

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

Second Appeal No.527 of 1999

- 1) Manikrao s/o Shivram Shinde.
Since deceased through his
legal representatives :
- 1/1) Sumitra w/o Bapurao Puyyad
Age 70 years,
Occupation : Household,
R/o Wayafana, Taluka Hadgaon,
District Nanded.
- 1/2) Kaushalya w/o Pundlik Kadam,
Age 60 years,
Occupation : Household,
R/o Shelgaon, Taluka Umbri,
District Nanded.
- 1/3) Shakuntalabai Shankarrao Gade,
Age 50 years,
Occupation : Household,
R/o Daregaon, Taluka Mudkhed,
District Nanded.
- 1/4) Shivajirao s/o Manikrao Shinde,
Deceased, through legal
representatives :
- 1/4/A. Chitrabai wd/o Shivajirao Shinde,
Age 40 years,
Occupation : Agriculture,
R/o Rohi Pimpalgaon,
Taluka Mudkhed, District Nanded.
- 1/4/B. Gopiraj S/o Shivajirao Shinde,
Age 35 years,
Occupation : Agriculture,
R/o Rohi Pimpalgaon,
Taluka Mudkhed, District Nanded.

- 1/4/C. Shesheraj S/o Shivajirao Shinde,
Age 30 years,
Occupation : Agriculture,
R/o Rohi Pimpalgaon,
Taluka Mudkhed, District Nanded.
- 1/4/D. Prabhakar S/o Shivajirao Shinde,
Age 25 years,
Occupation : Agriculture,
R/o Rohi Pimpalgaon,
Taluka Mudkhed, District Nanded.
- 1/4/E. Jyoti D/o Shivajirao Shinde,
Age 22 years,
Occupation : Household,
R/o Rohi Pimpalgaon,
Taluka Mudkhed, District Nanded.
- 1/5) Sheshrao S/o Manikrao Shinde,
Age 45 years,
Occupation : Agriculture,
R/o Rohi Pimpalgaon,
Taluka Mudkhed, District Nanded.
- 1/6) Lalitabai W/o Kishanrao Kadam,
Age 42 years,
Occupation : Household,
R/o Shelgaon, Taluka Umbri,
District Nanded.
- 1/7) Shobhabai W/o Tukaram Baswade,
Age 35 years,
Occupation : Household,
R/o Katkalamba, Taluka Kandhar,
District Nanded.
- 2) Kishan Shivram Shinde,
Deceased, through legal
representatives :
- 2/1) Neelabai Ramchandra Sawant
(dead)

- 2/2) Sumanbai W/o Balaji Kadam,
Age 60 years,
Occupation : Household,
R/o Mangalsangavi,
Taluka Kandhar, District Nanded.
- 2/3) Nirmalabai Dattarao Kadam,
Age 55 years,
Occupation : Household,
R/o. Shambargaon,
Taluka and District Nanded.
- 2/4) Kamalbai Sheshrao Jogdand,
Age 50 years,
Occupation : Household,
R/o Umbari, Taluka Umbari,
District Nanded.
- 2/5) Premalabai Uttamrao Shinde,
Age 47 years,
Occupation : Household,
R/o Ladka, Taluka Kandhar,
District Nanded.
- 2/6) Uttamrao Kishanrao Shinde,
Age 52 years,
Occupation : Agriculture,
R/o Rahi Pimpalgaon,
Taluka Mudkhed, District Nanded. **.. Appellants.**

Versus

- 1) Gangubai w/o Venkatrao Manurkar,
Age 43 years,
Occupation : Household,
R/o Manur, Taluka Bhokar,
District Nanded.
- 2) Bhagirathibai W/o Govindrao Mungal,
Age 58 years,
Occupation : Household,
R/o Ijali,
Taluka and District Nanded. **.. Respondents.**

Shri. V.D. Salunke, Advocate, for appellants.

Shri. Santosh C. Bhosle, Advocate, for respondents.

CORAM: T.V. NALAWADE, J.

DATE : 28th SEPTEMBER 2015

JUDGMENT:

1) The appeal is filed against the judgment and decree of Regular Civil Suit No.671/95 which was pending in the Court of the Civil Judge, Junior Division, Nanded and also against the judgment and order of Regular Civil Appeal No.14/1997 which was spending in the District Court Nanded. The suit filed by the present respondents for relief of declaration of ownership and relief of possession in respect of agricultural land is decided in their favour. Both the sides are heard.

2) The suit was filed by present respondents in respect of three agricultural lands like Survey No.272/1 called as Gadi Marg, Survey No.315/B/5 called as Dagdi and Survey No.328/B/1 called as Mala and situated at Rohipimpalgaon, Tahsil and District Nanded. It is the case of the plaintiffs that these properties were owned by

Sheshrao. Sheshrao was husband of plaintiff No.1 and he was father of plaintiff Nos.2 and 3. Defendants Nos.1 and 2 are real brothers of Sheshrao.

3) It is the case of the plaintiffs that partition had taken place amongst Sheshrao and the defendants during lifetime of Sheshrao and the suit properties were owned by Sheshrao and were standing in the name of Sheshrao. It is their case that plaintiff Nos.2 and 3 were given in marriage and as plaintiff No.1 had lost her husband, Sheshrao, the lands were given to the defendants for management and cultivation. It is contended that the defendants used to cultivate the lands on behalf of the plaintiffs and they used to give crop shares to the plaintiffs.

4) It is the case of the plaintiffs that during last one year no crop share was given and then plaintiffs realised that some revenue record was prepared behind their back in respect of the suit property to show that the defendants have become owner of the property. It is contended that in June 1995 they first demanded back

possession of the lands from the defendants and as they refused, the suit was required to be filed. The suit was filed in the year 1995.

5) The defendants filed their joint written statement and they denied that plaintiffs have become owner of the suit property after the death of Sheshrao. They have, however, admitted relationship of plaintiffs with Sheshrao and also with the defendants. They contended that during lifetime, Sheshrao had developed a fear that in case of his death his wife will sell the property and may re-marry and she may not take care of his daughters. It is contended that due to such fear and to make his real brothers owners of the property, Sheshrao made will and bequeathed the suit properties to defendants during his lifetime. It is contended that Sheshrao had given responsibility of marriage of his two daughter to the defendants.

6) It is the case of the defendants that after execution of will, Sheshrao died and the defendants spent for the marriages of plaintiff Nos.2 and 3. It is contended

that the land was mutated in the names of the defendants on the basis of the will and then some transactions were also made in respect of some portion of the suit property by them. It is contended that some properties were partitioned by them amongst themselves. They prayed for dismissal of the suit.

7) Issues were framed in the trial Court. Both sides gave evidence. The evidence of the plaintiffs is in accordance with the aforesaid pleadings.

8) The revenue record was produced by the defendants and as per this record name of Sheshrao was present in the revenue record as owner of the suit properties. The defendants relied mainly on one mutation which was sanctioned on 31-10-1961 (Exhibit 19). The entry of the names of the defendants in the revenue record was made and in the mutation it was shown that will was produced by the defendants for entering their names.

9) In the trial Court, defendant No.2 gave evidence. He deposed that about 15 days prior to the death, Sheshrao made will. It is not in dispute that Sheshrao was owner of these properties. The evidence of defendant No.2 shows that the will was not executed in his presence but Sheshrao had handed over the will 10 to 12 days prior to his death. His evidence shows that he does not know as to when and where the will was made. He did not know the contents of the will. He deposed that the will was handed over to revenue authority two months after the death of Sheshrao.

10) No other witness was examined by the defendants and they could not produce the will. It appears that in the first appellate Court they attempted to produce one document by contending that it was the will of the deceased. The first appellate Court passed reasoned order and refused permission to produce such evidence in the first appeal.

11) The learned counsel for appellants /defendants submitted that for giving opportunity to the defendants,

matter can be remanded back and the defendants need to be allowed to prove the execution of the will.

12) This Court admitted the appeal by observing that substantial questions of law can be formulated on Ground Nos. III, IV, V, IX and X mentioned in the appeal memo. The grounds are as follows :-

"III. The learned appellate Court ought to have granted Exhibit 21, application for bringing additional evidence on record when the parties have submitted all the documents along with the application. The learned appellate Court ought to have allowed the production and ought to have remanded the matter to trial Court for decision afresh.

IV. The learned lower appellate Court failed to appreciate that the copy of the will-deed was given to the Revenue Officer for recording their names, however, they did not remember that meanwhile the said document was returned to them, therefore, as soon as they received the copy of the said document, it was brought on record by way of additional evidence. The learned appellate Court ought to have brought the said document on record rather than rejecting it on technical grounds.

V. The approach of the learned appellate Court by rejecting application of plaintiff No.1 for bringing the will deed on record is totally technical, he ought to have remanded the matter by allowing additional evidence. The interpretation of the document i.e. will-deed itself is a substantial question of law involved in the appeal.

IX. The Courts below failed to consider the revenue record and long standing possession of the defendants, and it has evidenciary value under section 76 of the Evidence Act.

X. The Courts below ought to have considered the documentary evidence i.e. Exhibit 19, there is a mutation entry taken in the name of defendants on the basis of will-deed executed by deceased Sheshrao. Mutation Entry No.331 Exhibit 19 is a old document in which reference of Will-deed executed by deceased Sheshrao is there, in view of this claim of defendants ought to have been considered."

13) Though many grounds are raised and substantial questions of law are formulated, it can be said that in view of admitted fact that the property was owned by Sheshrao and in ordinary course, plaintiffs can get the property as heirs of Sheshrao, it was necessary for the defendants to prove that Sheshrao had executed the will and under the will they got the property. Evidence of the defendants already discussed shows that they have no personal knowledge regarding execution of the will. The evidence also does not show that they had made enquiry with anybody to ascertain as to who was the scribe of the will and who were the attesting witnesses. In spite of such nature of evidence, they wanted to rely on so called mutation effected in their favour in the year 1961. When

on one hand, evidence is given that within few days of execution of will, Sheshrao died (in that case Sheshrao must have died in the year 1951 itself), the mutation shows that the so called will was allegedly produced before the revenue authority in the year 1961 and then mutation was made. The age of plaintiff No.3 was given as 35 years in the suit and the age of plaintiff No.2 was given as 40 years. The defendants have not disputed this age of the daughters of Sheshrao. The age of the widow of Sheshrao was shown as 60 years. This age is also not disputed. These circumstances show that it does not look probable that Sheshrao had executed will in the year 1951. No such evidence is brought on the record. But there is evidence on record of defendant No.2 of aforesaid nature. From these circumstances it can be said that Sheshrao was alive at least till 1960. If the will was really produced, there would have been some endorsement on this document of the revenue authority but there is no such endorsement on this document.

14) When the defendants have no personal knowledge regarding execution of the will, it was out of

question for them to prove due execution of the will as mentioned in Section 63 of the Indian Succession Act. It was necessary for them to prove the due execution by examining at least one attesting witness as provided in section 67 of the Indian Evidence Act.

15) The evidence for proof of will could not have been given by the defendants in view of nature of evidence given on oath by them. They were not in possession of the will during pendency of suit and it cannot be said that they got it afterwards. It is clear that as Sheshrao had left behind two daughters and a widow and the daughters got married subsequently and the widow was living at the mercy of the defendants, they did nothing to see that the property remains in their name. In such circumstances it is upto the Court to decide as to whether the defendants can be allowed to give evidence first time in appeal when it could have been given in the trial Court. For getting permission to adduce evidence the conditions laid down in Order 41 Rule 27 of the Civil Procedure Code need to be satisfied and those conditions were definitely not satisfied. Such attempts are generally

made to protract the execution of the decree of possession by the persons who are in possession. Discretion is given to the first appellate Court in this regard and the first appellate Court has used the discretion and refused to give such permission. In such circumstance this Court, in second appeal, is not expected to interfere in the order made by the first appellate Court which involves the use of discretionary power.

16) Only making entry in the revenue record does not confer any right or interest in favour of the defendants. No other defence is taken by the defendants. Thus the plaintiffs have established their title over the suit property and so there was no alternative before the Courts below than to give decree of possession. All the aforesaid points are answered against the appellants, defendants.

17) In the result, the appeal stands dismissed. No order as to cost.

Sd/-
(T.V. NALAWADE, J.)

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