

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

**CIVIL APPLICATION NO. 4322 OF 2015
IN
FIRST APPEAL NO.1061 OF 2014**

Shashant Anand Kamath ..Applicant

IN THE MATTER BETWEEN

Rekha Gurudas Waravdekar ..Appellant

v/s.

Malini Balaji Kamat & Ors. ..Respondents

Mr. V.K.Nair for the Applicant/Appellant

Mr. Rajesh Jain, Ameya Mahajan, Dhanshree Shinde i/b. Legal Juris
for the Respondent No.1.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 14TH MARCH, 2018.**

P.C.

1. By this application, the applicant herein has sought to implead him as a party appellant in place of the original appellant Rekha Gurudas Waravdekar.

2. Heard learned Counsel for the applicant and the learned

Counsel for the respondents. The sole appellant Rekha Gurudas Waravdekar had expired on 17th September, 2015, during the pendency of the appeal. The applicant has averred in paragraph 3 of the application that the original appellant Rekha Waravdekar has executed Will dated 26th April, 2007, in his favour and that the said Will is duly registered before the Sub Registrar of Assurance at Mumbai under serial No. BDRI-05429-2007 on 15th June, 2007. The learned Counsel for the applicant has produced a copy of the said Will, which is taken on record and marked “X” for identification. A perusal of the Will prima facie reveals that Rekha had bequeathed the property mentioned in the Will, in favour of her nephew, the applicant herein.

3. The applicant has also filed Testament Petition No. 1945 of 2015 before this Court for Probate of the said Will. It is stated that the said Probate Proceeding has been converted into Suit No. 93 of 2016 and the same is pending adjudication.

4. The learned Counsel for the respondent submits that the applicant is not a legal representative of the original appellant and that the original appellant had no right to bequeath the subject

property in favour of the applicant. It may be mentioned that the question involved at this stage is not about the validity of the Will, but is about the right of the applicant to be substituted in place of the testator/ sole appellant Rekha Waravdekar.

5. In this regard, the learned Counsel for the Applicant has placed reliance on the judgment of ***Poonam Devi vs. Surendra Prasad AIR 2010 Patna 86***, wherein it is held as under:

“If a legatee or executor can institute a suit or set up a claim by way of defence, he can be allowed to be substituted in place of the testator or added as a party, if he makes a claim on the basis of unprobated Will. However, it is also well settled that such a legatee or executor making a claim on the basis of uprobated Will, though can institute a suit or take a defence in the suit on the basis of such Will, but his claim cannot be established in a Court of law unless and until a probate or letters of administration is granted meaning thereby that no decree can be passed in favour of such legatee nor defence can be accepted on his behalf unless a probate or letters of administration is obtained before its disposal.”

6. Accepting and applying the same principles, the applicant legatee can be allowed to be substituted in place of the testator/ sole appellant Rekha Gurudas Waravdekar. It is also reiterated that while deciding this application, this Court has not gone into the question

whether the testator/sole appellant Rekha Waravdekar, had legal right to execute such Will and bequeath the property in favour of the applicant. Suffice it to say that the claim of the applicant shall be subject to grant of probate.

7. Civil application is disposed of.

(ANUJA PRABHUDESSAI, J.)