

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 30 OF 1988

Smt. Dropadabai w/o Kashinath Karanjkar,
(Died) Through Legal Representatives :

- 1) Rama s/o Kashinath Karanjkar.
(Died) (Appeal abated as per Court
order dated 14-11-2014)
Through Legal Representatives :
- 1-I-i) Santosh s/o Ramchandra Karanjkar,
Age 33 years, occupation Agri.,
R/o Tadvale (Kasbe) Tq.Dist.
Osmanabad.
- 1-I-ii) Sharad s/o Ramchandra Karanjkar,
Age 31 years, occupation and R/o
As above.
- 1-I-iii) Kranti w/o Rajendra Thorsade,
Age 38 years, occupation Household,
R/o Thorsadwadi Tq.Dist. Osmanabad.
- 1-I-iv) Sau. Shailaja Vitthal Shelke,
Age 37 years, Occupation Household,
R/o Khamswadi Tq.Kallam Dist.
Osmanabad.
- 1-I-v) Sau. Sheetal w/o Rambhau Bodhale,
Age 31 years, occupation Household,
R/o Chincholi Tq.Barshi Dist.Solapur.
- 1-I-vi) Kamalbai w/o Ramchandra Karanjkar,
Age 67 years, Occupation Household,
R/o Tadvale (Kasbe) Tq.Dist.
Osmanabad.
- 1-I-vii) Nandabai w/o Ramchandra
Karanjkar,
Age 57 years, Occupation Household,
R/o As above.

- 2) Jagannath s/o Kashinath Karanjkar.
(Deleted as per Court order dated 09-02-2000)
- 3) Baban s/o Kashinath Karanjkar **..Appellants.**

VERSUS

- 1) Dattatraya s/o Devidas Surwase,
(Died) (Deleted as per order dated 23-09-1992).
- 2) Ramling s/o Devidas Surwase,
Minor, Under guardianship of
Subhadrabai d/o Massa Kamble
Age 29 years, Occupation Agri.,
(Deleted as per Court order dated 09-02-2000).
- 3) Vithal s/o Dhondiba Londe.
- 4) Rahiman s/o Nanhumiya Kotwal.
- 5) Rangnath s/o Bhagwan Pawar.
- 6) Kashinath s/o Namdeo Karanjkar
(Died) Through Legal Representatives :
 - i) Sow. Kusumbai w/o Dashrath Kadam.
 - ii) Sow. Dwarkabai w/o Dnyandeo Thodsare.
 - iii) Sow. Shardabai w/o Suryakant Bhingore. **..Respondent.**

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Mrs. M. A. Kulkarni, Advocate for appellants.
Mr. S. G. Chapalgaonkar , Advocate for respondents.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of reserving the Judgment :
10-01-2019.**

**Date of pronouncing the Judgment:
13-03-2019.**

JUDGMENT :

1. Present appeal has been filed by the original defendant No.1; wherein the Judgment and decree passed in Regular Civil Appeal No.238 of 1987 decided by learned Additional District Judge, Osmanabad has been challenged. The said appeal filed by her was dismissed on 27-01-1988. In the said appeal, the Judgment and decree passed in Regular Civil Suit No.85 of 1984 for declaration of ownership with consequential prayer of perpetual injunction was decreed by learned Joint Civil Judge, Junior Division, Osmanabad on 18-09-1987.

2. The facts contended by the plaintiff were that, one Sarubai was the widow of Tukaram Dhamekar. Sarubai was the owner and possessor of house property bearing No.43, 54, 56, 57, 58, 60, 62 together with the open plot around and more particularly described in suit situated at village Tadvale Tq. Osmanabad, as well as the agricultural land bearing Survey No. 615/1/2/B admeasuring 5 H 73 R out of 14 H 7 R. It is

stated that, Sarubai had no issue and therefore she was residing with Hiralal, who was the father of plaintiff. She was maintained by Hiralal and plaintiff even in her old age, and therefore, Sarubai left 'Will' dated 17-04-1974 bequeathing all the suit properties in favour of father of the plaintiff. Sarubai expired on 26-05-1974. It was also stated that, the defendant No.1 is claiming to be the daughter of Sarubai, however she had filed suit bearing Regular Civil Suit No.558 of 1944 in the Court of Barshi against Sarubai in respect of the suit properties itself, however her suit was dismissed. Further after defendant No.1 started obstruction to the possession of Sarubai over the suit properties, Sarubai filed Regular Civil Suit No.399 of 1965 for injunction. The said suit was decreed and the defendant No.1 was permanently restrained from interfering with the possession of Sarubai over the suit land. Defendant No.1 had preferred appeal challenging the said Judgment and decree, however the said appeal was dismissed. It was specifically held that, defendant No.1 has no concern with the suit properties and that she is not the daughter of Sarubai and Tukaram. Plaintiff claims to be the owner and possessor of suit property on the basis of 'Will' left by Sarubai in the name of their father. Since again the defendant No.1 had obstructed them on 28-05-1974, they had filed a complaint with police station Panghari, however no steps were taken against the defendant, hence suit. In the alternative, it was also contended that, if

it is held that the defendants are in possession then the direction should be given to hand over the possession to the plaintiff. It was stated that, defendants No.6 and 7 have purchased house property No. 57 during the pendency of the suit, and therefore, they have been added as party. Defendant No.2 appears to be the husband of defendant No.1, defendants No.3, 4 and 5 are their sons.

3. Defendants No.2 to 5 have not filed any separate written statement but they filed pursis stating that, they are adopting the written statement filed by the defendant No.1. Defendant No.1 resisted the claim of the plaintiff by stating that, she is the daughter of Sarubai and Tukaram. The properties were belonging to Tukaram and after death of Tukarma she as well as Sarubai had become owners and possessors of the suit properties. It is also stated that, Sarubai was not competent to execute 'Will' and even if such document has been got executed, it is not binding on her. It is also stated that, Sarubai was not in a fit mental state to execute that 'Will'. She had maintained her mother and had also performed all the last rites after death of Sarubai. She further states that, Sarubai had illicit relations with Hiralal, and therefore, plaintiff succeeded in obtaining 'Will' in respect of suit properties from Sarubai. She has admitted that, she had filed Regular Civil Sit No. 558 of 1944 against Sarubai and it was dismissed. So also

she admits that, Sarubai had filed Regular Civil Suit No.399 of 1965 against her which was decreed, appeal was dismissed. She being the owner and possessor of the property after death of Sarubai, it is stated that plaintiff has no concern with the same.

4. Defendants No.6 and 7 have filed their separate written statement and it is stated that, they have purchased the suit house after payment of due consideration, and therefore, they are the bona fide purchasers for value without notice.

5. With these pleadings parties went to trial, adduced evidence and after taking into consideration the evidence on record and hearing both sides, the suit was decreed. The plaintiff was held to be the owner of the suit properties and the defendants No.1 to 7 were perpetually restrained from interfering with the possession of the plaintiff over the suit properties.

6. As aforesaid the said Judgment and decree was challenged by original defendant No.1 only in Regular Civil Appeal No.238 of 1987 and after hearing both sides the said appeal has been dismissed, hence the present appeal has been filed.

7. It will not be out of place to mention here that, the appeal came to be admitted on 23-06-1988, however at that time the substantial

question of law were not framed. Hence, before considering the entire matter which is now heard finally with consent of both the parties, substantial questions of law would be formulated on the basis of arguments advanced by both sides.

8. The learned advocate appearing for the appellant submitted that, it has come on record that, Tukaram expired on 20-10-1922. That means, even prior to coming into force the Hindu Women Rights to Property Act, 1937. According to the appellants, appellant – original defendant No.1 is the daughter of Tukaram and Sarubai. It is not in dispute that, Sarubai was the widow of Tukaram and she expired on 26-05-1974. When admittedly the properties were belonging to Tukaram, the question is whether Sarubai got any right and share and then when it has come on record that defendant No.1 Dropadabai is the daughter of Tukaram and Sarubai, then whether she will get any share. It has come on record that, Dropadabai was borne on 18-06-1922. After death of Tukaram, her name was shown in the revenue record firstly as minor through guardian Sarubai, and thereafter, after attaining majority, in her own capacity. Further it has come on record that, Tukaram had received the suit properties in partition, therefore the suit properties became the self acquired or separate properties of Tukaram. It is the wrong preposition of law that, 'Shastrik Law' i.e. old Hindu Law

excluded 'daughter' from inheritance. In fact, there is right to the 'daughter' in her father's estate, especially the separate estate even prior to Hindu Women's Right to Property Act 1937. The plaintiff is claiming that, he received the properties by virtue of the 'Will' left by Sarubai. According to him, the 'Will' dated 17-04-1974 (Exhibit 199) bequeathes all the property of Sarubai in his favour. In fact there was no relationship between father of plaintiffs and Sarubai. Sarubai had illicit relations with Hiralal and plaintiff was the son of Hiralal. Therefore, there were suspicious circumstances surrounding the 'Will' and they are;

- i) Daughter (defendant No. 1) is excluded,
- ii) Attesting witness did not identify the thumb mark of Sarubai,
- iii) Third person Sarpanch was called to identify the thumb mark but that Sarpanch has not been examined,
- iv) The suit was filed by the minor sons of Devidas to whom the properties were allegedly bequeathed and the guardian was not got appointed through any legal procedure, and therefore, they were not entitled to sue defendants.

It is also submitted that, in order to prove the 'Will', the plaintiffs have not fulfilled the conditions laid down in Section 68 of Evidence Act and Section 63 and Section 59 of the Indian Succession Act. In fact on the

death of Tukaram, defendant No.1 had half share in the property and therefore at the most it can be said that Sarubai was owner of half portion only. She could not have left 'Will' in respect of entire property. In order to buttressed her submissions she has placed reliance on the decisions in ;

(1) *Ramrao Punjabrao Pawr and others Versus Sarubai Dalpatrao Pawar through L.R.*, reported in 2006 (1) Bom.C.R. 439,

(2) *Sir Mohammed Yusuf and another Versus D and Another*, reported in AIR 1968 BOMBAY 112,

(3) *Beni Chand (Since Dead) Now by L. Rs. Versus Smt. Kamla Kunwar and others*, reported in AIR 1977 Supreme Court 63.

All these citations are on the point of how the 'Will' can be said to be not proved and further reliance has been placed on *Laxman s/o Tukaram Versus Smt. Bendrabai wd/o Tukaram Karwate*, reported in 2005 (3) Mah. L.J. 506, wherein it has been observed that,

“Under Section 14 (1) of the Hindu Succession Act, any property possessed by a female Hindu acquired before the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The object of this section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited

owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. The word "acquired" in Sub-section (1) of Section 14 has to be given a widest possible meaning so also the word "possessed" is used in this section in a broad sense and in its widest connotation. The possession need not be actual physical possession or the personal occupation of the property by the female but may be possession in law. It may either be actual or constructive or in any form recognised by law provided that she has not parted with her right. Thus a female Hindu possessed of the property on the date Hindu Succession Act came into force would become an absolute owner if she was a limited owner at the time of the commencement of the Act."

It was lastly submitted that, since the 'Will' cannot be said to have been proved in this case and the fact that, defendant had half share in the suit properties being the daughter of Tukaram; both the learned Courts below ought to have given findings in favour of defendants. The suit ought to have been dismissed and appeal ought to have been allowed.

9. Per contra, the learned advocate appearing for the respondent No.1 has submitted that, the substantial question of law involved in this case is to the extent of whether the daughter in this case had right in the suit properties prior to 1956. It has come on record that, in the

year 1944 when the defendant was already married, she had filed suit against Sarubai i.e. mother claiming her share in the suit property. However, that suit was dismissed. In that suit, she had levelled allegations against Sarubai that, Sarubai has illicit relations with Hiralal. Thereafter, Sarubai filed Regular Civil Suit No.399 of 1965 for injunction against the present defendant Dropadabai. The said suit was allowed and the appeal filed by defendant was dismissed. Therefore, it can be said that, Sarubai has been held to be the exclusive owner of the suit properties after death of Tukaram. This fact can also be viewed from another angle. Tukaram died on 20-10-1922, at that time it was stated that he was survived by wife and daughter. Though in the 'Will', Sarubai has stated that, she has no issue yet even if for the sake of arguments it is accepted that, defendant is her daughter, yet in view of Hindu Women's Rights to Property Act, 1937 and prior to that the old Hindu Law, gave only the right to widow and not to the daughter. When Hindu Succession Act, 1956 came into force, only Sarubai was the owner of the property and also the possessor. Therefore, even if she had any limited interest in the property, it had become absolute by virtue of Section 14 of the Hindu Succession Act and that was confirmed in Regular Civil Suit No.399 of 1965. Therefore, she was competent to dispose of the properties. There was reason for her to exclude her daughter i.e the daughter was levelling allegations of

unchastity or illicit relations against the mother, so also she had filed the suits. There was no suspicious circumstance surrounding the 'Will'. The attesting witness was examined to prove the 'Will'. In fact the 'Will' is registered. Under such circumstance when all the compliance have been made in respect of Section 68 of the Evidence Act, both the Courts have concurrently held that plaintiff has become owner of the suit properties after the death of Sarubai by virtue of 'Will'.

10. To buttress his arguments he relied on the decision in, *Radhabai Balasaheb Shirke (since deceased, through L.Rs.) Vs. Keshav Ramchandra Jadhav & Ors.*, reported in 2007 (2) ALL MR 823. The Single Bench at Principal Seat did not agree with the decision in Laxman's case (*Supra*) on the point that daughter could have acquire right either limited or absolute by inheritance prior to coming into force of the Hindu Succession Act, in the property of her deceased father, who had died prior to 1956 leaving behind him in addition to such daughter, is widow as well, and therefore, the point has been referred to the Larger Bench. Under such circumstance this Court cannot only rely on the decision in Laxman's case. Further he relied on the decision in *Chandrashekhar s/o Manohar Tanksale Vs. Pandharinath s/o Vithobaji Neware*, reported in 2013 (6) Mh.L.J., 377, wherein it has been held that,

“It is defined as a rule deducible from the application of law to the facts and circumstances of the case and not some conclusion based upon facts which may appear to be similar.”

And therefore, the case of which facts are similar will have to be considered. The facts of the case in Radhabai's case (Supra) were similar to that of the present case but in addition to that the circumstance is that in the earlier round of litigation Sarubai was held to be the exclusive owner when the daughter herself was party to that proceeding. The said findings in those matters have achieved finality. Therefore, no substantial questions of law have been pointed out. He also relied on the decision in, *Ashok Rangnath Nagar Vs. Shrikant Govindrao Sangvikar*, reported in 2015 AIR SCW 6318, wherein it has been held that,

“Second Appeal under S.100 Civil P.C. should be dealt with in following manner : -

(i) On the day when the second appeal is listed for hearing on admission if the High Court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law ;

(ii) In cases where the High Court after hearing the appellant is satisfied that the substantial question of law is

involved, it shall formulate that question and then the appeal shall be heard on those substantial question of law, after giving notice and opportunity of hearing to the respondent ;

(iii) In no circumstances the High Court can reverse the judgment of the trial court and the first appellate court without formulating the substantial question of law and complying with the mandatory requirements of Section 100 CPC."

He therefore prayed for the dismissal of the second appeal.

11. As aforesaid substantial questions of law were not framed at the time of admission of the law and therefore, they are now framed and they are as follows:

- a) Whether Sarubai had become exclusive owner of suit properties by virtue of provisions of Section 14 of the Hindu Succession Act, 1956 ?
- b) Whether taking into consideration the facts of the case, daughter Dropadabai had share in the suit properties ?
- c) Whether Devidas had become owner of the suit properties by virtue of 'Will' left by Sarubai ?
- d) Whether interference is required in the impugned judgment and decrees?

12. The basic facts which are required to be considered here in this case are that, admittedly Tukaram expired on 20-10-2022 leaving behind the suit properties, which had come to him in partition. It is also not in dispute that, Sarubai was his wife. No doubt, in the 'Will' left by Sarubai she has stated that, she is issueless and she had not accepted Dropadabai as her daughter and accordingly the plaintiff had come with that case, yet it is to be noted that in one of the litigation earlier i.e. Regular Civil Suit No.558 of 1944, it had come on record that present defendant is the daughter of Sarubai. Fact is also admitted that, Regular Civil Suit No.558 of 1944 which was filed by the present defendant against Sarubai was dismissed but the entire pleadings in that suit have not been produced in this case. What has been produced at Exhibit 190 is the written statement from the said suit filed by defendant No.5 therein, defendant No.5 was Sarubai. As it appears from the page No.5 of the said written statement and in para No.2 it is stated that, plaintiff is her daughter from Tukaram. But again it is also required to be noted is that, Exhibit 169 is the plaint in Regular Civil Suit No.399 of 1965 which was filed by Sarubai against the present defendant. In that case it was stated that, Dropadabai is not her daughter but some persons which are against Sarubai had conspired with each other and they were saying in public that, Dropadabai is the

daughter of Sarubai from Tukaram. The Judgment in the said case shows that, there was no specific issue in respect of the relationship, however the issue No.1 was in respect of title of Sarubai over the suit properties. It appears that, there was a submission on behalf of the defendant therein (Droupadabai) that, it should be observed that defendant is the daughter of the plaintiff, however the trial Court in that suit specifically observed that, it will not be proper on the part of the Court to record a finding in that respect when there is no specific issue on the point and the parties had no opportunity to agitate the said point in detail. However, on the basis of decision in Regular Civil Suit No.558 of 1944 it was held that, Sarubai is the exclusive owner of the property. The same issue was involved in Regular Civil Suit No.558 of 1944, and therefore it is held that, in view of the said decision, the same point cannot be re-agitated that Sarubai had lost interest or right over the suit property of Tukaram since she had remarried. Thus it can be seen from this piece of evidence that, when the suit bearing No.558 of 1944 was decided, it was held that Sarubai is the exclusive owner of the suit property. This has taken place prior to coming into force of the Hindu Succession Act, 1956. Thereafter, by virtue of Section 14, the suit properties have become the absolute properties of Sarubai.

13. The said fact can be taken into consideration from another angle.

The parties were admittedly governed by Bombay state. Paragraph 43 of 22nd Edition of Mulla's Hindu Law would be the relevant paragraph which deals with, order of succession among *Sapindas* ;

“43. It is son, grandson (son's son) and great-grandson (son's son's son), and widow, predeceased son's widow, and predeceased son's predeceased son's widow would inherit the property. ”

Thus only 'widow' was covered and not the daughter. Further the law on this point has been elaborated in paragraph No.16 of Radhabai's Judgment. Though the matter has been referred to the larger Bench yet what has been stated in Mulla's Hindu Law (22nd edition) can be taken into consideration. Paragraph No.42 of Mulla's Hindu Law is also required to be considered here, and therefore, the bare perusal of the paragraph No.43 with relevant rules would show that, daughters will get the share in the property if there is no 'widow'. Here in this case Sarubai, the widow, would get the limited share first and thereafter after coming into force of Hindu Succession Act in 1956, by virtue of Section 14 thereof, she would become the absolute owner. She was the only person who was possessing the suit properties when Hindu Succession Act came into force, and therefore, the decision in *Gummalapuru Taggina Matada Kotturuswami Vs. Setra Veeravva and Others*, reported in *AIR 1959 Supreme Court 577*, will have to be

considered wherein it has been observed that,

"The Property in which Hindu female acquires a life interest must be one possessed by her at the time of Act came into force. The Act only improves the legal status of Hindu Women, enlarging their limited interest in property inherited or held by them to an absolute interest, provided that, they were in possession of the property when the Act came into force."

Further in *Yamunabai w/o Harihar Pandit and Another Vs. Ram Maharaj Shreedhar Maharaj Pandit and another*, reported in *AIR 1960 Bombay 463*, it has been held that,

"Her possession i.e. the widow's possession may be actual or constructive or in any form recognized by law."

Another fact which also requires consideration is that, in the year 1944 itself Dropadabai had levelled allegations of unchastity on the widow i.e. the mother but then that cannot be a bar to Sarubai to inherit the property left by Tukaram. This has been held in, *Akoba Laxman Pawar V. Sai Genu Laxman Pawar*, reported in *A.I.R.1941 Bombay 204* that,

"In the recent Hindu Women's Rights to Property Act (XVIII of 1937), the bar of unchastity seems to have been removed even with regard to the widow inheriting her husband's property, because it says that its provisions shall apply notwithstanding any rule of Hindu law or custom to the contrary, and as observed in Mayne's Hindu Law, 10th

edn., at p. 722, "as the Act confers upon the widow a right of succession notwithstanding any rule of Hindu law, an unchaste widow will not be disqualified from inheritance." .

14. Though *Radhabai's* case has been referred to the larger Bench and the said point is yet to be decided finally, it was not necessary to wait till the reference is decided in view of the decision in *Ashok Sadarangani Vs. Union of India*, reported in 2012 (11) SCC 321. Further in this case the peculiar circumstance is that, in the suit of 1944 which was admittedly decided prior to 1956, Sarubai was held to be the exclusive owner of the suit properties. Further in the suit that was filed by Sarubai i.e. Regular Civil Suit No.399 of 1965, there was a specific issue that 'whether plaintiff has proved her title to the suit property'? The finding was given in the affirmative. Sarubai was the plaintiff therein. The suit was decreed. Defendant Dropadabai was restrained from obstructing the possession of the plaintiff in the suit land. Dropadabai had challenged the said Judgment and decree passed in Regular Civil Suit No.399 of 1965 in Civil Appeal No.525 of 1966. The said appeal came to be dismissed. The Dropadabai has not challenged the said decision further. That means, the said finding has achieved finality. At any point of time during the lifetime of Sarubai, Dropadabai had not filed any suit for partition and separate possession, and therefore, there is absolutely no necessity for this Court to again make

a reference like Radhabai's case and refer the point for decision. Here one of the party viz. Dropadabai is the same and plaintiffs are claiming through Sarubai. With this peculiar facts it can be said that, only Sarubai was the owner of the property and she was competent to dispose of the same like executing 'Will'.

15. In respect of the point i.e. title of Sarubai, it is not necessary to go into the oral evidence for the simple reason that the documentary evidence was conclusively pointing out that Sarubai was the owner of the suit properties. Yet the oral evidence can be referred; that in her cross-examination D.W.1 Dropadabai has admitted that the suit filed by her mother bearing Regular Civil Suit No.399 of 1965 was decreed against her and her appeal was dismissed. In clear terms she has admitted that her mother was in possession of the suit property till her death. That means, Sarubai alone had exercised all the rights over the suit properties as owner thereof.

16. Now turning towards the another point i.e. the plaintiffs were claiming to be the owners of the suit properties after death of Sarubai by virtue of the 'Will' left by Sarubai. In fact the 'Will' was left in the name of Devidas Hiralal Survase, however it appears that Devidas expired and his minor sons had filed the suit contending that after death of Devidas, they have become owners of the suit properties. The

said suit was filed under guardianship of one Subhadrabai d/o Massa Kamble. Objection has been raised by Dropadabai that, no order in respect of guardianship was obtained prior to the filing of the suit from a competent Court. It is to be noted that, as regards suit by minor, Order XXXII Rule 1 of The Code of Civil Procedure is required to be considered. It says that, a minor can institute suit through 'next friend'. It is absolutely not necessary that the 'next friend' should obtain any order or get himself appointed through a competent Court. Though word "Guardianship" has been used in the title of the judgment of Trial Court, we will have to take it as 'next friend'. In fact, in the plaint, it was stated in Marathi as, " अज्ञान पालन करणार ", it may be termed as 'guardian' or it may be termed as the person who is looking after minor. The literal meaning of the same is, person maintaining minor. Therefore, there is no substance in that point that the guardian of the minor has not got herself appointed as guardian prior to the institution of the suit. There is no such requirement of the law.

17. As regards the proof of 'Will' dated 17-04-1974 is concerned, the objection is raised that it is surrounded by suspicious circumstances. The first is regarding exclusion of daughter. Substance can be found in the arguments advanced by the respondent No.1 that, since the relationship between mother and daughter were strained since prior to

1944 which had resulted in the suit by daughter against mother in which allegations about her chastity were levelled, and thereafter, mother filing suit against daughter for injunction, it can be taken that there was a good ground to exclude daughter. Another point that has been raised is that, the attesting witness did not identify the thumb impression of Sarubai. Here in this case the original 'Will' has been produced at Exhibit 199 and one attesting witness has been examined. P.W.2 Baburao Patil is the attesting witness. He has specifically stated that, deceased Sarubai was the cousin sister of his father. He was called by Sarubai in the office of Sub-Registrar, Barshi, another person by name Baburao Rangnath Dethe was present. Sarubai had purchased stamp and then bond writer wrote 'Will'. It was read over to all of them and then Sarubai signed the same. This is what is stated in the English version of the deposition and in Marathi version it is stated that, "सरुवाईने तेंव्हा अंगठा केला", (Sarubai then put thumb mark). In fact as per paragraph No.254 (3) of Chapter X of Civil Manual,

"The evidence of witness shall be recorded in the language of the Court i.e. in Marathi beyond the limits of Greater Bombay."

Then it is stated that,

"The notes of evidence recorded by the Presiding Officers shall be in English where evidence is not given in English."

As regards this discrepancy is concerned, reliance can be placed on the decision in the *State of Maharashtra Versus Bhaurao Doma Udan and others*, reported in [1996 (1) Mh.L.J. 214]. Though it was a criminal case challenging the acquittal of the accused persons from the offence punishable under Section 302, 325, 324 etc. of Indian Penal Code, and the provisions of Criminal Manual were taken into consideration; almost similar provisions are there in Civil Manual, wherein a note was taken of the Government Notification dated 30-04-1966 stating that, Marathi should be the language of all the criminal Courts in the State. Here as regards civil case is concerned, the rule itself says that, the evidence of the witness shall be recorded in the language of the Court i.e. Marathi. It was observed in the said decision that, "*where a witness deposed in Marathi which is the language of the Courts in Moffusil and that evidence is read over to the witness and was admitted by him to be correct and the memorandum of evidence was made by the Judge in English, in such a case, when a question arises as to what exactly the witness had stated in his evidence, it is the Marathi deposition of the witness that has been to be taken into account and not the memorandum in English prepared by the Judge*". Therefore, in this case taking into consideration the discrepancy, the Marathi should prevail; which shows that, Sarubai had impressed her thumb mark in

the presence of P.W.2 Baburao Patil. He was the attesting witness and he had seen the testator affixing her thumb mark, and therefore, that can be taken as the requisite compliance regarding the proof of the 'Will'.

18. Defendant has tried to take advantage of the fact that, her name was entered to the record of rights, however it can be noted that, recently in *Dharam Singh (D) thr. L.Rs. and Ors. Vs. Prem Singh (D) thr. L.Rs.*, decided by the Hon'ble Supreme Court on 05th February 2019. It has been reiterated that, the record of entries *per se* do not confer title. Therefore, merely on the basis of entries in 7/12 extract, it cannot be stated that the defendant No.1 i.e. Dropadabai was the owner of the suit lands, after the demise of Sarubai.

19. Therefore, taking into consideration all these facts as well as legal position, it can be held that, both the Courts below have not committed any error of law or error of fact. The findings of substantial questions of law are given as follows:

- a) Yes, Sarubai was the exclusive owner of the suit properties by virtue of Section 14 of Hindu Succession Act, 1956.
- b) No, Dropadabai had no share in the suit properties.
- c) Yes, Devidas had become owner of the suit properties by virtue of will left by Sarubai in his favour.

d) Interference is not required.

20. There is no merit in the second appeal, hence second appeal is hereby dismissed with costs. Decree be drawn up accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

DATE : 13-03-2019

1) After pronouncement of the Judgment learned advocate for the appellants submitted that, the interim relief granted earlier be continued since the appellants intend to approach the higher Court.

2) It is to be noted that, both the Courts below have given a concurrent findings and this Court has also come to the same conclusion. Another peculiar fact is that, in the suit of 1944 also, there was no relief in favour of the present appellants. Thereafter, in the suit filed by Sarubai, injunction was granted against the present appellants predecessor. Under such circumstance, there was no order operating in favour of the appellants so that it can be continued. Hence, oral prayer is rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.