



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

WRIT PETITION NO. 5519 OF 2023

**RAOSAHEB UTTAMRAO KHETRE AND OTHERS
VERSUS
CHAMPABAI UTTAMRAO KHETRE DIED THROUGH LRS
KALYAN UTTAMRAO RAUT AND ANOTHER**

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Advocate for the Petitioners : Mr. Choudhari Yuvraj S.

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CORAM : SHAILESH P. BRAHME, J.

DATE : 18th FEBRUARY 2025

PER COURT :

1. Heard learned Advocate Mr. Choudhari for the Petitioners. Despite service of final disposal notice upon respondents, none appeared to represent them.
2. Petitioners are challenging the order dated 27/07/2022 below Exhibit – 254 passed by 3rd Joint Civil Judge, Junior Division Georai in RCS No.431/2022. Respondent No.1 Deceased - Champabai filed RCS No.431/2022 for partition and possession. She is the first wife of Uttamrao Devrao Khetre who was issue-less. She died on 13/09/2020. Respondent No.2 – Parvatibai is the second wife of Uttamrao and petitioners are born out of wedlock from Parvatibai.
3. Respondent No.1 – Champabai had executed registered will

on 13/02/2015 in favour of Kalyan Panditrao Raut, who is her nephew. After her death, he submitted an application Exhibit – 242 under Order 22 Rule 3 of CPC. It was allowed by order dated 25/02/2022. It was challenged in Civil Revision Application No.52/2022. This Court by order dated 08/04/2022 dismissed the Revision.

4. Petitioner No.1 submitted application Exhibit – 254 under Order 22 Rule 4 and 5 of CPC read with Section 151 contending that after death of Champabai, Petitioner Nos.1 and 2 are the heirs and the will executed by Champabai is bad in law. Therefore, declaration is solicited in that regard. It was contested by Kalyan Raut and by the impugned order application was rejected.

5. Mr. Yuvraj Choudhari learned counsel for the petitioner submits that, Champabai was the first wife and respondent no.2 Parvatibai was the second wife. The petitioners being children of Parvatibai are entitled to have share and interest in the suit properties. Their claim cannot be discarded. The will executed by Champabai has been challenged. He would further submit that in earlier round of litigation, this Court in order dated 08/04/2022 clarified that the status of Mr. Kalyan Raut being legal representative would be decided at full-fledged trial and no any status was conferred at the interlocutory stage. It was also

clarified that he will have to prove genuineness of the will and his right to claim share. It was expected of the trial court to frame appropriate issue. It is therefore submitted that the application of the petitioner should not have been rejected, which is perversity.

6. I have gone through order dated 25/02/2022 below Exhibit – 242 and order dated 08/04/2022 passed in CRA No.52/2022. Though, Mr. Kalyan Raut has propounded will his status as legal representative is fact in issue which is to be adjudicated after full fledged trial. He bears onus to prove will and his entitlement to the suit properties. It is clear that he is only permitted to be brought on record subject to further adjudication by the trial Court.

7. It is overlooked by the trial Court that the suit properties are originally belonging to Uttamrao Devrao Khedke and those are ancestral properties. Another moot question in the proceedings between the parties is that is as to whether deceased Champabai had any authority to bequeath the suit properties to her nephew Mr. Kalyan Raut. If according to the original plaintiffs, suit properties are ancestral then the petitioners can have interest in the properties being children born out of void marriage. Their claim cannot be discarded. This aspect of the matter has also to be adjudicated by the trial court. As already observed by the coordinate bench, necessary issues need to be recast.

8. Neither the status of Mr. Kalyan Raut nor the status or entitlement of the petitioner nos.1 and 2 can be decided at the interlocutory stage. But the fact remains that, petitioners have arguable points. The observations of learned Judge in Paragraph No.8 are inconsistent. There are rival claims of Mr. Kalyan Raut and the petitioners, which cannot be concluded at interlocutory stage. In that view of the matter, the learned Judge is not justified in rejecting the application of the petitioners by imposing cost. It is clarified that the status of the petitioner nos.1 and 2 as well as Mr. Klayan Raut would be decided at the final conclusion of the trial in the suit.

9. Writ Petition is disposed of by quashing the impugned order with above observations. The trial Court shall frame the necessary issues and proceed with the matter expeditiously.

SHAILESH P BRAHME
JUDGE

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