

Shiv

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3743 OF 2022**

Mamta Prasad Punekar & Ors ...Petitioners
Versus
Bhushan Sharad Punekar & Ors ...Respondents

Mr Mohan B Gawade, for the Petitioners.
Ms Shruti Vyas, "B" Panel Counsel for the State/Respondent.

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**CORAM G.S. Patel &
Madhav J. Jamdar, JJ.**
DATED: 31st March 2022

PC:-

1. There is dispute between Petitioner Nos 1 and 2 regarding immovable properties. One is a Flat No A-402 at Shivshankar CHS and the other is a commercial Shop No 1 on the ground floor in Shivsmruti CHS in Shiv Shakti Raheja Complex, Kalyan (West).
2. The dispute relates to the estates of one Sharad Bhaskar Punekar and one Aruna Sharad Punekar who died on 11th April 2013 and 22nd January 2014 respectively.
3. The Petitioners have already filed a Civil Suit in the Court of Civil Judge, Senior Division, Kalyan being a Special Civil Suit No

169 of 2018. According to the Petitioners, during pendency of this suit, Respondent Nos 1 and 2 have attempted to transfer properties that were in the estate of either Sharad or Aruna Punekar or both and have done so without obtaining probate to a testamentary writing. The Petition questions how the *Registrar of Assurances* could have registered such a document of transfer.

4. In our view this Petition is misconceived. The Registrar has no authority to adjudicate the civil rights claimed by either the Petitioners or Respondent Nos 1 and 2. Only a Civil Court (more precisely, a testamentary court) can make that adjudication. The Registrar will accept the documents for registration under section 17 of the Registration Act. He cannot determine or decide the respective rights of the parties where someone not a party to the document challenges the rights of one of the transacting parties to pass title. It is for the Petitioners to obtain appropriate orders in the civil suits that they have filed against Respondent Nos 1 and 2. It is also well settled that a probate proceeding will not determine title, that is to say, whether the testator or testators had title to the property to begin with. Under Section 57 (read with Section 213) of the Indian Succession Act, probate would be compulsory if the Will (made by a Hindu, etc) is made in one of the specified places (Kolkata, Chennai, Mumbai) or relates to immovable property in one of those places. It is not otherwise compulsory.¹ Under Section

¹ *Kanta Yadav v Om Prakash Yadav*, 2019 SCC OnLine SC 920, approving *Winifred Nora Theophilus v Lila Deane*, AIR 2002 Del 6; *Bhagwanji Karsanbhai Rathod v Surajmal Anandraj Mehta*, 2003 SCC Online Bom 628 : (2003) 5 Bom CR 387 (per AM Khanwilkar J, as he then was); *Mahesh N Bhat v Mark Uppaluri*, 2018 SCC OnLine Bom 9891; *Sidney Francis Gomes v Maureen Therese Gonzales*, 2018 SCC OnLine Bom 3424; *Chetan Calvin Nazareth v Lena John D'Souza*, 2021 SCC OnLine Bom 5337 : AIR 2021 Bom 165.

222, probate can only be granted to an executor appointed under a Will. An executor is the deceased testator's legal representative *for all purposes* under Section 211. Probate is proof of the Will 'in its solemn form'. If there is a Will but no executor has been appointed under it, a legatee must seek letter of administration with Will annexed. But the requirement of compulsorily obtaining probate is still subject to the provisions of Section 57 read with Section 213. For our purposes, it is enough to note that any rights claimed by way of testamentary bequests or legacies must be established and decided by a testamentary court. They cannot be decided in writ proceedings. If title is claimed independently of a Will, then that determination is the province of the Civil Court. Similarly, if a registered document is to be delivered up for cancellation, there must be a decree of a civil court so ordering.

5. Consequently, we dispose of the Petition as not maintainable but permit the Petitioners to make an appropriate application either in the pending civil suit or in a fresh proceeding as they may be advised. All contentions are kept open. The disposal of this Petition will not come in the way of a determination of those proceedings which will be decided on their merits.

(Madhav J. Jamdar, J)

(G. S. Patel, J)