

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

**WRIT PETITION NO. 11646 OF 2022**

Shri Sudhir s/o. Sudhakar Jadhav .. Petitioner  
Age. 54 years, Occ. Agriculture,  
R/o. Siddharth Nagar, Chitod Road,  
Dhule, Tq. & Dist. Dhule.

Versus

1. Smt. Paregabai Shivaji Kapure .. Respondents  
Age. 52 years, Occ. Agriculture,
2. Shri Dilip s/o. Shivaji Kapure,  
Age. 34 years, Occ. Agriculture,
3. Shri Umesh s/o. Shivaji Kapure,  
Age. 30 years, Occ. Agriculture,  
All R/o. At Gartad, Post Narvhal,  
Tq. & Dist. Dhule.
4. Sau. Bayaja Manoj More,  
Age. 32 years, Occ. Household,  
R/o. Jai Hind Colony Road,  
Near Law College, Vishnunagar, Deopur,  
Dhule, Tq. & Dist. Dhule.

Mr.Yogesh B. Bolkar, Advocate for the petitioner.  
Mr.M.S. Kulkarni, Advocate for respondent Nos.1 to 4.

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| <b>CORAM</b>         | <b>:</b> | <b>KISHORE C. SANT, J.</b> |
| <b>RESERVED ON</b>   | <b>:</b> | <b>30.06.2023</b>          |
| <b>PRONOUNCED ON</b> | <b>:</b> | <b>25.07.2023</b>          |

**ORDER :-**

01. The petitioner has approached this Court challenging the order dated 10.11.2022 passed by 3<sup>rd</sup> Jt. Civil Judge, Sr. Division, Dhule in Probate Application No.1 of 2021. He had filed an application for intervention in the proceedings of Probate Application No.1 of 2021. The respondents are the original applicants in the said Probate Application.

02. The facts in short are that respondent Nos. 1 to 4 filed application under the Indian Succession Act for probate. It is a case that one deceased Sundarbai Ahire had executed a will dated 05.01.2017. She happens to be a paternal grand-aunt of the respondents. She died on 06.04.2017. By way of the will, the land had given to one deceased Shivaji Manga Kapure and since thereafter it was in his possession. Deceased Shivaji happened to be husband of respondent No.1 and father of respondent Nos. 2 and 3. Shivaji also died on 21.07.2020 and the respondents are his legal heirs. There is no any other heir to deceased Shivaji. The respondents after death of Shivaji approached the revenue authorities for recording their names in the revenue record. The revenue authorities, however, demanded a probate of Sundarbai Ahire, as revenue entries were still in her name.

03. The respondents filed probate application, wherein the petitioner filed intervention application under Order 1 Rule 10(2) of the Civil Procedure Code. It is case of the petitioner that the alleged sale-deed of Sundarbai is illegal and forged. Same is not registered. There is no reason for delay of five years in filing of probate application. It is further case of the petitioner showing his interest that deceased Sundarbai had executed document in favour of the petitioner on 14.02.2007, by accepting consideration. There is also possession receipt executed by her on the date of sale-deed. It is this petitioner, who is in possession of the land. After death of Sundarbai, her heirs namely, Sanjay, Rajendra, Yogesh and Lalitabai also executed agreement to sale by accepting Rs.1 lakh from the petitioner. The sons and daughter of Sundarbai are aware about the fact that it is the petitioner, who is in possession and also about the transaction between the petitioner and Sundarbai. It is alleged that by keeping even sons of Sundarbai away, the application is filed. It is further case that one Rasiklal Oswal has also filed a suit in the Court of Civil Judge, Senior Division, Dhule, bearing SCS No.58 of 2020 against heirs of Sundarbai, wherein interim order is passed directing not to create third party interest. Against that there is also appeal pending before

the revenue collector bearing RTS Appeal No.38 of 2021. The petitioner, thus, filed application for intervention.

04. The application came to be opposed. The learned Trial Judge after hearing the parties held that the petitioner is not legal heir of late Sundarbai nor related to her in any manner. The deceased had only executed power of attorney in favour of the petitioner. After her death a notarized Sauda Pavti is executed between the petitioner and the legal heirs of deceased Sundarbai. The Court mainly considered scope of section 295 and 283 of the Indian Succession Act. It is further observed that the Probate Court is not expected to conduct inquiry as to whether the testator was having legal right to bequeath the property by will or not. A judgment delivered by Hon'ble Apex Court in the case of **Sunil Gupta Vs. Kiran Girhotra and Ors., reported in (2007) AIR (SC) 140** on the scope of section 263 and 267 of the Indian Succession Act is considered, wherein it is observed that the purchaser of the property belonging to the deceased testator is not entitled to be impleaded as a party in the probate proceedings and rejected the application. The learned Advocate for the petitioner submits that the petitioner has direct interest in the probate application as the property standing in the name of deceased

Sundarbai is sold to him and Sundarbai had entered into transaction with the petitioner with respect to the suit property. The property is also in possession of the petitioner. Even the legal heirs of deceased have also executed documents by accepting Rs. 1 lakh from the petitioner. The respondents, who claimed right on the basis of will are heirs of her nephew. The will is surrounded by suspicious circumstances. The date of the will is 05.01.2017. The deceased died exactly after three months after executing the will. Though the will was executed and deceased died in 2017, the probate application is filed only 2021, without making anyone as party respondent. When the petitioner has direct interest, his application ought to have been allowed under Order 1 Rule 10(2) of the CPC.

05. The learned Advocate for the petitioner relied upon following judgments :-

- (i) **Basanti Devi Vs. Ravi Prakash Ram Prasad Jaiswal, (2008) 1 SCC 267.**
- (ii) **G. Gopal Vs. C. Baskar & Ors., (2008) 10 SCC 489.**
- (iii) **Vijay Shivram Pathare Vs. City Corporation Ltd., 2023 SCC OnLine Bom 721.**
- (iv) **Kailash Vohra Vs. The State & Ors, CM(M) 95/2019 (Delhi High Court).**

06. The learned Advocate for the respondents opposes the petition

mainly relying upon judgment in the case of **Sunil Gupta (Supra)**. He submits that the alleged power of attorney and the agreement is executed by deceased Sundarbai in 2007. In September, 2014, the agreement was executed with the alleged third party. The petitioner had filed a special civil suit seeking specific performance from deceased Sundarbai. In the said suit, the deceased was temporarily restrained by one Rasiklal Pratapchand from creating third party interest either by sale or in any other way till disposal of the suit. It is thus submitted that the petitioner has no locus standi. The petitioner is not title holder. He submits that the Trial Court has considered the judgment direct on the part and the judgments relied upon by the petitioner are not applicable. He relies upon judgment in the case of **Sunil Gupta (Supra)**. The judgment in the case of **Sunil Gupta (Supra)** is directly on the point.

07. The learned Advocate for the petitioner again reiterates that the petitioner is in possession. Therefore, he ought to have been added as party respondent.

08. On the basis of submissions, this Court has to consider mainly the legal position. In the case of **Basanti Devi (Supra)**, the Hon'ble Apex Court

had considered the provisions of sections 15, 3(f) and 8 of the Hindu Succession Act. The Hon'ble Apex Court had also considered the maintainability of such application and locus standi of the applicants, who had filed application for revocation of probate. It was a case wherein the revocation was sought on the ground that the deceased had properties in two different States. While granting probate, the citation was issued only in one of the States. It was held that the probate when granted binds all the parties before the Court and also all other persons in all proceedings arising out of the will and claims under or connected therewith. It is held that the judgment in probate is a judgment in rem and a person aggrieved thereby is entitled to file application for revocation of probate on the ground available to him.

09. In the case of G. Gopal (Supra), a party had approached the Hon'ble Apex Court, challenging the order of grant of revocation of probate, passed by the Single Judge of the High Court and said was confirmed by Division Bench of the High Court of Madras. It was considered that a person who has even slight interest in the estate of testator is entitled to file caveat and contest the grant of probate of the will of the testator. The Hon'ble Apex Court refused to entertain said petition.

10. In the case of Vijay Shivram Pathare (Supra), this Court considered the scope of section 283 of the Indian Succession Act. In that case in the probate application itself it was specifically stated that there were other legal heirs of the deceased. However, their names and addresses were not given. In that case it was held that the District Judge ought to have directed issuance of special citation on the legal heirs of Anjanabai. In that case, the petitioners were aware that the respondents therein had already acquired interest in the estate. However, still they were not made party. There the respondents had purchased subject property and therefore it was held that he has acquired interest in the testatrix's estate and as such was entitled to citation and it was held that the respondent was necessary party.

11. The judgment in the case of Sunil Gupta (Supra) was also considered. In the said case the transferee of the property was a transferee during the pendency of the proceeding and therefore it was held that such transferee is not a necessary party.

12. In the case of Kailash Vohra (Supra), the Delhi High Court had

considered the case wherein there was litigation between the parties with respect to estate of deceased testator and in that view of the matter it was held that all the parties were necessary parties and that order was not interfered with by the Delhi High Court.

13. So far as the judgment in the case of **Sunil Gupta (Supra)**, which is considered by the Trial Court is concerned, this Court finds that the transferee had sought to be impleaded as party to the probate proceedings. The Hon'ble Apex Court held that in that case the transferee of the property during the pendency of the proceeding was not a necessary party, as he was a transferee pending the proceedings. It is only the party who claims right through or under the will or denied or dispute, the execution thereof is necessary party.

14. Considering the decision in the case of **Sunil Gupta (Supra)**, this Court finds that in the probate proceedings the Court is only concerned with the legality and validity of the will. The Court is not to adjudicate upon the substantive right of the parties. The Court is also not to adjudicate upon the right of the person executing a will over the property.

15. One more judgment that needs to be considered in this case is the judgment in the case of **Krishna Kumar Birla Vs. Rajendra Singh Lodha & Ors., (2008) 4 SCC 300**. In the said judgment the Hon'ble Apex Court considered sections 284, 286, 295 of the Indian Succession Act. In that case a person had entered into an agreement for sale entitling him to file a suit for specific performance of a contract. The Hon'ble Apex Court, however, observed that caveateble interest is not created, as the agreement would be binding both on the executor, if the probate is granted, and on the heirs and legal representatives of the deceased, if the same is refused. The Hon'ble Apex Court further considered the wordings of sections 238(1)(c) and 294 of the Succession Act. It is observed that if anybody and everybody including a busy body or an interloper is found to be entitled to enter a caveat and oppose, grant of a probate, then the sections would have been differently worded. Such an interpretation would lead to an anomalous situation and turned down the submission that the caveatele interest should be construed very widely. The Apex Court also considered judgment in the case of **Sunil Gupta (Supra)**.

16. In view of the judgment in the case of Krishna Kumar Birla (Supra), this Court finds that in this case at the most the interest of the petitioner is in getting specific performance of the agreement enforced. If at all probate is granted in favour of the respondents, then the petitioner can certainly sue the respondents for specific performance, as the alleged agreement entered into between the deceased and the present petitioner would become binding upon the executor as well as on the persons in whose favour the probate is granted.

17. To conclude, this Court finds that the petitioner has failed to demonstrate any caveateble interest, so as to make him party necessary for adjudication of the probate application. The Trial Court has rightly considered the application and has rightly passed the order rejecting application Exh.27. This Court does not find any ground to interfere with the impugned order. The writ petition, thus, fails and is hereby dismissed with no order as to costs.

**[KISHORE C. SANT, J.]**

. At this stage, the learned Advocate for the petitioner makes prayer for continuation of interim relief, since it is running in his favour. The

learned Advocate for the respondents opposes the prayer. However, looking to the fact that the interim relief is running in favour of the petitioner since long, same is continued for three weeks from today.

**[KISHORE C. SANT, J.]**