

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

WRIT PETITION NO.9476 OF 2015

Govind s/o Laxman Kore

Petitioner

Versus

Balaji s/o Laxman Kore & others

Respondents

Mr.S.S.Manale, advocate for the petitioner

Mr.R.K.Ashtekar, advocate for Respondents No.1 & 2.

CORAM : AVINASH G. GHAROTE, J.

DATE : 28th July, 2021.

PC :

1 Heard Mr.Manale, learned Counsel for the petitioner and Mr.Ashtekar, learned Counsels for Respondents No.1 & 2.

2 The challenge is to the impugned order dated 07.08.2015, by which the plea raised by the petitioner, that he be treated as the legal heir of the deceased respondent no.2/plaintiff no.2 on the basis of the Will dated 28.06.2011 executed by the deceased mother in his favour, has been rejected.

3 It is not in dispute that the petitioner along with his

mother had jointly filed RCS No.624 of 2004 for partition and separate possession, in which, decree was passed on 11.08.2011, holding that the plaintiffs no.1 and 2 therein had 2/5th share in the agricultural land and plaintiff no.1 had 1/3rd share in the house property. The plaintiff no.1, in the suit, was Govind Laxman Kore – the petitioner herein. The plaintiff no.2 in the suit was Smt. Kalubai Laxman Kore, who had passed away on 08.03.2014, during the pendency of the appeal bearing RCA No.185/2011. During the pendency of the appeal, on account of demise of original plaintiff no.2, an application came to be filed by the petitioner on the basis of the will dated 28.06.2011 to treat him as a legatee of deceased Kalubai, which application, has been rejected by the order dated 07.08.2015 on the ground that the Will is yet to be proved.

4 It is axiomatic to say that in case, a question arises as to the determination about legal representative in an appeal, where a person claims on the basis of a Will or otherwise, the procedure, as laid down in proviso to Rule 5, Order 22 of the Code of Civil Procedure, has to be followed.

5 In the instant matter, the learned lower appellate court

has lost sight of the provision. The impugned order, therefore, cannot be sustained. Same is quashed and set aside. The learned lower appellate court is directed to follow the procedure as laid down in the proviso to Rule 5, Order 22 of the Code of Civil Procedure, in the matter of determining the legal representative on the basis of the plea, as raised by the petitioner in the application below Exhibit-22.

6 The petition is accordingly allowed to the above extent.
No order as to costs.

(AVINASH G. GHAROTE)
JUDGE

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