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

WRIT PETITION NO.14411 OF 2016

Mallikarjun B. Kawale and ors ... Petitioners.

V/s.

Chandrakala A. Kawale ... Respondent.

Mr. Anand Kulkarni, for the Petitioners.

Mr. Surel S. Shah, for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th JANUARY, 2018.

P.C. :

1] Rule.

2] Rule made returnable forthwith with the consent of learned counsel for petitioners and respondent and heard finally.

2] By this writ petition filed under Article 227 of the Constitution of India, the petitioners are challenging the order dated 30th September, 2016, passed by the Jt. Civil Judge S.D. Solapur, below Application at exh. 160. The said application was filed by respondent-plaintiff, under Section 151 of the Code of Civil Procedure

for permission to lead the additional evidence of the witness by name Annarao Nimbargi, to prove the will deed dated 30.11.1995.

3] The submission of learned counsel for the petitioners is that in the instant case, the evidence of the plaintiff is already closed. Even the evidence of defendant is also closed and thereafter, plaintiff has filed said application making out totally new case. It is submitted that the case of the plaintiff is that she became the owner of the suit property on the basis of sale deed dated 21.01.2000 executed by original owner Baburao Kawale. Now by seeking permission to lead additional evidence of the attesting witness, namely Annrao Nimbargi, plaintiff wants to base her claim on the basis of will deed and hence it is urged that the trial Court has committed an error in allowing the plaintiff's application for permission to lead additional evidence.

4] However, perusal of the order passed by the trial Court, clearly reveals that though the plaintiff filed suit on the basis of sale deed 21st January, 2000 executed by Baburao Chanbasappa Kawale in her favour, it is the defendant who has claimed ownership over the suit property on the basis of will deed dated 11.5.1994 executed by deceased Baburao Chanbasappa Kawale. However, in the course of

cross examination of defendant's witness Shashikant Hippargi, plaintiff has brought on record that Baburao Kawale has executed will deed dated 30.11.1995 and by this will he has cancelled his earlier will deeds dated 11.5.1992 and 11.5.1994. This witness Shashikant Hippargi has also admitted that this will deed dated 30.11.1995 bears signature of Baburao and it is registered will deed. However, as it is not exhibited, now plaintiff wants to lead evidence of attesting witness to prove the said will deed dated 30.11.1995 to show that the will deed dated 11.5.1994 on which defendant has based his claim of title over the suit property is cancelled.

5] Now having regard to the nature of the controversy involved in the case and further considering that this will deed dated 30.11.1995 is produced in the course of evidence of witness of defendant, it has become necessary for the plaintiff to lead additional evidence and hence the trial Court has rightly considered that for deciding controversy involved in the suit, it is necessary to permit the plaintiff to lead additional evidence of the attesting witness namely Annarao Nimbargi.

6] The impugned order, therefore, passed by the trial Court trial Court does not call for any interference as petitioner will get

sufficient opportunity to cross examine the said witness and if in the cross examination it is found that the plaintiff is making out different case which is not having foundation in the plaint, that ground is always available to the petitioners either to resist or reject the case of the plaintiff. Hence writ petition being without any merit stands dismissed.

7] Rule stands discharged.

[DR.SHALINI PHANSALKAR-JOSHI, J.]