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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6149 OF 2019**

Shri Baburao Namdev Phad (Deceased)
through his Legal representatives
1A Smt. Sushilabai Baburao Phad
and Ors.

...Petitioners.
(Judgment Debtors)

V/s

Parvatabai Namdev Phad
died on 26/01/2015.
Shri Shantaram Mahadu Sangle

(Decree Holder)

...Respondent.
(Intervener)

Mr. Girish R. Agrawal for the Petitioners.
Mr. Praadeep D. Dalvi for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: FEBRUARY 16, 2022

P.C.:-

1] This Petition is by the judgment-debtors, questioning order below Exhibit-22 passed on 27/9/2017 vide Exhibit-62 whereby prayer of the Respondent – Shantaram Mahadu Sangle to be legal representative of the deceased decree holder based on Will dated 6/8/2012 came to be accepted.

2] Facts necessary for deciding the Petition are as under:-

3] Deceased Parvatabai filed Special Civil Suit No.7 of 2004 in the Court of Civil Judge, Senior Division, Niphad, alleging that she was wife of deceased Namdev Phad, son of Dada Phadm, having half share in the suit property. The said suit came to be decreed with observation that decree holder is entitled to half share with inquiry in the mesne profit. Since the decree has attained finality, decree holder initiated Special Darkhast No.19 of 2012 for execution.

4] Parvatibai died on 26/1/2015. However, present Respondent-Shantaram Mahadu Sangle alleged that she has executed registered Will in his favour, so also a deed of confirmation on 30/6/2004 and 6/8/2012 respectively.

5] As a sequel, Shantaram Mahadu Sangle in whose favour Will was executed moved an application for recording him as a legal heir. Said prayer was objected by the Petitioners vide Exhibit-28 on the ground that Will was never executed by deceased Parvatabai, so also confirmation deed. It is claimed that she was critically indisposed and

as such was not in a fit state of mind to execute the Will, so also her eye sight was very weak. It is further claimed that Parvatabai was unable to travel as she was under medical treatment and as such circumstances in which Parvatabai was living on the date of alleged execution of Will, would not have prompted her to execute the lawful Will. The aforesaid objection of judgment-debtors was rejected vide order impugned dated 27/9/2017 i.e. Exhibit-62. As such this Petition.

6] Contentions of Mr. Agrawal, learned Counsel appearing for the Petitioners are, Judgment Exhibit-62 is contrary to very settled position of law. According to him, Executing Court cannot decide genuineness of the Will as Petitioners are left remedy-less against such findings. He would further urge that findings of the Executing Court will come in the way of the Petitioners in the matter of challenge to the legality of the Will. Drawing support from the judgment of the Apex Court in the matter of *Suresh Kumar Bansal vs. Krishna Bansal and Anr* reported in **AIR 2010 SC 344**, he would urge that the issue canvassed aforesaid is very much covered. He has drawn support

from the observations in para 9 of the said judgment. In addition, Mr. Agrawal would urge that if Will is not conferring any right as the same is under cloud, the order impugned ought not to have been passed, thereby treating the Respondent – Shantaram Mahadu Sangle as legal heir of the deceased. He has drawn support from the judgment of the Apex Court in the matter of *Jitendra Singh vs. The State of Madhya Pradesh and Ors* reported in **2021(4) CIVIL COURT CASES 029 (S.C.)**, particularly paras 5 and 6 so as to substantiate his claim.

7] While countering the aforesaid submissions, Mr. Dalvi, learned Counsel for the Respondent – Shantaram Mahadu Sangle would support the order impugned. According to him, Parvatabai during her last days was living with the Respondent. According to him, claim of the Petitioners as regards genuineness of the Will is already gone into and that being so findings which are based on appreciation of evidence cannot be interfered with. He would further claim that in execution proceedings provisions of Order 22 Rule 5 do not provide for abatement of the execution proceedings.

8] I have appreciated the aforesaid submissions.

9] It appears that in execution proceedings, Exhibit-22 was taken out by Respondent - Shantaram Mahadu Sangle, claiming that he be treated as legal heir of deceased Parvatabai based on the Will, so also confirmation deed. As far as said Will is concerned, objection to the Will was based on prevailing circumstances at the relevant time in relation to adverse health condition of the deceased Parvatabai. Said issue has been duly considered by the Executing Court, permitting the proposed legal heir to prove the fact. The proposed legal heir accordingly produced original Will and examined himself at Exhibit-29, attesting witness Sudam at Exhibit-33 and Sub-Registrar at Exhibit-36. The judgment-debtors examined themselves at Exhibit-45. Original Will Deed, Confirmation Deed, Certified copy of the Minute Book maintained by the Office of Sub-Registrar, certified copy of Day Book and certified copy of the Will i.e. Exhibits- 34, 35, 40, 41 and 42 respectively were duly taken into account.

10] Petitioners have relied on Exhibits-56 and 51 i.e. Mutation Entry

in favour of the judgment-debtors and copy of the Ration Card respectively. Execution of the Will was duly proved as could be noticed from appreciation of evidence of legal heir, attesting witness and Sub-Registrar. As regards testimony of Petitioners is concerned, Mutation Entry does not confer any title in their favour, as the same is only for fiscal purpose. In the aforesaid backdrop, fact remains that the issue that was decided by the Executing Court pursuant to the objections raised by the Petitioners vide Exhibit-28 was as to whether name of Respondent – Shantaram Sangle can be entered as legal representative in Darkhast proceedings. As such, findings recorded in the order impugned dated 27/9/2017 – Exhibit-62 are restricted only to the extent of recording status of Respondent – Shantaram Mahadu Sangle as that of legal representative. Though Mr. Agrawal has drawn support from the judgment of the Apex Court in the matter of *Jitendra Singh* cited supra as regards Will, fact remains that whether deceased Parvatabai, in law, was entitled to disposed of the property by virtue of Will is an independent issue which is not considered or dealt with by the order impugned. The Petitioners can agitate the said issue in an independent proceedings. However, merely because there

was Mutation Entry in favour of the Petitioners that by itself will not permit them to claim that Petitioners have become successors of the property of the deceased. The law on the aforesaid issue is well settled. Party who is claiming title on the basis of Will has to approach appropriate civil court and get the rights crystalised, as rightly so observed in the judgment of the Apex Court in the matter of *Jitendra Singh* cited supra. As such, said judgment will be hardly of any assistance in favour of the Petitioners in deciding the issue as to whether they are legal heirs. Apart from above, on the similar lines, judgment relied on by Mr.Agrawal in favour of the Petitioners in the matter of *Suresh Kumar Bansal* cited supra will be of hardly any assistance in view of aforesaid observations. Rather, Mr. Dalvi was justified in relying on judgment of the Apex Court in the matter of *Vardarajan vs. Kanakvalli and Ors* in Civil Appeal No.5673 of 2009 decided on 22/1/2020 in which Apex Court has considered entire law relating to provisions of Order 22 Rule 5 of the Civil Procedure Code and has noted that legal representative under the said provisions is only for limited purpose of representation of the estate of the deceased and adjudication of the case. It is further observed by the

Apex Court that the said provisions are summary in nature and are limited only to the extent of determination of right of legal heirs therein to be impleaded. In the present case Petitioners and Respondent – Shantaram Sangle were on conflicting terms on the issue as to who will be legal representative of the deceased Parvatabai. Said conflicting claims can be decided only under Order 22 Rule 5 in the execution proceedings. As such issue, in my opinion, is squarely covered by the judgment of the Apex Court in the matter of *Vardarajan* cited supra.

11] In this backdrop, claim put-forth by the Petitioners cannot be accepted. That being so, Petition fails and same stands dismissed.

12] However, Petitioners shall be at liberty to question the Will and right of Respondent – Shantaram Mahadu Sangle to succeed to the estate of the deceased through Will in independent proceedings and same will be decided in accordance with law without being influenced by the findings recorded hereinabove.

(NITIN W. SAMBRE, J.)