

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY PETITION NO. 5513 OF 2024

Surendra Shamrao Thombre

...Petitioner

Bhimarav Krishna Thombare alias
Thombare Bhimarav

...Deceased

Adv. Dhruv Gupta for the Petitioner.

CORAM : ARIF S. DOCTOR, J.

DATE : 13TH FEBRUARY, 2025

P.C.:-

1. The Testamentary Department on 11th December, 2024 has raised the following requisition:

"4. Therefore, to ascertain the heirs of the deceased after the death of the his widow, Rule 3 of Section 16 of the HS Act, is applicable. According to this Rule, to ascertain the heirs of the husband of the female, it has to be assumed that soon after the death of the female, her husband dies. Hence, after the death of widow, persons who are alive and comes as per the entry given in the Class-II, as provided in the schedule annexed to the HS Act, can claim an inheritance. Hence, on 16.12.2022 in a petition, only class-II, Entry (ii) heir (i.e. brother of the deceased) can claim the inheritance as per Sec. 9 of the HS Act.

5. Under such circumstances, as per the Section 15(1) (b) read with Rule-3 of Sec. 16 along with Section 9 of HS Act , only Narayan who falls under the Class-II, Entry-(II) legal heir can claim inheritance to

properties of the deceased. Petitioner and others persons, whose names are mentioned at serial no. 2(b) to 2(d) and 3(a) to 3(d) comes at Entry-IV in Class-II legal heirs. Therefore, class-II entry-II heir, only Narayan have the preference, excluding the heirs fallen under subsequent entry.

6. Even otherwise, for sake of discussion, the date of the death of the deceased is considered, then Shamrao predeceased to the deceased and therefore, in life time of Class-II, Entry(II) Legal heirs, Class-II, Entry(IV) legal heirs from the schedule of the HS Act do not have preference over to Class-II, Entry(II) legal heirs. However, as mentioned herein above, in life time of the widow of the deceased, no other than her had a right of inheritance to the properties left by the deceased.

7. The petitioner comes under Class-II, Entry-(IV) legal heirs as per the Schedule annexed to the HS Act. Hence, in life time of the brother of the deceased (Class-II, Entry-(II)), capacity of the petitioner to present the petition comes in question. Hence, Petitioner to satisfy about his capacity."

2. Learned Counsel for the Petitioner points out that the Petition has been filed by the nephew of the deceased and the objection was taken as to how the Petition is maintainable when the brother of the deceased is alive. Learned Counsel pointed out that all the legal heirs including the brother of the deceased have filed consent affidavits and it is thus dispensation of requisition has been sought for. Learned Counsel invites my attention to an order dated 30th November, 2023 passed in the case of **Kabir Ashok Lulla & Anr. and Thakur Lachman Lulla** (Testamentary Petition (I) No.25555 of 2023) and points out that this Court had in similar circumstances dispensed with the requisition in view of the fact that there is consent by all the legal heirs.

3. Hence, I find no reason why the Petition is not maintainable, especially when there are consent affidavits of all the legal heirs. Hence, the office requisition already reproduced above is dispensed with. Registry is directed to proceed with the matter.

(ARIF S. DOCTOR, J.)