

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO.114 OF 2015

Sow.Irabai w/o Shankarrao Patil,
Aged : 44 years, Occu: Agri. & Household,
R/o Kotgyal, Tq. Biloli,
Dist.Nanded.

**...APPELLANT
(Orig. Applicant)**

VERSUS

1. Chandrabai w/o Madhavrao Kanthe,
Aged 61 years, Occu: Household,
R/o. Ganjgaon, Tq. Biloli,
Dist. Nanded, at present
Kotgyal, Tq. Biloli, Dist. Nanded.
2. The State of Maharashtra,
through the Tahsildar, Biloli,
Tq. Biloli, Dist. Nanded.

**...RESPONDENTS
(Orig.Defendants)**

...
Mr.A.G.Godhamgaonkar, Advocate for appellant.
Shri G.O.Wattamwar, A.G.P., for respondent State.
Mr.H.I.Pathan, Advocate for respondent no.1.

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CORAM: P.R.BORA, J.

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Date of reserving the order: 2/8/2016

Date of pronouncing the order:20/9/2016

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PER COURT:

1. In the present appeal, Appellant has challenged the order dated 22nd April, 2015, passed by the Civil Judge, Senior Division, Biloli, below Exh.1 in R.C.S.No.99/2014. Vide the impugned order the trial Court has rejected the application filed by the present appellant in the said suit at Exh.30 and has consequently dismissed the suit as abated.

2. R.C.S.No.99/2014 was filed by deceased Irabai w/o Sangappa Laghule (Warle) against the present respondent no.1 seeking perpetual injunction restraining respondent no.1, who was defendant no.1 in the said suit, or her agents from obstructing and interfering in the peaceful possession of the plaintiff. During pendency of the aforesaid civil suit, plaintiff in the said suit, namely, Irabai w/o Sangappa died on 26th October, 2014. After demise of said Irabai, the present appellant filed an application in the aforesaid civil suit at Exh.30 praying for taking on record her name as the legal representative of deceased Irabai widow of Sangappa Warle. It was the contention of the present appellant in the said application

that she has derived the title to the suit properties by virtue of a registered will deed executed in her favour on 6th of August, 1996, by deceased Irabai Sangappa.

3. Defendant no.1 i.e. respondent no.1 in the present appeal resisted the aforesaid application by filing her reply to the application at Exh.30. In the reply it was contended by present respondent no.1 that no will deed or gift deed was voluntarily executed by deceased Irabai in favour of the present appellant. Respondent no.1 had alleged that the present appellant had taken undue advantage of the old age and the mental depression of deceased Irabai and had got fraudulently prepared the alleged will / gift deed. It was the further contention of present respondent that she is the only legal representative of deceased Irabai. Respondent no.1 had also alleged that the appellant and her husband caused death of Irabai to grab the suit properties and a complaint was also, therefore, lodged in that regard by present respondent no.1 at Police Station, Kundalwadi, on 3rd of August, 2014. It was the further contention of present respondent no.1 that no right to sue was surviving after

the death of deceased Irabai w/o Sangappa and the suit was liable to be abated.

4. Learned trial Court, after considering the contentions raised and the say filed to the said application by present respondent no.1, rejected the said application and consequently dismissed the suit as abated vide the impugned order.

5. Shri Godhamgaonkar, learned Counsel appearing for the appellant, submitted that the trial Court has failed in appreciating the facts and the legal provisions involved in the present matter. Learned Counsel submitted that the present appellant falls in the category of 'legal representative' as defined under Section 2(11) of the Code of Civil Procedure since deceased Irabai had executed a will in her favour. Learned Counsel further submitted that as provided under Rule 10 of Order 22 of the Code, the interest in the suit properties, thus, devolved upon appellant no.1 and, as such, the appellant was entitled to prosecute the suit further.

6. Shri H.I.Pathan, learned Counsel appearing for respondent no.1, supported the impugned order. Learned Counsel submitted that the trial Court has recorded a correct finding that right to sue was not surviving and has, consequently, rightly rejected the application filed by the appellant and has consequently dismissed the suit as abated. According to learned Counsel, no interference is required in the impugned order. Learned Counsel, therefore, prayed for dismissing the Appeal.

7. After having carefully considered the submissions advanced by the learned Counsel appearing for the respective parties and on perusal of the impugned judgment and other material placed on record, apparently, I do not see any reason for causing any interference in the impugned order for following reasons.

8. Regular Civil Suit No.99/2014 was admittedly filed by deceased Irabai seeking perpetual injunction to restrain defendant no.1 i.e. present respondent no.1 from

interfering into her possession over the suit properties and to restrain defendant no.2 from effecting any change in the revenue record pertaining to the suit properties. Irabai, original plaintiff, admittedly, died during the pendency of the suit. After the death of said Irabai, present appellant, whose name is also Irabai, filed an application seeking her impleadment as legal representative of deceased Irabai claiming that deceased Irabai i.e. original plaintiff had executed a will in her favour and the same was duly registered on 6.8.1996. According to present respondent no.1, deceased Irabai had never executed any will in favour of the present appellant. Respondent no.1 has also contended that it is a fraudulent attempt on the part of the present appellant to plead that deceased Irabai had executed a will in her favour. Thus, the will on the basis of which the present appellant is claiming certain rights in the suit properties has been seriously disputed by present respondent no.1.

9. As has been observed by the learned trial Court, the original plaintiff i.e. deceased Irabai has not claimed any relief in the suit so filed by her on the basis of

ownership. On the contrary, from the pleadings in the suit plaint, it is transpired that deceased Irabai was co sharer in the suit properties along with present respondent no.1. Considering the nature of the claim raised by

deceased Irabai in the suit, there remains no doubt that the suit so filed by her and the reliefs claimed by her were based only on the contention that she had right to enjoy the joint possession of the suit properties. It is, thus, further evident that the right which was claimed by deceased Irabai was her personal right to enjoy the property. As such, I do not find any fault in the observation made by the trial Court that the claim of deceased Irabai to enjoy possession of the suit properties without obstruction therefor from defendant no.1, thus, does not exist after her death.

10. In the above circumstances, if it is the contention of the appellant that the interest in the suit properties has been devolved upon her by virtue of a will executed in her favour by deceased Irabai, the appellant has to institute an independent suit to establish her said right but, in no case, she can be allowed to continue the

suit. The appellant, not being the natural heir, cannot continue the suit unless she establishes her right by devolution under the will allegedly executed in her favour by deceased Irabai.

11. Shri H.I.Pathan, learned counsel appearing for respondent no.1, has placed on record copy of Regular Civil Suit No.82/2015, filed by the present appellant in the Court of Civil Judge, Senior Division, at Biloli, for perpetual injunction restraining the defendants therein from making any sort of interference and obstruction in her possession over the suit property. Present respondent no.1 and her children are made defendants in the aforesaid suit. It is, thus, quite clear that the present appellant had already availed the remedy under law which, according to me, is the only appropriate course to be adopted by the present appellant.

12. Though it was sought to be canvassed by Shri Godhamgaonkar, that in the will executed by deceased Irabai in favour of the present appellant, it is averred that the legatee i.e. the present appellant, is residing with her

i.e. deceased Irabai, as noted by me hereinabove, the execution of the will has been seriously disputed by respondent no.1 and, in the circumstances, unless the appellant establishes her right by devolution under will, she cannot be allowed to continue the suit further filed by deceased Irabai.

13. The judgments which are relied upon on behalf of the appellant are on quite different facts and hence, cannot be of any help to take the cause of the appellant further. On the contrary, the judgment which has been relied upon by the learned Counsel appearing for respondent no.1 and which has also been referred to and relied upon by the learned trial Court is perfectly applicable to the facts of the present case. In the said case before the Madras High Court (Sivagurunathan -Vs- Rajendrababu and others) the plaintiff, namely, Krishnaveni Ammal had filed the suit against the respondents therein for mandatory injunction directing them to pay half of the produce from the suit property to her till her death and for other reliefs. Pending the said suit, Krishnaveni Ammal died. Mr.Sivgurunathan, the

petitioner in the petition before the Madras High Court, filed an application in the said suit under Order 22 Rule 3 of Code of Civil Procedure Code to implead him as a second plaintiff in the said suit. The learned trial Court dismissed the said application whereupon revision was presented by said Shri Sivgurunathan before the Madras High Court. The point for consideration before the Madras High Court was whether said Shri Sivagurunathan was entitled to be impeaded as second plaintiff in the suit as contemplated under Order 22 Rule 3 of Code of Civil Procedure or not. The Madras High Court dismissed the revision application filed by said Shri Sivagurunathan observing that the relief claimed by Krishnaveni Ammal was so personal that it could not have been enjoyed after her death and, thus, the right to sue was not surviving. The Madras High Court has further observed that Sivagurunathan not being a natural heir, was not entitled to continue the suit without establishing his right by devolution under the will allegedly executed in his favour by deceased Krishnaveni Ammal.

14. In the instant matter also, as stated earlier, if the appellant is claiming any right under the will, she has got the independent remedy. As has come on record the appellant has already availed the said course by filing a civil suit bearing RCS No.82 of 2015.

15. After having considered the entire material on record, I do not see any reason to disagree with the finding recorded by the learned trial Court that after the death of Irabai i.e. the original plaintiff, the right to sue was not surviving. I do not see any error in the order impugned in the present Appeal. In the result, the following order:

ORDER

1. The Appeal From Order (No.114 of 2015) is dismissed with costs. Pending Civil Applications, if any, stand disposed of.

**(P.R.BORA)
JUDGE**

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AGP/114-15AO

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Date of decision:

For approval and signature

HON'BLE MR.JUSTICE P.R.BORA

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| 1. Whether the Reporters of Local Papers may be allowed to see the Judgment ? | Yes |
| 2. To be referred to the Reporter or not ? | Yes/No |
| 3. Whether Their Lordships wish to see the fair copy of the Judgment ? | No. |
| 4. Whether this case involves a substantial? question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ? | No. |
| 5. Whether it is to be circulated to the Civil Judges ? | No. |
| 6. Whether the case involves an important question of law and whether a copy of the Order should be sent to Bombay, Goa and Nagpur Office ? | No |

Private Secretary
AGP/