



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

27 APEAL FROM ORDER NO. 23 OF 2025

KAMAL KISHOR S/O NANDKISHOR ASOPA

VERSUS

RAMESHCHANDRA S/O GOVINDLAL ALIAS GOVINDRAM ASOPA DIED
THROUGH ANAND S/O RAJGOPAL ASOPA AND OTHERS

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Advocate for the Petitioner : Mr. Kedar Balbhim R.

Advocate for Respondent nos. 1A, 1B, 2, 6 to 8 : Mr. A.S. Deshpande

Advocate for Respondent No. 5 : Mr. Mahesh V. Ghatge h/f Mr. Ravibhushan
P. Adgaonkar.

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CORAM : SHAILESH P. BRAHME, J.

DATE : 09.10.2025

PER COURT :

Heard both sides.

2. This appeal is directed against order dated 15.02.2025 passed below Exh. 5 rejecting the application for injunction filed under Order XXXIX Rule 1 of the Code of Civil Procedure in Special Civil Suit No. 110/2020.

3. The applicant is original plaintiff, who is asserting his right on the basis of unregistered will dated 29.04.1994 executed by Ravatmal, nephew of defendant no. 1 Rameshchandra. It is contended that 9 Acres and 10 Ares land from Survey No. 172 and house property were bequeathed in favour of the plaintiff on the basis of will. When appellant/plaintiff asserted his right by applying for mutation, that was not approved. He was required to file suit. The compromise decree passed in RCA No. 184/2002 as well as compromise decree in RCS No. 171/2009 and three distinct sale-deeds executed by dodging the claim of the appellant, are subjected to challenge in

the suit. A separate application (Exh. 5) was filed for injunction restraining the respondents-defendants from creating third party interest.

4. It is contended that the appellant was disclosed will in the year 2014 at the instance of one of the attesting witnesses. Meantime defendant no. 1 unauthoriedly executed agreement to sell in favour of respondent no. 5. The appellant was required to file M.A. No. 178/2016 for succession certificate, on the basis of will executed in his favour. The Trial Court allowed the application and granted succession certificate in favour of the appellant. It was challenged before the Lower Appellate Court and by order dated 15.10.2006 the order was reversed. The said order is confirmed up to the Apex Court. However, right of the appellant to prefer substantive proceedings is preserved.

5. The respondents contested the suit as well as application Exh. 5 on the ground that Ravatmal infact had executed a will on 12.04.1994 in favour of resondent no. 1. On the basis of the will, the proceedings undertaken by the appellant and the decisions in their favour were contested. In pursuance of the will, respondent no. 1 asserted right and entered into various transactions.

6. The learned counsel Mr. Kedar for the appellant submits that already the respondents have created third party interest without there being any authority. If they are not restrained, more complications would be created. It is contended that there is strong prima facie case, as the appellant is armed with the will and in pursuance of that, Misc. Application. No. 178/2016 was preferred. It is further contended that as per the observations by various judicial forums reserving the right of the appellant to resort to substantive proceeding, present suit is filed. It is submitted that the property is valuable and if the complications are created then grave prejudice will be caused to the appellant. It is further submitted that there is no delay in approaching the Civil Court, considering the sequence of

events. Lastly, it is submitted that the Trial Court will conduct the objective scrutiny and decide merits of the matter but till then valuable immovable property involved in the litigation needs to be protected from further alienation and complications.

7. Mr. Deshpande, counsel for the respondent no. 1A, 1B, 2 and 6 to 8, submits that no *prima facie* case is made out by the appellant. He would advert my attention to the plaint and few orders to indicate that the suit has been filed belatedly and entire claim is shrouded with doubt. It is contended that the appellant had knowledge that the respondents have been objecting his entitlement to the subject matter but still no timely steps are taken. It is further submitted that even the order passed in Writ Petition No. 9865/2016 would disclose that the petitioner had cause of action much earlier. In a proceeding for the succession certificate, authorities have concurrently decided against the appellant. It is further submitted that respondents have also filed Regular Civil Suit No. 450/2016, challenging the will propounded by the appellant.

8. Learned counsel Mr. Mahesh Ghadge appearing for respondent no. 5, adopts above submission.

9. I have considered the rival submissions of the parties. The subject matter is 9 Acres and 10 Ares of Survey No. 172 and house property for which there are rival claims of the parties. The appellant is staking claim on the basis of will dated 19.04.1994 and respondent no. 1 is banking on the will dated 12.04.1994. It reveals from record that agreement to sell was executed by respondent no. 1 on 01.01.2005 in favour of respondent no. 5. The decrees passed in couple of suits are also made subject matter of the present suit. It's a matter of record that M.A. No. 178/2016 was filed by the appellant seeking succession certificate. It was allowed by the Trial Court but the order is reversed by the Appellate Court and the same is confirmed upto the Supreme Court.

10. I have gone through common judgment dated 15.10.2016 passed by the Appellate Court in Misc.Civil Appeal No 47/2016 and 50/2016. Those appeals were allowed quashing the succession certificate issued in favour of the appellant and the appellant was granted liberty to institute regular suit for the purpose of establishing his claim. This right of the appellant is preserved up to the Supreme Court. From 15.10.2016, no steps are taken to institute substantive suit till the present suit is filed in the year 2020.

11. I have gone through the order of the coordinate bench passed on 07.12.2016 in Writ Petition No. 9865/2016. It was arising out of an interlocutory order passed in Specail Civil Suit No. 34/2012, in which appellant solicited to intervene in the suit. The purport of the order indicate that again in 2016 it was hinting that appellant should institute independent substantive proceeding. Despite of this situation, the suit is filed in 2020. I further find that application (Exh. 5), which was filed in 2020 is pressed into service after considerable period i.e. more than four years, albeit, the appellant has his own explanation for that. The manner in which the appellant is prosecuting the substantive remedy, creates a doubt and reflects on *prima facie* case.

12. It reveals from record that respondent no. 1 is repetitively asserting his right on the basis of a will dated 12.04.1994, which is not challenged in the suit filed by the appellant. Respondent no. 1 has filed Regular Civil Suit No. 450/2016 challenging the will executed in favour of the appellant. In this situation, I have strong reservation for the so-called *prima facie* case agitated by the appellant.

13. I do not find any perversity or patent illegality so as to cause interference in jurisdiction under Order 43 of CPC. The jurisdiction of the Appellate Court is restricted one, as I am being guided by law laid down by the Supreme Court in **Wander Ltd. and Ors. Vs. Antox India Private Ltd.;** 1990 (Suppl) Supreme Court Cases 727. I find that no case is

made out as per parameters laid down by the Supreme Court in the present case.

14. An apprehension of the applicant is that there will be further alienations, which would lead to complications in the matter. The interest of the applicant is protected by provisions of Section 52 of Transfer of Property Act. Further alienations or the complications would be subject to outcome of the suit instituted by the appellant.

15. It is submitted that the protection under Section 52 of the Act is inadequate at a times and there is need to have a complete protection by invoking powers under Order 39 Rule 1 and 2 of CPC. I would have accepted the submissions of the learned counsel for the appellant had there been a strong prima facie case in his favour. I have already observed the conduct and the manner in which the appellant is prosecuting the suit. In that view of the matter, the law laid down by Division Bench in the matter of **Prakash Gobindram Ahuja Vs. Ganesh Pandharinath Dhonde and others; 2016 (6) AIR Bom R 745** is not helpful to the appellant. The facts are distinguishable. The principles laid down by the Division Bench cannot be disputed. But those cannot be made applicable even in the given facts and circumstances of the case.

16. It is relevant to notice that the appellant has come with a case that he was minor when will was executed in his favour and it was disclosed only in the year 2014, at the instance of one of the attesting witnesses. The plaint reflects that his father was being appointed as a natural guardian. It is incomprehensible as to how the petitioner was disclosed the existence of the will till 2014. The theory of the appellant that he was not aware of the will is not appealing.

17. The findings recorded by the Trial Court cannot be faulted. There is no perversity or patent illegality in the impugned order. I find no merit in the appeal, therefore, I pass following order.

ORDER

- (i) Appeal From Order is dismissed.
- (ii) It is clarified that observations made in the foregoing reasons are prima facie in nature. It would be open to the parties to agitate their claims on merits before the Trial Court.
- (iii) Considering the facts and the exigency in the matter, the proceedings of RCS No. 450/2016 and Special Civil Suit No. 110/2020 shall be decided within period of one year from today.

(SHAILESH P. BRAHME, J.)

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