

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

905 SECOND APPEAL NO. 114 OF 2015
WITH CA/3553/2015 IN SA/114/2015

GANGUBAI PANDHARINATH DEVHARE LRS PRABHAKAR AND
OTHERS
VERSUS
VINAYAK PANDHARINATH DEVHARE

...
Advocate for Appellants : Deokate Mayur G.
Advocate for Respondent : S.S. Kulkarni
...

CORAM : T.V. NALAWADE, J.
DATED : 27th April, 2016.

ORDER :

1. Heard the learned counsel for appellants. Some hearing was given to the learned counsel for respondent, plaintiff.

2. The suit was filed for various reliefs like relief of possession of suit property and also relief of direction involving permission to the plaintiff to run the business in the shop and also the relief in respect of so call pre-emption right. The Trial Court dismissed the suit, but the First Appellate Court has set aside the judgment and decree of the Trial Court and the suit is decreed. The correction made in the decree shows that a direction is given to the defendant No. 7, purchaser, to hand over the possession of entire shop to the plaintiff.

3. The submissions made and the record show that the suit shop was purchased by Pandharinath and his brother Laxman under registered sale deed. Plaintiff and defendant Nos. 1 to 4 are successors of Pandharinath. Laxman died without leaving any son and he had made a will in respect of his share in the shop in favour of his brother Pandharinath and the sons of Pandharinath. Thus, apparently after the death of Laxman, Pandharinath was owner of half portion of the shop and Pandharinath and his sons were together owners of the remaining half portion which was previously owned by Laxman. It appears that in spite of these circumstances, Pandharinath made a will in favour of his wife and bequeathed entire property to the wife. On the basis of said will, after the death of Pandharinath, wife sold the property to defendant No. 7.

4. It appears that there was some proceeding started in city survey office in which the name of Laxman was deleted. But, even at this stage, it can be said that such deletion cannot be recognized in the eye of law as Laxman was owner of 1/2 portion of the suit shop and necessary documents were not executed for transferring the property, if the will was not to be acted upon. From the evidence before the Trial Court, it can be said that

plaintiff Vinayak can get share atleast in the property which was belonging to Laxman due to the will left behind by Laxman. If both the wills are held to be proved, in that case also plaintiff will be getting atleast something in the property due to ownership of Laxman of 1/2 portion of the shop. That does not mean that Laxman can be allowed to get entire property as due to the will made by Pandharinath, his widow can get 1/2 share and also the share of Pandharinath in the property of Laxman and other sons of Pandharinath can get their shares in the property left behind by Laxman. Due to these circumstances, in ordinary course, suit ought to have been filed for partition and for getting separate share. There was no such nature of suit, but the First Appellate Court has given decree of possession in favour of plaintiff. In view of these circumstances, appeal needs to be admitted on following substantial questions of law.

(i) Whether the First Appellate Court has committed error in ignoring the fact that Pandharinath was owner of 1/2 portion of shop and he was entitled to get share in the property left behind by Laxman due to will left behind by Laxman ?

(ii) Whether the District Court has committed error in not considering properly the right of Pandharinath

to give his property under will to his widow ?

(iii) Whether the District Court has committed error in not considering the right of issues of Pandharinath, other sons of Pandharinath to get share in the property of Laxman in view of the will left behind by Laxman ?

(iv) Whether the District Court has committed error in holding that only the plaintiff is entitled to get possession of the entire shop when the defendant Nos. 1 to 4 are apparently entitled to have most portion of the property due to the will executed by Pandharinath and will executed by Laxman ?

5. Appeal is **admitted**. Notice after admission is waived by Shri. S.S. Kulkarni for original plaintiff.

6. Civil Application No. 3553/2015 is filed for stay. This Court has already admitted the appeal and this Court has made observations regarding rights of original plaintiff. In view of those rights, before giving stay some conditions need to be put. The stay to the execution can be granted subject to condition that the defendants, present appellants deposit amount of Rs. 3,00,000/- (Rupees three lakh) in this Court. The amount is to be

deposited within one month. If the amount is not deposited within this period, it is to be presumed that there is no stay to the judgment and decree given by the First Appellate Court. In those terms the application is allowed and disposed of.

[T.V. NALAWADE, J.]

ssc/