

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

SECOND APPEAL NO.416/2017

Dilip s/o Shamrao Kapkar & Ors. ..vs.. Bapu @ Ratnakar Shamrao Kapkar

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. Mohit Khajanchi, Advocate for appellants.
Mr. Rohit Joshi, Advocate for respondent.

CORAM : V.M. DESHPANDE, J.
DATED : NOVEMBER 9, 2017

Original defendants are before this Court in this appeal. I have heard Mr. Mohit Khajanchi, Advocate for appellants and Mr. Rohit Joshi, Advocate for the respondent.

According to the learned counsel for the appellants, the lower appellate Court committed mistake in granting decree of declaration that the Will dated 14.09.2001 executed by the deceased Shamrao in favour of the defendant is not binding on the plaintiff. He also submitted that the appellate Court ought to have remanded the matter to the trial Court by exercising the powers under Order XLV Rule 25 of the Code of Civil Procedure to give an opportunity to the defendant to prove the Will.

Following are the admitted facts in this appeal.

Shamrao was the common ancestor of the appellants and the respondent. The respondent filed the suit for declaration and injunction. A declaration was sought to the effect that the Will executed by Shamrao is illegal and is not binding on the plaintiff and that the defendants be restrained from creating third party interest in respect of the

share of the plaintiff.

Initially, in the year 1989, a suit was filed by the present respondents against the appellant-Shamrao for a partition in respect of the various agricultural properties. The said suit was registered initially as Regular Civil Suit No. 123/1989 which was renumbered as Regular Civil Suit No. 156/1991. In the said suit, the present respondents claimed 1/5th share. The said suit was decreed on 21.11.1998 and in that the present respondent was given 1/6th share in the suit properties. An appeal was carried bearing Regular Civil Appeal No.73/1999. During the pendency of the said appeal, Shamrao expired on 14.02.2003. On 22.07.2005, the appeal was decided in which the appellate Court observed that the present respondent is entitled to get 1/5th share. The said finding was not challenged by the present appellants nor the actual partition by mets and bounds took place.

Shamrao executed the Will during his lifetime on 14.09.2001, whereby the entire properties, which were the subject matter of the earlier suit for partition decided by the Courts below, were bequeathed to the appellants.

The suit which gave rise to the present second appeal was dismissed by the trial Court by holding that the present respondent has admitted execution of the Will and he failed to point out as to why the Will was sham or bogus or void document.

The appellate Court, in my view has correctly recorded a finding that the subject matter of Will was the ancestral properties and at the most, in view of the decree in the earlier partition suit, the testator was competent to

execute a Will only to the extent of his share. However, since the properties stated in the Will were not allotted to the share of Shamrao and there was no actual partition by mets and bounds, Shamrao was not competent to execute the Will in respect of entire ancestral properties. Further, it is the case of the present respondent that the Will is not binding on him only to the extent of his 1/5th share, in respect of which there is already a decree in his favour passed in Regular Civil Suit No.156/1991.

It was not the question of validity of the Will that was involved but the question involved in the suit in question was of the authority of the deceased Shamrao to execute the Will in respect of 1/5th share of the respondent/plaintiff in view of the decree for partition passed earlier. The question of proof of Will as such was not for consideration and hence no substantial question of law arises for remand of the matter and the appellate Court did not commit any mistake.

In that view of the matter, I am of the view that no substantial question of law is involved in the present case. The appeal is therefore dismissed. No order as to costs.

JUDGE