

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

WRIT PETITION NO.2272 OF 2017

Smt.Lata Shamrao Lakde (Patil)

... Petitioner

Vs.

Smt.Sushila @ Lakshmi Shamrao Lakde (Patil) & Ors.

... Respondents

Mr.S.S. Kanetkar for the Petitioner

Mr.K.U. Patil for Resp. Nos.1, 2 & 3

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 5, 2017**

P.C. :

1. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.
2. This Writ Petition is directed against the order dated 12.3.2015 passed by the learned Civil Judge Junior Division, Karad, below exhibit 110 in Regular Civil Suit No.156 of 1998, so also the order dated 28.6.2016 passed below exhibit 119 as well as the order dated 8.12.2016 below exhibit 122 in the same suit.
3. I have heard submissions of the learned Counsel for the petitioner and the submissions of the learned Counsel for

respondent Nos.1, 2 & 3 who opposed the Writ Petition vehemently.

4. This Writ Petition is the best example as to how a simple issue has got entangled in the cobweb of the procedure. The only issue is to get the will of one Shyamrao Rukde Patil on record and exhibited. The original will is produced admittedly before the High Court in the Testamentary Suit No.1053 of 1998. The said Testamentary Suit was dismissed by order dated 8.9.2006. A person who has signed as a witness in the said will whose name is Prakash Bhedate, PW2, was examined to prove the said will in the present Suit No.156 of 1998. He filed his affidavit in lieu of examination in chief identifying the signature of the executor of the will and the other witness and also gave evidence that the said will was read over by him and in his presence, the signature was put by the executor and he has also identified his signature as well as of the other witness. His examination in chief was filed on 9.9.2010. His cross-examination was completed on 16.11.2010. However, it appears that from the submissions of the learned Counsel for both sides that the learned trial Judge at the relevant time, did not exhibit the said document. First it was the duty of the

advocate for the plaintiff to show that the document i.e., the certified photocopy of the will to the witness Mr. Prakash Bhedate and ask him to identify the signature of the executor and his signature and calling all the other witnesses. The witnesses should have actually seen that document in the witness box and then only the document should have been exhibited and admitted in evidence. It appears that it was not done by the learned Counsel for the plaintiff but only the affidavit in chief is taken on record. However, in the examination in chief, the witness has specifically stated about the execution of the will and also identify all the signatures. Under such circumstances, it was also the duty of the trial Judge not to be passive but also to guide the advocate who may not be either conversant with the procedure of the Evidence Act or might have been inadvertently forgotten to show the document to the witness and get it exhibited. However, the said will is the important document for adjudicating the issues in the suit. So it was not done at that time and therefore, though the document was on record which was filed under a list i.e., exhibit 66 remained there unexhibited.

5. The evidence of both the parties is already over and thereafter, a purshis for closure of the evidence of the plaintiff was by the plaintiff on 3.8.2012 and in the year 2014, a purshis for closure of the evidence of the defendants was given. Thereafter, in the year 2015, the matter was fixed for final arguments. Then, on 2.2.2015, application below exhibit 110 was filed seeking permission to lead secondary evidence. However, it was rejected on 12.3.2015. The said order should have been challenged in the High Court which was not done. However, the said order is now challenged. Thereafter, another application was moved below exhibit 119 on 7.9.2015 requesting the trial Court that a letter of request is to be sent to the High Court and call the original document which was rejected by the order dated 28.6.2016. Thereafter, exhibit 122 was filed on 27.7.2016 for reviewing the order passed under exhibit 119. However, the said application was also rejected by order dated 8.12.2016. I am also informed that earlier, exhibit 113 was filed by the plaintiff on 2.4.2015, against requesting the Court to issue witness summons to Prothonotary and Senior Master, Bombay High Court, Original Side, Mumbai, that the will is to be produced. The said application was rejected on 2.7.2015.

6. Thus, these applications and the orders passed therein disclose that the plaintiff was trying his level best to bring either the original will on record by requesting the Court to issue witness summons in the name of the Prothonotary & Senior Master or to bring the document on record by requesting that he be allowed to tender secondary evidence. However, all his applications were rejected.

7. It is to be noted that in the examination in chief of the witness Prakash Bhedate, he has deposed about the execution of the will, about his signatures and about the signatures of the executor. Under such circumstances, it is the duty of the Court to allow the document on record. The trial Court should hold a very positive approach towards bringing the evidence on record. The trial Court has to facilitate smooth trial by allowing the relevant and admissible evidence on record. Guiding the parties how to lead evidence and how to get documents proved, does not amount to showing favour to either of the parties. On such occasions, the learned Judge needs to assist the bar in the judicial proceedings to enable himself of herself to reach to the goal of finding the truth. Therefore, I am of the view that the objections raised by the

respondents i.e., the original defendants, that the order of secondary evidence earlier is not challenged and the other orders are beyond limitation, hold no substance. Once the document is shown and the signatures are identified by the witness and the cross-examination is taken on the basis of the said document, then, it is necessary to exhibit the document, may be with objections.

8. The plaintiff is allowed to lead secondary evidence and the trial Court to accept the certified true copy of the will, which is issued by the Registry of the High Court to the plaintiff. The said certified copy is to be taken on record and is to be expedited. If the said certified copy is not available, then, the Court may issue witness summons to the Prothonotary and Senior Master to appoint a responsible officer to produce the original will on record. In that event, the travel expenses and the other witness bhatta are to be borne by the plaintiff. This is to be done on or before 15.8.2017. Thereafter, the suit to proceed further.

9. Rule made absolute accordingly.

(MRIDULA BHATKAR, J.)