahadik and Shabir Momin are attesting witnesses. The defendant examined attesting witness-Dattatray Venkat Mahadik. In paragraph 2 of affidavit in evidence, he has dealt with execution of the Will as also its attestation. It, however, appears that the document was not exhibited during the course of his evidence. The defendants, therefore, took out application Exh.246, inter alia, contending that DW 2 Mahadik was examined at Exh.135 and he has deposed on the relevant aspect. However, inadvertently Will was not marked as exhibit. It was, therefore, contended that since the compliance of Sections 67 and 68 of the Indian Evidence Act, 1872 was made, document may be exhibited. The plaintiff resisted that application by contending that the said Will was not referred in the examination-in-chief as also it was not shown to witnesses in the course of cross examination and therefore it cannot be exhibited.

5. In the impugned order, the learned trial Judge has observed that DW 2 stated on oath the Will of Yakub Thakor is dated 27.6.1988 and that he is one of the attesting witnesses of that Will and the said Will was signed by the testator in his presence and the contents of the Will was referred in the presence of DW 2. The learned trial Judge further observed that at the time of

evidence it was not exhibited. Technical error can be cured at any time and accordingly exhibited the Will.

6. Mr. Bodake relied upon clauses (ii) and (iii) of paragraph 92 of Full Bench decision in Hemendra Rasiklal Ghia (supra) which reads thus :

“(ii) Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit.”

However, in the present case, clause (ii) is not applicable as the objections raised by the petitioner are not relating to proof of document which is otherwise admissible. The objection is about marking of the document. Clause (iii) of paragraph 92 reads thus:

“(iii) Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case.”

Perusal of clause (iii), extracted herein above, shows that objection to the document which, according to the plaintiff, in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case. In the present case, witness DW 2 has specifically referred to the Will. The learned trial Judge was, therefore, justified in observing that the Will was not inadvertently exhibited. In view thereof, it cannot be said that the document is inadmissible in

evidence. While deciding the suit, the learned trial Judge will consider whether the defendant has proved the Will. In the light of this discussion, reliance placed by Mr. Bodake on the decisions referred in paragraph 3 of the order does not advance the case of the plaintiff.

7. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)