



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 100/2024

Yadav s/o Sambhaji Khillare,
aged 77 yrs., Occ. Agriculturist,
R/o. Village Ancharwadi,
now R/o. Malkapur, Tq. Malkapur,
Dist. Buldhana.

...APPELLANT

Ori.Deft. 2 on R.A.

VERSUS

1. Leelabai w/o Vithoba Khillare,
(dead), thr. Lrs. Sau. Kamal Milind
Ambhore, aged 45 yrs., Occ. Household,
R/o. Malkapur, Pangra, Tq. Sindakhed Raja,
Dist. Buldhana.

Ori. Plff. on R.A.

2. Baban Madhav Khillare,
aged 56 yrs., Occ. Agriculturist,
R/o. Ancharwadi, Tq. Chikhali,
Dist. Buldhana.

Ori. Defendant
No.1 on R.A.

RESPONDENTS

Mr. R.G. Kavimandan, Advocate for appellant.
Mr. A.S. Dhore, Advocate for respondent No.1.
Mr. R.D. Karode, Advocate for respondent No.2.

CORAM : ROHIT W. JOSHI, J.
DATED : 28/04/2025.

JUDGMENT :

Heard.

2. The second appeal is filed by original defendant No.2. The original plaintiff is one Leelabai Khillare. Defendant Nos. 1 and 2 are brothers of her husband. The suit for partition and separate possession filed by Leelabai being Regular Civil Suit No.07/2009 came to be decreed vide judgment and decree dated 01.11.2012 passed by learned Civil Judge, Junior Division, Chikhli granting 1/3rd share to the plaintiff in the suit property. Aggrieved by the said decree for partition, original defendant No.2 filed first appeal being Regular Civil Appeal No. 137/2012. During the pendency of said appeal, original plaintiff Leelabai expired. She has died issueless. Her husband had pre-deceased her and therefore, she had filed suit for partition against brothers of her husband. Normally, after demise of Leelabai, the property would devolve upon the defendant who are real brothers of her pre-deceased husband in view of Sections 15 and 16 of the Hindu Succession Act, 1956. However, one Kamal Milind Ambhore filed an application in RCA No. 137/2012 claiming that original plaintiff Leelabai had executed will with respect to her share

in the suit property in her favour. The said application came to be allowed by learned First Appellate Court and accordingly said Kamal Ambhore was substituted as legal representative of deceased Leelabai. It is undisputed that the will was disputed by the appellant/ original defendant No.2. It is also undisputed that the will was not proved by examining any attesting witness before learned First Appellate Court. It is admitted that the photocopy of the said will was filed on record. It is thus, undisputed that even the original will was not on record for perusal of learned First Appellate Court. Having permitted said Kamal Ambhore to be brought on record as legal representative of deceased respondent No.1 i.e. original plaintiff, learned First Appellate Court has dismissed the appeal filed by defendant No.2 who is appellant in the present second appeal. Vide order dated 05.07.2024, following substantial question of law was framed in the present appeal:-

“Whether the First Appellate Court is justified in not deciding the legality of the Will Executed in favour of respondent No.1.”

Vide order dated 17.04.2025, parties were put to notice that the matter would be heard finally on the aforesaid question at the admission stage.

3. Learned counsel for appellant has drawn my attention to Order 22 Rule 5 of the Code of Civil Procedure (“CPC”) to contend that learned First Appellate Court has erred in permitting name of Kamal Ambhore to be substituted as a legal representative of the original plaintiff/respondent No.1 without conducting any inquiry merely on the basis of copy of a will that was filed on record.

4. Learned counsel for respondent No.1 contends that inquiry under Order 22 Rule 5 of the CPC is a limited inquiry and learned First Appellate Court has not committed any error in permitting Kamal Ambhore to be impleaded as legal representative of deceased respondent No.1 on the basis of will. He however admits that said Kamal Ambhore will not be entitled to receive any share unless the will is proved in accordance with law. He also concedes that the will was not proved in accordance with law before learned First Appellate Court.

5. The mandate of Order 22 Rule 5 of CPC is clear and explicit, it will be profitable to refer the judgment of Hon'ble Supreme Court in the matter of *Jaladi Suguna (deceased) through Lrs. Vs. Satya Sai Central Trust and others, (2008) 8 SCC 521*, as also judgment of this Court in the matter of *Roni Adi Tarapurwala and another Vs. Dinshaw Adarji Tarapurwala since deceased thr. LRs. and others, 2012(4) Mh.L.J. 464*. The ratio laid down in both these judgments is that an inquiry under Order 22 Rule 5 of the CPC cannot be deferred and the application for bringing legal representative/s has to be decided prior to the adjudication of the appeal on merits.

6. In view of clear legal position, I am inclined to answer the substantial question of law framed in the appeal in favour of the appellant/original defendant No.2. In that view of the matter, second appeal is partly allowed. Judgment and decree dated 07.11.2023 passed by learned District Judge-2, Buldhana in Regular Civil Appeal No. 137/2012 is quashed and set aside. The matter is remanded to the file of learned First Appellate Court with directions to decide the issue of legal representative in

accordance with law, particularly having regard to the mandate of Order 22 Rule 5 of the CPC and then to proceed with the hearing of appeal, if required.

7. Learned First Appellate Court is requested to make endeavour to decide the appeal within a period of 12 months from the date of appearance. The parties to appear before learned First Appellate Court on 09.06.2025 for which separate notices will not be issued.

(ROHIT W. JOSHI, J)

Gohane