



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

SECOND APPEAL NO. 218 OF 2026

**Balkrishna Rajaram TambeAppellant
(Original Defendant)**

Versus

1. Mukund Rajaram Tambe

1A. Madhavi w/o Mukund Tambe

1B. Niraja Sachin Deshpande

1C. Nikhil Mukund Tambe

2. Jyoti Prakash Shendre

**3. Chandrashekhar Mukund Padhye ...Respondents
(Original Plaintiffs)**

*** Advocate for the Appellant : Mr. Suniket Anil Kulkarni**

CORAM : MEHROZ K. PATHAN, J.

DATE : 16th APRIL 2026

ORAL JUDGMENT :

1. The Second Appeal is filed by the Appellant (Original Defendant) against the judgment dated 01.07.2021 passed by the Civil Judge, Senior Division, Dhule in Special Civil Suit No. 35/2016 and the judgment dated 12.01.2026 passed by the Ad-hoc District Judge-1, Dhule in Regular Civil Appeal No. 28/2021.

2. The Plaintiff has filed a suit for partition, stating that the suit property is the ancestral property of the Plaintiff and the Defendants,

who are the real brothers and sisters. The names of the Plaintiffs and Defendants are recorded in the suit property. However, the Defendant intends to demolish the suit property, for which a complaint was filed at the police station. Despite this, the Defendant continued with the demolition work. On 12.01.2016, the Plaintiff visited the spot and found that household articles worth Rs. 90,000/- had been stolen, a major portion of the property had been demolished, and material worth Rs. 10 Lakhs had been sold. As the Plaintiff has a share in the said amount, he therefore filed a suit for recovery of his share and sought to restrain the Defendants from alienating the property.

3. The Defendant resisted the suit and filed a written statement along with a counterclaim (Exhibit-15), stating that the Plaintiff never took care of the parents, whereas the Defendant looked after them out of love and affection. The father, Rajaram, had executed a Will in respect of the suit property in favour of the Defendant. The Plaintiff, in fact, intended to alienate the suit property, and therefore the Defendants prohibited him from doing so. The Plaintiff had earlier filed RCS No. 53/2004, thereby admitting the Defendant's possession of the suit property since 1999. Thus, the Defendant became the owner of the property. The Defendant therefore filed a counterclaim seeking probate of the Will. The earlier suit, RCS No. 53/2004, was rejected on the ground of non-joinder of necessary parties. Hence, the present suit is not maintainable, and the Defendant prayed for dismissal of the suit with a further request to allow the counterclaim.

4. The Plaintiff opposed the counterclaim by submitting that, in RCS No. 53/2004, the property was held to be the ancestral property of Rajaram, and therefore he did not have the right to execute a Will. Moreover, the Defendant took undue advantage of Rajaram's ill health following the death of his wife, Mandakini, and within one month of her death fraudulently procured the execution of a sale deed. The Plaintiff further submitted that there exists another Will dated 06.06.1998 executed by Rajaram, and therefore the Will relied upon by the Defendant cannot be considered the last Will. Consequently, the probate proceedings filed by the Defendant are not maintainable, as in view of the findings in RCS No. 53/2004, the Defendant failed to file probate proceedings within the prescribed limitation period. Hence, the claim for probate of the Will is barred by limitation and liable to be rejected.

5. The learned trial Court dismissed the suit filed by the Plaintiff on the ground of non-joinder of necessary parties, as the earlier RCS No. 53/2004 had also been dismissed on the same ground. It was held that the Plaintiff failed to establish that the Defendant had sold the material of the house for Rs. 10,00,000/- and further failed to prove that the Defendant was intending to sell the suit property. The fact of filing RCS No. 53/2004 earlier by the Plaintiff was also suppressed. Accordingly, the suit filed by the Plaintiff came to be dismissed.

6. The trial Court further rejected the counterclaim filed by the

Defendant seeking probate of the Will. The Court held that since the Defendants failed to establish that late Rajaram had any right to execute a Will in respect of the suit property, such Will could not be probated. Moreover, the Defendant's contention in the written statement that the counterclaim for probate was filed pursuant to directions in RCS No. 53/2004 was found to be misleading, as no such directions were issued while dismissing RCS No. 53/2004. The trial Court also observed that probate proceedings were not filed by the Executor of the Will, and therefore probate cannot be issued in favour of the beneficiary, as the Defendant was not the Executor named in the Will. Additionally, the Court found that the counterclaim for probate was barred by limitation, since the plea of Will was first taken by the Defendant in his written statement in RCS No. 53/2004. As per Section 137 of the Limitation Act, a three-year limitation applies to filing an application for probate. The earlier suit, RCS No. 53/2004, was disposed of in 2007, whereas the present counterclaim for probate was raised in the written statement filed in Special Civil Suit No. 35/2016 in the year 2016. Thus, the claim for probate of the Will was held to be time-barred. Accordingly, the trial Court, by its judgment dated 01.07.2021, dismissed both the suit filed by the Plaintiff and the counterclaim filed by the Defendant.

7. The Defendant/Appellant herein alone filed an appeal before the First Appellate Court in RCA No. 28/2021. The learned First Appellate Court, by its judgment dated 12.01.2026, dismissed the appeal filed by Defendant, holding that the Will dated 18.03.1998 relied upon by

the Defendant could not be probated, as during the lifetime of deceased Rajaram Tambe, the name of Mandakini Tambe had been entered into the record of the suit property, thereby making her the absolute owner under Section 14 of the Hindu Succession Act. The Court noted that the two witnesses examined by the Defendant, DW-1 Santosh Bora and DW-3 Lila Biwre, did not state that the Will was written in their presence or that deceased Rajaram Tambe had signed the Will in their presence.

. The learned First Appellate Court did not accept the submissions made by the Defendant that deceased Rajaram Tambe had executed a Will in his favour in respect of the suit property on 18.03.1998, as per his own desire and in his own handwriting. Since the Will relied upon by the Defendant was not proved, the claim for probate of the Will, as prayed for in the counterclaim, was therefore rejected even in RCA No. 28/2021 filed by the Defendant alone which came to be dismissed vide impugned judgment dated 12.01.2026.

8. The Appellant is thus challenging the aforesaid two judgments in the present Second Appeal. I have heard the learned Counsel for the Appellant and have also examined the judgments of the Trial Court as well as the First Appellate Court. The following substantial questions of law are emphasized by the Appellant to be involved in the present Appeal :

(a) Whether the findings arrived at by the learned Trial Court as well as the First Appellate Court are perverse to the evidence led by the Defendant on the point of execution of the Will in favour of the Defendant?

(b) Whether Article 137 of the Limitation Act applies to probate proceedings? and Whether the Defendant's counterclaim for probate of the Will could have been rejected on the ground of limitation by the learned trial Court?

9. The perusal of the judgment of the trial Court shows that the counterclaim filed by the Appellant/Defendant seeking probate of the Will was dismissed on the ground that the Defendant failed to establish that Rajaram had the right to execute a Will in respect of the suit property. The claim for issuance of probate was also rejected in view of Section 222 of the Indian Succession Act, 1925, which provides that probate shall be granted only to the executor appointed under the Will. The claim for issuance of probate was further dismissed on the ground of limitation. A reading of Section 222 of the Indian Succession Act makes it clear that probate can be granted only to the executor appointed under the Will, and therefore the Defendant, being merely a beneficiary, could not have claimed probate under Section 222.

10. Section 222 of the Indian Succession Act, 1925 is as under :

(1) Probate shall be granted only to an executor appointed by the Will.

(2) The appointment may be expressed or by necessary implication.

11. Thus the perusal of the Section itself makes it clear that probate shall be granted only to an executor appointed by the Will. It is a settled principle of law that a beneficiary cannot seek probate of the Will, as probate can be granted only to the executor. Since the

Applicant himself is a beneficiary under the alleged Will for which he is seeking probate, the Applicant could not have been granted probate in view of the provisions of Section 222 of the Indian Succession Act.

12. The learned First Appellate Court also considered the fact that the Defendant failed to prove that the Will was executed by deceased Rajaram of his own free will, desire, or in his own handwriting. The testimonies of the witnesses, DW-1 Dr. Santosh Bora and DW-3 Lila, did not inspire confidence to establish that the Will was signed by deceased Rajaram in their presence. Consequently, the execution of the Will dated 18.03.1998 in favour of the Defendant could not be proved. The learned First Appellate Court therefore rightly rejected the appeal filed by the Defendant against the judgment dated 01.07.2021 passed in Special Civil Suit No. 35/2016, which had dismissed the counterclaim filed by the Defendant seeking probate of the Will. I find no error in the judgments passed by the learned Trial Court as well as the First Appellate Court.

13. The Article 137 of the Limitation Act is as under :

"137.	Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues."
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. The perusal of the Limitation Act shows that no specific period of limitation is prescribed for filing probate proceedings. Therefore, the general period of limitation of three years under Article 137 of the

Limitation Act would apply to cases of probate. The perusal of the judgment of the learned trial Court shows that the plea of execution of the Will was taken by the Defendant while filing the written statement in RCS No. 53/2004. The said suit came to be decided in the year 2007.

. In the present case, it is admitted that the Appellant raised the plea of execution of the Will by deceased Rajaram while filing the written statement in RCS No. 53/2004. However, probate proceedings were first initiated by the Defendant only in the year 2016, by filing a written statement in Special Civil Suit No. 35/2016 instituted by the Plaintiff. Therefore, as per Article 137 of the Limitation Act, the claim for probate filed by the Defendant in his counterclaim was barred by limitation and was rightly rejected by the learned trial Court. The findings arrived at by both Courts do not suffer from any perversity. Hence, both the substantial questions of law framed hereinabove are answered accordingly.

14. No other substantial question of law arises for consideration in this Second Appeal. The appeal is therefore dismissed.

**[MEHROZ K. PATHAN]
JUDGE**

Najeeb..