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

WRIT PETITION NO.9115 OF 2014

Kisan S/o Bansi Harde,
Age : 35 years, Occu. Agri.,
R/o Mandve (KH), Tq. Parner,
Dist. Ahmednagar

..PETITIONER

VERSUS

1. Rohidas S/o Ananda Harde,
Age : 62 years, Occu. Agri.,
R/o Mandve (KH), Tq. Parner,
Dist. Ahmednagar
2. Anusayabai Rohidas Harde,
Age : 59 Years, Occu. Household,
R/o Mandve (KH), Tq. Parner,
Dist. Ahmednagar
3. Sakharam S/o Rambhau Agare,
Age : Major, Occu. Agri.,
4. Baban S/o Rambhau Agare,
Age : Major, Occu. Agri.,
5. Janku Balasaheb Shinde,
Age : Minor, Under Guardianship
of Vithabai Balasaheb Shinde
6. Balasaheb S/o Bhivsen Agare,
Age : Minor, Under Guardianship of
Rangubai Bhivsen Agare,
7. Prabhakar S/o Sakharam Agare,
Age : Minor, Under Guardianship of
Latabai Sakharam Agare,
Respondent Nos.3 to 7,
R/o Parshi, Tq. Parner,
Dist. Ahmednagar
8. Laxmibai Ananda Harde,
Deceased
9. Gorakshanath S/o Ananda Harde,
Age : 72 years, Occu. Agri.,

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10. Yamuna Goraksha Harde,
Age : 64 years, Occu. Household,
Resp. Nos. 9 & 10 R/o Mandve (KH),
Tq. Parner, Dist. Ahmednagar

11. Bansi S/o Ananda Harde,
Age : 74 years, Occu. Household,

Nos. 11 & 12, R/o Mandve (KH),
Tq. Parner, Dist. Ahmednagar

..RESPONDENTS
(Res. No.1 Org Plaintiff,
Res. Nos. 2 to 8 are org.
Deft. 5 to 10, Resp. Nos.
9 to 12 Org. Deft.
Nos.2,4,1,3)

Mr Y.V. Kakade, Advocate for petitioner;
Mr N.C. Garud, Advocate for respondent no.1;
Mr R.R. Karpe, Advocate for respondents no.3 to 7

CORAM : NITIN W. SAMBRE, J.

DATE : 4th September, 2017

ORAL ORDER:

The judgment and decree dated 3rd May, 2008, passed in Regular Civil Suit No.54 of 2001 for partition and separate possession was challenged in Regular Civil Appeal No.158 of 2008.

2. The petitioner, claiming to be a person in whose favour deceased Laxmibai executed a will, preferred an application along with the will questioning the aforesaid decree.

3. Learned lower appellate court, in view of the application (Exh.25) moved under Order XLI, Rule 27 of the Code of Civil Procedure, remanded

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the matter to the Trial Court for recording evidence on the issue as to whether the will deed dated 1st February, 2007, executed by Laxmibai in favour of the petitioner is a genuine will or not, vide order dated 13th August, 2013.

4. As the will was executed in favour of the petitioner, he approached the learned Trial Court seeking his impleadment as a party, which prayer was rejected by the order impugned dated 2nd December, 2013, passed by Civil Judge Junior Division, Parner. His further efforts for seeking review of the order of the learned District Judge remanding the matter for recording evidence so as to test the genuineness of the will, to the extent of he being added as a party interested in the suit, was also turned down by impugned order dated 19th July, 2014. As such, this petition.

5. The issue, as to whether the petitioner is to be heard in the suit pursuant to an order of remand passed by the learned District Judge, Ahmednagar on 13th August, 2013 and the order of the learned Civil Judge Junior Division, Parner on 2nd December, 2013 refusing to implead the present petitioner as a party is required to be tested particularly in the light of the directions issued by the District Judge so as to record the findings on the genuineness of the will by the Trial Court.

6. It is not in dispute that the will deed dated 1st February, 2007 is executed in favour of the petitioner. What is directed by the first appellate court is to record the evidence of both the parties on the issue as to

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whether the will deed executed by Laxmibai is a genuine or not, upon analyzing the evidence to that effect. In absence of the petitioner being a party before the Trial Court, what is directed to be adjudicated is, whether the will executed in favour of the petitioner is a genuine or not.

7. If the issue as regards the genuineness of the will is to be decided by the Trial Court pursuant to the order passed by the first appellate court, the issue about genuineness of the will if answered against the petitioner, certainly same will cause prejudice to him and such order cannot be passed without hearing the present petitioner.

8. Though Mr Garud, learned Counsel appearing on behalf of respondent no.1 and Mr Karpe, learned Counsel on behalf of respondents no.3 to 7 have tried to support the impugned order on the ground that the suit is already decided in favour of the petitioner, however, the fact remains that the order passed under Order XLI, Rule 27 of the Code of Civil Procedure permitting production of will executed in favour of the petitioner and further order of directions to the Trial Court to record evidence and findings on the genuineness of the same is not questioned by either of the parties. In view thereof, in my opinion, it has to be held that the present petitioner should be added as contesting defendant to the suit in question since the issue of genuineness of the will is also looked into by both the Courts below.

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9. In view thereof, the present petition needs to be allowed and is accordingly allowed to the extent of the prayer of the petitioner to add him as a party defendant to the suit and he be given appropriate opportunity to represent his case. Such amendment be carried within a period of two weeks from today.

10. It is made clear that parties to the present proceedings undertake to appear before the Trial Court on 25th September, 2017.

11. The Trial Court shall record evidence and findings on the issue of genuineness of will after giving due opportunity to the parties and submit the same to the lower appellate court by 27th November, 2017.

With above observations and directions, the petition stands allowed.

(NITIN W. SAMBRE, J.)

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