

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

WRIT PETITION NO. 10460 OF 2016

Kai Shivdas bhaga Chaudhari
(Deceased) Through L.Rs.

1. Nilkant Shivdas Chaudhari
Age: 58 years, Occu.: Agri.,
2. Sandeep Shivdas Chaudhari
Age: 58 years, Occu.: Agri.,

Both R/o Gat No.6, Tq. & Dist. Dhule.

..PETITIONERS

VERSUS

1. Gajanan Ramdas Chaudhari
Age: 53 years, Occu.; Business.
2. Kalpesh Gajanan Chaudhari
Age: 31 years, Occu.: Business.
3. Hitesh Gajanan Chaudhari
Age: 24 years, Occu.: Business.
4. Gitesh @ Jitesh Gajanan Chaudhari
Age: 22 years, Occu.: Education.
5. Gayatri Ravindra Chaudhari
Age: 28 years, Occu.: Houshold,

All R/o House No. 1963, Galli No.6,
Near Kondaji Vyayam School,
Dhule, Tq. & Dist. Dhule.

..RESPONDENTS

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Mr. A.N.Sabnis, Advocate h/f Mr. N.L. Choudhri, Advocate for petitioners.
Mr. K.C. Sant, Advocate for Respondent Nos.1 to 4.

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CORAM : T.V. NALAWADE, J.
DATED : 01st DECEMBER, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard both sides by consent for final disposal.

2. The proceeding is filed to challenge the order made on Exhibit 60 filed in Probate Application No. 06 of 2013 which is pending in the Court of Civil Judge, Senior Division, Dhule. Said proceeding is fled by respondent for getting probate in respect of will executed by Shivdas – father of present petitioners. It appears that the applicants of probate proceeding have filed affidavit as evidence of widow of Shivdas and she is old lady. On the date when she was kept present for cross-examination, the petitioner sought adjournment on that ground that they wanted to change the advocate. In view of circumstance, the Trial Court rejected the application on 21st April, 2016. The witness had expressed the apprehension that she will be pressurised by present petitioners and she may not be in position to give evidence on the next date. The Court held that she is a material witness in the matter. After rejection of that application, no cross order was made on the same day i.e. 21st April,

2016. Application for setting aside the no cross order was filed. It appears that the advocate was not changed but additional advocate was appointed and submission was made. After considering this circumstance and previous circumstances, the Trial Court has rejected the application at Exhibit 60 also.

3. Submissions made show that according to the applicants from probate proceeding, will is executed by Shivdas and their favour. Gajanan – applicant of probate proceeding was given in adoption by Shivdas. Present petitioners are the sons of Shivdas. In view of this circumstance, this Court holds that opportunity needs to be given to the present petitioner to contest the probate proceeding. It can be said that both sides ought to have gone to the Civil Court as issue of probate would not decide real dispute between them. In any case, in view of nature of dispute and aforesaid circumstance, this Court holds that opportunity needs to be given to the present petitioner to cross examine the said witness who is their mother and get the decision on merits.

4. In view of circumstances mentioned by probate Court, this Court holds that cost of Rs.10,000/- (Rupees Ten Thousands Only) needs to be imposed on the petitioner. In the result petition is allowed

subject to deposit of costs before 05th December, 2016 in the Trial Court. If the costs is not deposited, it is to be presumed that present proceeding is dismissed. On 05th December, 2016, the witness will present in the Probate Court and on the same day the petitioner need to cross examine the witness. If petitioner does not cross examine the witness even after depositing the costs amount, the Court will be at liberty to decide the matter on the same day. If witness does not appear on that day then only other order can be made.

(T.V. NALAWADE, J.)

SSD