

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10435 OF 2016**

Prabhakar Ramchandra Kirve (Teli)	..Petitioner.
Vs	
Eknath Dattu Kirve (Teli) and Ors.	.. Respondents

Mr. Vivek V. Salunke, Advocate for Petitioner.

**CORAM : R.G.KETKAR,J.
DATE : 23/01/2017**

PC:

1. Heard Mr.Vivek Salunke, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'decree holder', has challenged the Judgment and order dated 30.1.2016 passed by the learned Jt. Civil Judge, Jr.Dn., Dahiwadi below Exhibits 67 and 75 in Regular Darkhast No. 74 of 1997. By that order, the learned trial Judge allowed the application Exhibit-67 filed by the third party and rejected Exhibit-75 filed by decree holder. The learned trial Judge directed the decree holder to amend execution proceedings to show that judgment debtor no.2- Ramchandra Dattu Kirve has died and third party (applicants in Exhibit 67) are his legal representatives.

3. Decree holder had instituted suit, inter alia, praying for declaration, partition and separate possession. Suit was decreed on 10.7.1997 and the learned trial Judge declared shares of

respective parties. Aggrieved by that decision, appeal was preferred in District Court. By order dated 21.3.2002 appeal was partly allowed and shares allotted by the learned trial Judge were modified. In the meantime, decree holder filed Darkhast No.74 of 1997 for execution of the decree. Application Exhibit-67 was filed on 6.9.2012 by Ganesh Kirve. Omkar Kirve and Rushikesh Kirve, hereinafter referred Collectively to as 'applicants', inter alia, contending that on 3.4.2001 judgment debtor no.2-Ramchandra Kirve had executed registered Will bequeathing his share in the suit property in their favour. The applicants, therefore, filed application for bringing them on record in Darkhast as legal representatives of Judgment debtor no.2. Along with that application, they also produced Will dated 3.4.2001. Decree holder filed reply dated 6.11.2012 at Exhibit -73. Decree holder also filed application dated 16.4.2013 at Exhibit-75, inter alia, contending that judgment debtor died leaving behind decree holder and his widow Nagarbai-judgment debtor no.8 and, therefore, they should be brought on record as legal representatives of judgment debtor no.2. That was opposed by the judgment debtor by filing reply at Exhibit-76.

4. Parties adduced evidence in support of their case. After considering the evidence on record, the learned trial Judge allowed application Exhibit-67 filed by the applicants and rejected application Exhibit-75 filed by the decree holder and

directed decree holder to amend execution proceedings as indicated earlier. It is against this order, decree holder has instituted the present petition.

5. In support of this petition, Mr Salunke submitted that the Will propounded by the applicants is not proved. He submitted that the applicants have not established due execution and attestation of the Will. He has taken through the evidence of the attesting witness Dilip Kirve and in particular his cross examination. In cross examination, the attesting witness deposed that now he cannot tell as to what are the contents of the Will. He also could not tell the contents of the affidavit in examination in chief prepared by his Advocate.

6. Mr. Salunke further submitted that judgment debtor no.2 Ramchandra was not mentally sound to execute the Will. He has taken me through the findings recorded by the learned trial Judge in that regard.

7. I have considered the submissions advanced by Mr Salunke. I have also perused the material on record. Perusal of the evidence of the attesting witness Dilip Kirve shows that in conformity with the requirement of Section 63 of the Indian Succession Act, 1925, he has deposed in examination in chief. However, on this aspect, virtually there is no cross examination. Merely because the witness is not in a position to disclose the contents of the affidavit in the course of evidence, that will not

lead to the conclusion that he is not the attesting witness.

8. In the case of N. Kamalam Vs. Ayyasamy, (2001) 7 SCC 503, the Apex Court has referred to paragraph 312 in Halsbury's Laws of England, 4th Edition, Vol. 50. Paragraph 22 of the judgment reads thus:

".. ... As regards the requirement of attestation, Halsbury's Laws of England has the following to state:

"The testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. Each witness must then either attest and sign the will or acknowledge his signature, in the testator's presence. The testator's complete signature must be made or acknowledged when both the attesting witnesses are actually present at the same time and each witness must attest and sign, or acknowledge, his signature after the testator's signature has been so made or acknowledged. Although it is not essential for the attesting witnesses to sign in the presence of each other, it is usual for them to do so. Each witness should be able to say with truth that he knew that the testator had signed the document **but it is not necessary that the witness should know that it is the testator's will.** There is, however, no sufficient acknowledgement unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator expressly states that the paper to be attested is his will or that his signature is inside the will." (Halsbury's Laws of England: 4th Edn. Vol. 50 para: 312)"

(emphasis supplied)

9. The learned trial Judge has extensively dealt with evidence of Dilip Kirve from paragraphs 20 to 45. After perusing the evidence of the attesting witness- Dilip Kirve, I am satisfied that

the due attestation and execution of the Will is established by the applicants. I am in complete agreement with the reasons recorded by the learned trial Judge from paragraphs 20 to 45. There is one more aspect which requires to be noted. During the life time of the judgment debtor no.2-Ramchandra, he had filed application Exh.43 on 11.2.2008. Along with that application, he had produced the Will on record. Judgment debtor no.2-Ramchandra died on 24.8.2012. In other words, during his lifetime itself, the judgment debtor no.2 Ramchandra had brought on record registered Will executed by him on 3.4.2001. In paragraph 32, the learned trial Judge dealt with application Exh.43 dated 11.2.2008 which was supported by affidavit. Judgment debtor no.2 Ramchandra appeared through Advocate. He admitted the contents of the Will which was filed in the Court. In view thereof, I do not find that the learned trial Judge committed any error in holding that the attestation and execution of the Will is duly proved by the applicants.

10. Mr. Salunke submitted that in any case, Ramchandra was mentally ill and, therefore, the Will cannot be said to be a valid Will. The learned trial Judge has considered this aspect in paragraphs 46 to 59. In paragraph 55, the learned trial Judge noted that in the previous round of litigation, the decree holder came with the case that judgment debtor no.2 was not mentally ill. However, in the present case they have taken contrary stand.

Equally, the applicants had taken stand in the previous suit that Judgment debtor no.2 was mentally ill. The learned trial Judge has noted that parties have changed their stand. In paragraph 56 the learned trial Judge referred to the order passed directing Judgment debtor no.2 Ramchandra to pay maintenance. The learned trial Judge, therefore, observed that as both the parties have changed their stand, it is necessary to go by the findings recorded by the Court on this aspect. The learned trial Judge, therefore, held that there is no evidence on record to establish that Judgment debtor no.2 Ramchandra was mentally ill at the time of registration of the Will.

11. For the reasons recorded by the learned trial Judge in paragraphs 46 to 59, I do not find any merit in the submission of Mr Salunke that Judgment debtor no. 2 was mentally unfit to execute the Will. The learned trial judge also referred to section 2(11) of C.P.C. which defines the expression 'legal representative'. In addition, Section 211 of the Indian Succession Act, 1925 lays down that Executor or Administrator as the case may be, of the deceased person is his legal representative for all purposes and all properties of deceased persons vest in him as such. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)