

**IN THE COURT OF THE ADDITIONAL SENIOR CIVIL
JUDGE, AT: HAVERI**

**Present: GUDI VASUDEV RADHAKANT,
B.com., LL.M.
ADDITIONAL SENIOR CIVIL JUDGE,
HAVERI.**

DATED: THIS THE 7th DAY OF MARCH, 2018

Execution Petition No.106/2015

Decree Holder: Smt. Basavva W/o Nagappa Hadimani
R/o: Nelogal, Now at: Haveri,
Tq: & Dist: Haveri.

V/s

Judgment Debtor: Smt. Rekha @ Surekha
W/o Ashok Hadimani,
R/o: Haveri, Tq: & Dist: Haveri
and others.

I.A.No.III

APPLICANT : Shanthappa S/o Nagappa Hadimani,
(Decree Holder) Age: 57, Occ: Job, R/o Nelogal,
Tq: & Dist: Haveri,
Now at: Davanagere.

(By Sri. K.C. Pavali, Advocate)

V/s

RESPONDENT : Smt. Rekha @ Surekha
Judgment Debtors: W/o Ashok Hadimani R/o Haveri,
Tq: & Dist: Haveri and others.

(Jdr.1 & 2 by Sri. S.R. Hegde, Advocate)
(Jdr.3 by Smt. A.V. Kelkar, Advocate)

ORDER ON I.A.No.III

Present application is filed by the proposed Decree Holder by name Shantappa S/o Nagappa Hadimani under Oder XXII Rule 10, 11 and 16 read with Order I Rule 10(2) and Section 151 of Code of Civil Procedure, 1908 with a request to implead himself as legal representative of the deceased Decree Holder as legatee under the will.

2. This application is supported by the affidavit of proposed Decree Holder. He has stated in the affidavit that on 10.02.2017, Decree Holder by name Basavva Hadimani died who is none other than his own mother. The present Execution Petition is filed to execute the final decree in FDP No.10/2013 which emanate from the preliminary decree passed in O.S.No.71/1999. In the said decrees, Decree Holder was allotted with 1/3rd share in the suit properties and also costs. He looked after his mother during her lifetime. All the children of his mother are already dead. He

is alone surviving children. Therefore, his mother was having love and affection towards him. Considering the love and affection, she had executed the Will on 20.12.2010 bequeathing her 1/3rd share in the suit properties in his favour, in pursuance of final decree passed in FDP No.10/2013 and preliminary decree passed in O.S.No.71/1999. As per the Will and wish of his mother, he had instituted the present Final Decree Proceedings. Hence, as per the registered Will, he became legatee and legal representative of his mother. Therefore, he prays to allow him to come on record as Decree Holder.

3. This application is resisted by the Judgment Debtor by filing objections interalia contending that the present application is not maintainable in law or on facts. There is no provision in Code of Civil Procedure, 1908 as Order XXII Rule 16. Moreover, Order XXII Rule 10, 11 and Order I Rule 10(2) and Section 151 of Code of Civil Procedure, 1908 are not applicable to execution proceedings and they are applicable only to the suit and appeal. Decree Holder is having other legal heirs. If the applicant is claiming as legal heir of the deceased Decree Holder, he ought to have brought all the legal heirs on record. Hence, the present application is not maintainable. Applicant is not the Decree

Holder or party to the suit. Therefore, he is not entitled to come on record as necessary party. Execution of Will by Basavva W/o Nagappa Hadimani bequeathing her 1/3rd share in the amount etc., is denied. Applicant has deliberately created false Will and deceased Basavva Hadimani was not having any interest to execute the Will. Applicant misused her old age, inability and created the false Will by misguiding deceased Basavva Hadimani. Unless and until applicant obtains the probate from the competent court, he is not entitled to come on record as legatee under the Will. In this execution petition itself, Decree Holder was ready to compromise the matter with the Judgment Debtors and she has decided to give up her right in favour Judgment Debtors. But the applicant had played mischief with an intention to engulf the entire properties and made the Decree Holder not enter into compromise. Decree Holder was having love and affection towards Judgment Debtor No.2. Hence, alleged Will is sham and bogus. Applicant is not entitled to come on record to continue the execution proceedings. On all these grounds, he sought for rejection of the application.

4. Heard arguments of learned counsel for the proposed Decree Holder as well as learned counsel for the Judgment Debtors at length. Perused the records of the case.

5. On perusal of records of the case and having heard arguments, following points arises for consideration.

1. Whether applicant has made out sufficient grounds to come on record as legal heir/legatee of deceased Decree Holder by name Basavva W/o Nagappa Hadimani?

2. What order?

6. My findings to the above points as under:

Point No.1: Inquiry as contemplated under Order XXII Rule 5 of Code of Civil Procedure, 1908 is necessary.

Point No.2: As per final order, for the following:

REASONS

7. **REASONING ON POINT NO.1:-** Evidently, proposed Decree Holder is claiming right over the suit properties on the strength of Will stated to be executed by the deceased Decree Holder in his favour on 20.12.2010 bequeathing her 1/3rd share in the suit properties in his favour. Further, applicant contends that he is the only surviving children of the deceased. Therefore, he became her legal heir also. Admittedly, the present Execution Petition arises out of final

decree passed in FDP No.10/2013 which emanate from the preliminary decree passed in O.S.No.71/1999.

8. Learned counsel for the applicant has vehemently argued that even he need not file an application for substitution of the legal representative. It is sufficient for him to continue the execution by informing to the executing court. In order to support his contention, he has relied upon the decision reported in **AIR 1986 Allahabad 49 (Budh Singh and others v. 8th Additional District Judge, Meerut and others)** in which it is held that

"3. Upon reference to O. 22, R. 12, C.P.C. it will appear that according to that provision nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order. This means, in other words, that in relation to execution, the legal representatives are not called upon to seek substitution upon the death of the decree-holder or the judgment-debtor, as the case may be. Were, as in this case, the decree-holder died it is open to the legal representatives claiming interest in the estate of the deceased or as being entitled to proceed with the decree, to come up just by way of information to the execution Court

and thereafter proceed with the execution. Since under the Code no application for substitution or otherwise is required to be made by such legal representatives, it cannot be claimed that the bar of Art. 137 of the Limitation Act is attracted. Art. 137 may be invoked where an application is required under the law to be necessarily made in order to confer or create a right to proceed in a matter, but where no such application is the requirement of law, the bar of limitation is inapplicable."

9. To the same effect, he has also relied upon the decision reported in **AIR 1980 Delhi 217 (Smt. Thakuri Bai (through L.Rs.), v. Laxmi Chand and others)**. In the said decision, it is held that application wrong quoting of provision of law does not divest the court of its jurisdiction. Learned counsel for the applicant has also relied upon the decision reported in **AIR 1971 Calcutta 160 (Indrajit Choubey and another v. Sitaram Agarwalla and others)**, wherein it is held as under:

"4. This aspect of the matter may not be altogether free from difficulty and the point whether, on partition, there is really

any assignment, may not be altogether free from controversy. We do not, however, think that it is necessary for us, for purposes of this case, to go into that question, as, in our view, the present matter would be covered by Order 22, Rule 10 of the Code of Civil Procedure, as it is now well established that the said rule applies to execution proceedings, (vide Krishnaji Ramchandra Koshti V. Bhikchand Ramkarn Marwadi, ILR 1941 Bom 629 = (AIR 1942 Bom 82); Manmohan Dayal V. Kailash Nath, AIR 1957 All 647; Mahimuddin V. Panu Sahani, AIR 1952 Orissa 64; Ajodhya Lal Mahaseth V. Mahanth Brij Kishore Dass, AIR 1940 Pat 615 and the Bench decision of this Court; Tara Prasanna Gangully V. Naresh Chandra Chakrabutty, 37 Cal WN 494 = (AIR 1933 Cal 329). It is true that, in an earlier Bench decision of this Court, some doubt was expressed on the point (vide Hem Chandra Banerjee V. annapurna Debi, 36 Cal WN 93 = (AIR 1932 Cal 423); but the

same cannot prevail against the above preponderance of judicial authority. On an examination of the relevant statute also, namely, the Code of Civil Procedure, we are ourselves of the opinion that the said statutory provision (Order 22, Rule 10) will apply to execution proceedings, as it is not excluded by the excepting or excluding rule (Order 22, Rule 12)."

10. On reading of the principles emerging from these decisions, cumulative effect is that the legal heir of the deceased Decree Holder is entitled to come on record and continue the execution proceedings even by informing to the executing court. However, the procedure is little-bit different in case of Will. It is true that a Hindu need not obtain the probate to claim as legatee under the will. However, for the purpose continuation of the proceedings, an inquiry contemplated under Order XXII Rule 5 of Code of Civil Procedure, 1908 is necessary. As per the Order XXII Rule 12 of Code of Civil Procedure, 1908, Rule 3, 4 and 8 of Order XXII are shall not applicable to the proceedings in execution of the decree or order. However, this provision does not exclude the operation of Order XXII Rule 5 of Code of Civil

Procedure, 1908 to execution proceedings. As per Section 47(3) of Code of Civil Procedure, 1908, the executing court is bound to decide who are the representatives of a party for the purpose of continuation of execution proceedings. Under such circumstances, there is no impediment for proposed Decree Holder to come on record as legal representative of deceased Decree Holder. However, prime importantly, it is relevant to consider that he is claiming his right over the properties through the Will stated to be executed by the deceased Decree Holder-Basavva W/o Nagappa Hadimani on 20.12.2010. The said Will is registered Will. Mere registration of will does not dispense with its proof as per Section 63 of Indian Succession Act, 1925 and Section 68 of Indian Evidence Act, 1872. Legal representative of Decree Holder cannot straight away entitled to execute the decree, unless, he proves the Will as per law. For proof of Will full-fledged trial may not be necessary in the execution proceedings. However, inquiry as contemplated under Order XXII Rule 5 of Code of Civil Procedure, 1908 is necessary to hold that the applicant is the legatee under the Will. Under these facts and circumstances of the case, it is necessary to place reliance on the decision of Hon'ble High Court of Karnataka reported in **2005 (1) KCCR 137(BHIMAPPA**

**RAMACHANDRAPPA AMATE V/S SHRIKANT MARUTHI
MIRAJAKAR),** wherein it is held as under:

"In my view, as rightly contended by the learned Counsel appearing for the respondent, the direction given by this Court should be treated as a direction given under Order 22, Rule 5 of Code of Civil Procedure, 1908. Order 22 concerns with the death, marriage and insolvency of parties and Order 22, Rule 1 states that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives and the other rules are the procedures that has to be adopted when either the plaintiff or plaintiffs, defendant or defendants dies during the course of the proceedings. Under Order 22, rule 4A when a party dies and when there is no L.R to represent the dead party, the Court may also appoint an administrator or an officer of the Court to represent the estate of the deceased to continue the suit. But the relevant Rule for the purpose of our case is Rule 5 which reads as follows:

"R.5 Determination of question as to legal representative.-Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the questions, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons thereof, and the appellate Court may take the same into consideration in determining the question."

21. Thus, under the above provision an appellate Court before determining the question could direct any sub-ordinate Court to try the question and to return the records together with the evidence if any

recorded in such proceeding and its findings and reasons thereof and the appellate Court may take those findings into consideration and pass make its own order. These proceedings are only summary proceedings. In similar circumstances, this Court in RFA 6 of 1996 disposed of on 17.04.2004 has held that an enquiry made after an order made by this Court under Order 22, Rule 5 Code of Civil Procedure, 1908 is on a summary proceeding and any order passed in the appeal before this Court after impleading the L.R on the finding given by the lower Court will be in respect of the rights of the parties in the suit for whom the L.R represents. Any such declaration given in favour of either the plaintiff or the defendant could decided only their rights and not the rights of the L.R and under such circumstances, the L.R cannot rely upon the findings given in the summary enquiry and claim his individual rights in respect of the suit properties."

11. If the factual score of the present case is considered in the light of principles emerging from this decision, inevitably an inquiry under Order XXII Rule 5 of Code of Civil Procedure, 1908 only for the purpose of continuation of proceedings is necessary. Therefore, it is necessary to direct the applicant to lead his evidence with regard to proof of Will and thereafter his application can very well be considered. It is needless to state that mere quoting of wrong provision of law will not take away rights of the parties. With these observations, point No.1 is answered accordingly.

12. ON POINT NO.2:- For the reasons stated above, I proceed to pass the following:

ORDER

It is hereby held that an inquiry under Order XXII Rule 5 of Code of Civil Procedure is necessary to determine whether the applicant/Shantappa S/o Nagappa Hadimani is the legatee under Will stated to be executed by Basavva

**W/o Nagappa Hadimani.
Therefore, applicant is
directed to lead evidence in
respect of proof of said Will.**

(Dictated to stenographer, transcribed, typed by her, corrected by me and then pronounced in the open court on 7th day of March, 2018)

**(GUDI VASUDEV RADHAKANT)
ADDITIONAL SENIOR CIVIL JUDGE,
HAVERI.**