

SA Pathan

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5105 OF 2019

Hirabai Vasant Tare (Deceased)

Through Legal Heirs

... Petitioners

V/s.

Vanita Vasant Tare & Ors

... Respondents

Mr. Rohit D. joshi, for Petitioners.

Mr. Kuldeep S. Patil, for Respondent Nos.1 to 3.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 1, 2023

P.C.:

1. The petitioners are the legal heirs of original plaintiff who filed an application before the Trial Court to bring themselves on record.
2. The Trial Court by order dated 29 March 2016 rejected the application.
3. The petitioners thereafter filed another application to hold inquiry under Order 22, Rule 5 of the Code of Civil Procedure, 1908 and to bring legal heirs of plaintiff on record.
4. By the order dated 3 October 2018, the Trial Court rejected the application. Both the orders are subject matter of challenge in the present writ petition.

5. The predecessors of petitioner filed a suit seeking declaration that the suit properties are owned by the petitioner. Based on title, relief of delivery of possession of suit property is sought.
6. During pendency of suit, the original plaintiff died on 29 July 2015. The petitioners, therefore, on 18 August 2015 filed an application to bring themselves on record based on registered Will deed executed by the original plaintiff.
7. The Trial Court by order dated 29 March 2016 rejected the application holding that the applicants have not placed heir-ship certificate on record.
8. The petitioners, therefore, filed another application below Exhibit 64 to hold an inquiry under Order 22, Rule 5 of the Code of Civil Procedure, 1908 indicating that the probate is not required as the suit properties is situated beyond territorial jurisdiction of original side of this Court.
9. The Trial Court rejected even the second application on the ground that the earlier application below Exhibit 54 was rejected.
10. On perusal of the order dated 29 March 2016, I am satisfied that the order is perverse. It appears that the Trial Court is not aware of basic principles of law. It is now well settled that for institution of proceedings for establishing rights, probate of Will is not required. It is also well settled that even within the territorial jurisdiction of original side of this Court, for instituting the proceeding claiming rights over immovable property probate is not required. It is only at the time of passing of decree or grant of relief in a proceeding where suit property is situated within

territorial jurisdiction of original side of this Court, probate is required. Therefore, insistence of probate or heir-ship certificate at the time of bringing legal representatives on record was total uncalled for. Since, the order dated 29 March 2016 is perverse, subsequent order dated 3 October 2018 also deserves to be quashed and set aside.

11. For the reasons stated above, the writ petition succeeds. The application below Exhibit 54 in Regular Civil Suit No.406 of 2012 is allowed.

12. The writ petition stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)