

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.12404 OF 2016

Kamalkishor S/o. Nandkishor Asopa
Age: 32 years, Occu.: Business,
R/o.Asopa Sadan, Kadmar Road,
Latur, Tq. & Dist.Latur.

..Petitioner
(Orig. Respondent)

VERSUS

1. Rameshchandra S/o. Govindlal Asopa
Age: 72 years, Occu.: Retired,
R/o. Latur, at present Patdi,
Tq.Dasada, Dist.Surendra Nagar,
(Gujarat State)

2. Smt. Ujwala W/o. Naresh Asopa
Age: 48 years, Occu.: Household. & Agri.,
R/o. Asopa Galli, Latur,
Tq. & Dist.Latur.

..Respondents
(Orig. Appellants)

...

WITH

WRIT PETITION NO. 12699 OF 2016

Kamalkishor S/o. Nandkishor Asopa
Age: 32 years, Occu.: Business,
R/o.Asopa Sadan, Kadmar Road,
Latur, Tq. & Dist.Latur.

..Petitioner
(Orig. Respondent)

VERSUS

Smt. Ujwala W/o. Naresh Asopa
Age: 48 years, Occu.: Household. & Agri.,
R/o. Asopa Galli, Latur,
Tq. & Dist.Latur.

..Respondents
(Orig. Appellant)

...

Advocate for Petitioner : Shri Ravindra M. Deshmukh
Advocate for Respondent No.1 : Shri P.R.Katneshwarkar h/f.
Shri A.S.Deshpande

Advocate for Respondent No.2 in WP/12404/2016 & Respondent
in WP/12699/2016 : Shri H.V.Patil

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CORAM : P.R.BORA, J.

DATE: 3rd June, 2019

JUDGMENT:-

1. Since these two Writ Petitions are arising out of a common Judgment delivered by District Judge-1, Latur on 15.10.2016, in Miscellaneous Civil Appeal No.47 of 2016 and Miscellaneous Civil Appeal No.50 of 2016, I have heard common arguments in both these Writ Petitions and I deem it appropriate to decide these Writ Petitions by a common reasoning.

2. The present petitioner was the respondent in both the aforesaid Miscellaneous Civil Appeals. Miscellaneous Civil Appeal No.47 of 2016 was filed by Rameshchandra s/o. Govindlal Asopa, who is respondent No.1 in Writ Petition No.12404 of 2016. Miscellaneous Civil Appeal No.50 of 2016, was filed by respondent in Writ Petition No.12699 of 2016. Both the aforesaid Miscellaneous Civil Appeals were filed against the order dated 08.07.2016, passed by the learned 2nd Joint Civil Judge, Senior Division, Latur in M.A.No.178 of 2016, whereby the petitioner in the present Writ Petitions namely Kamalkishor Nandkishor Asopa was declared as the legal heir of deceased Rawatmal Abedmal Asopa. The petitioner had filed the aforesaid application under the provisions of Bombay Regulation for grant of legal heir-ship certificate claiming himself to be the sole legal heir of deceased

Rawatmal Abedmal Asopa, who died on 07.05.1994, leaving behind him agriculture land Gut No.172, ad-measuring 9 Acres 10 Gunthas and Municipal House No.83, in Ward No.23 situated at Latur. The petitioner had filed the aforesaid application on the basis of a Will Deed stating the same to have been executed by deceased Rawatmal in his favour on 29.04.1994. In the aforesaid application filed under the provisions of Bombay Regulation Act, a proclamation was published in local newspaper calling for objections. Since, no one raised any objection, the learned Trial Court allowed the application vide order dated 08.07.2016 and declared the petitioner as the legal heir of deceased Rawatmal.

3. After having come to know that the petitioner has been declared as legal heir of deceased Rawatmal in the aforesaid application, respondents in the present Writ Petitions preferred the aforesaid Miscellaneous Civil Appeals for revocation of the grant, which was made in favour of the present petitioner. It was the common contention of both the appellants that present petitioner was not the sole legal heir of deceased Rawatmal and further that the Will Deed dated 29.04.1994, was forged. The learned District Judge-1, Latur, after having considered the evidence on record and the relevant legal provisions, allowed both the Miscellaneous Civil Appeals and set aside the order dated 08.07.2016 passed in M.A.No.178 of 2016. Aggrieved

thereby, the petitioner has preferred the present Writ Petitions.

4. Shri R.M.Deshmukh, learned counsel appearing for the petitioner in both the Writ Petitions assailed the impugned common Judgment on various grounds. The learned counsel submitted that the impugned common Judgment is against the provisions of law and the learned District Judge has failed in considering that the petitioner had raised the objection regarding maintainability of the said Miscellaneous Civil Appeals. The learned counsel submitted that the District Judge had no power and authority to decide the Miscellaneous Civil Appeals filed by the present respondents as the original order passed by the learned 2nd Joint Civil Judge, Senior Division, Latur is under Indian Succession Act, 1925. The learned counsel further submitted that the learned District Judge has also failed in appreciating that the Will Deed prepared by deceased Rawatmal dated 29.04.1994 is the only genuine and legal Will Deed executed by him and relying on it the learned 2nd Joint Civil Judge, Senior Division, Latur, had rightly allowed M.A.No.178 of 2016. The learned counsel submitted that the learned District Judge has also failed in appreciating that Will Deed dated 12.04.1994, is false and fabricated. The learned counsel submitted that learned District Judge has also failed in appreciating that opinion of handwriting expert placed on record by the present petitioner was clearly

revealing that the signatures of deceased Rawatmal appearing on the Will Deed dated 29.04.1994 and on the Rent Receipt were quite similar to each other. The learned counsel submitted that the learned District Judge has for wrong reasons set aside the order passed by learned 2nd Joint Civil Judge, Senior Division in M.A.No.178 of 2016. The learned counsel, in the circumstances, prayed for setting aside the common Judgment and order dated 15.10.2016, passed by the learned District Judge-1, Latur and consequently to restore the order dated 08.07.2016, passed by learned 2nd Joint Civil Judge, Senior Division, Latur in Miscellaneous Application No.178 of 2016.

5. Shri P.R.Katneshwarkar, learned counsel and Shri H.V.Patil, learned counsel appearing for the respondents supported the impugned common Judgment and order. The learned counsel placed reliance on the Judgment of this Court in the case of ***Shri Vitthal Ramchandra Mali Vs. Smt.Laxmi Ganpati Mali and Another [2006 (4) ALL M.R. 389]***, to urge that the appeal lies to the District Judge against the order passed on application of succession certificate by Civil Judge, Senior Division, irrespective of the value of the subject matter. The learned counsel, inviting my attention to the discussion made by the learned District Judge in paragraph Nos.10, 11 and 12, submitted that the learned District Judge has rightly rejected the objection raised on behalf of the

present petitioner that the appeal before the learned District Judge was not maintainable. The learned counsel further submitted that the learned District Judge has rightly held in the impugned Judgment that the Testamentary Court is not required to decide the validity of the Will. The learned counsel, in the circumstances, prayed for dismissal of the Writ Petitions.

6. After having considered the submissions advanced by the learned counsel appearing for the respective parties and on perusal of the impugned Judgment as well as the order passed by the learned Civil Judge, Senior Division, in M.A.No.178 of 2016, apparently I see no reason for causing any interference in the Judgment and order dated 15.10.2016, passed by learned District Judge-1, Latur. The objection raised on behalf of the petitioner that the District Judge was not having jurisdiction to try and entertain the appeals is liable to be turned down in view of the law laid down by this Court in the case of **Shri Vitthal Rameshchandra Mali** (supra). I deem it appropriate to reproduce herein below paragraph Nos.9 and 10 of the said Judgment.

“9. In view of this position, the Civil Judge, Senior Division in these two Appeals have exercised the jurisdiction under Sub-section 1 of Section 388 of the said Act of 1925. In view of the proviso to Sub-section 2 of Section 388, the Appeals under Section 384 of the said Act of 1925 against the order of the learned Civil Judge, Senior Division will therefore lie to the

District Judge and not to this Court. By virtue of the proviso to Sub-section 2 of Section 388 of the said Act of 1925 in case of all appealable orders passed on Application for succession certificate by the Courts referred to Sub-section 1 of Section 388, the Appeal will lie to the District Judge irrespective of the value of the subject matter of the Application for grant of succession certificate. The reason being that the forum of Appeal is created by the proviso to Sub-section 2 of Section 388 of the said Act of 1925 and not by the provisions of said Act of 1869.

*10. The Registrar (Judicial I) in his report has invited my attention to a decision of the learned Single Judge of this Court reported in **A.I.R. 1996 Bombay 29 (Manohar Baburao Sapre v. Bhaurao Shribhate and Another)**. The learned Single Judge considered the relevant provisions of the Civil Manual which are referred to in earlier part of this Judgment. After considering Section 388 of the said Act of 1925, the learned Single Judge held that the Appeal before the District Court was maintainable against an order passed by a Civil Judge. However, it must be noted here that the subject matter of the Appeal before the learned Single Judge was an order passed on Application for probate under Section 276 of the said Act of 1925. Therefore, the said decision has no relevance to the present controversy."*

7. In view of the observations made and the finding recorded as above, I see no infirmity in the finding recorded by the learned District Judge in the impugned Judgment that it was competent to entertain the appeals filed before it against the order passed in M.A.No.178 of 2016.

8. The present petitioner had contended in M.A.No.178 of 2016, that he is the only legal heir of deceased Rawatmal, who

died on 07.05.1994. It is the matter of record that on the basis of the Will Deed dated 29.04.1994, claimed by the petitioner to have been executed by deceased Rawatmal in his favour, it was prayed by the petitioner that the heir-ship certificate be issued in his favour being the only legal heir of the deceased Rawatmal. The learned District Judge has rightly observed that unless the right is undisputed, even the formal recognition of heir-ship cannot be granted by the Court under the Bombay Regulation Act. It is the matter of record that none was made respondent in Miscellaneous Civil Application No.178 of 2016, filed by the petitioner. It is true that proclamation was published in local newspaper calling for objections and since no one came forward taking any objection, the learned Civil Judge, Senior Division allowed the application and declared the petitioner to be the legal heir of deceased Rawatmal. Order passed in M.A.No.178 of 2016, reveals that the learned Civil Judge, Senior Division relied upon the Will Deed, which was at Exhibit 14 in the said proceeding. There is no dispute that the said Will Deed, according to the case of the petitioner himself, was executed on 29.04.1994. While relying on the said Will Deed, the learned Civil Judge, Senior Division, however, seems to have lost sight of the fact that, though the Will Deed was executed on 29.04.1994 and within few days thereafter i.e. on 07.05.1994, the executor of the

Will Deed namely Rawatmal expired, no application seeking heirship was made by the petitioner for more than 20 years.

9. After the respondents in the present Writ Petition came to know that heirship certificate has been obtained by the present petitioner, they promptly initiated proceeding for cancellation of the said heirship certificate. The facts, which are revealing from the proceedings initiated by the present respondents, show that the petitioner was not liable to be treated as the only legal heir of deceased Rawatmal, when the other relatives, which were at higher level in pedigree, were surviving. It is also revealed that deceased Rawatmal had earlier executed another Will Deed and it was the contention of the respondents that the alleged Will Deed dated 29.04.1994, was never executed by deceased Rawatmal. In view of the facts as aforesaid, the learned District Judge, after having considered the provisions under the Indian Succession Act as well as Bombay Regulation Act, has rightly set aside the order dated 08.07.2016, passed in M.A.No.178 of 2016. The material on record also reveals that pending the Appeals before the District Court, respondent Rameshcandra Govindlal Asopa, on his own accord, has referred the signatures of deceased Rawatmal Asopa and attesting witness Ramniwas Asopa, appearing on the alleged Will Deed allegedly executed on 29.04.1994 and the signature of deceased Rawatmal Asopa and

Ramniwas Asopa, appearing on the documents in earlier litigation, for comparison and seeking opinion of the handwriting expert. The opinion, which has been given in the said matter by the handwriting expert, *prima-facie* shows that there was dissimilarity in the said signatures.

10. It is also true that the present petitioner Kamalkishor Nandkishor Asopa has also placed on record opinion of another handwriting expert showing similarity pertaining to the signatures of deceased Rawatmal appearing on the Sale Deed dated 29.04.1994 and one Rent Receipt.

11. In view of the aforesaid evidence, which has come on record, the learned District Judge has observed in paragraph No.24 of the impugned Judgment that, the appellants, before the District Court, were trying to establish that the Will Deed dated 29.04.1994, was not genuine and the present petitioner, who was respondent in the said Appeal, was asserting that the said Will Deed was genuine and the signature appearing thereon was of deceased Rawatmal and none else. The learned District Judge has rightly observed in the further part of the impugned Judgment that deciding the validity of the Will Deed was not the job of the Testamentary Court. The learned District Judge has further rightly observed that the Civil Court would not have

issued the heir-ship certificate when the authenticity and validity of Will Deed dated 29.04.1994, was not legally established. The learned District Judge has further rightly observed that complicated issues were involved in the matter, which could be resolved only by the competent Civil Court in the Regular Civil Suit. It is further rightly observed by the learned District Judge that unless authenticity of the alleged Will Deed is proved, the heir-ship certificate, as claimed by the present petitioner, could not have been granted. The learned District Judge, in the circumstances, has set aside the order passed in M.A.No.178 of 2016. I see no error in the order so passed. It has to be further stated that while setting aside the order passed in M.A.No.178 of 2016, the District Court has given liberty to the present petitioner to institute a Regular Civil Suit for the purpose of establishing his claim. It appears to me that a well reasoned order has been passed by the learned District Judge and no interference is required in the said order. Both the Writ Petitions being devoid of any substance deserve to be dismissed and are accordingly dismissed.

(P.R.BORA)
JUDGE