

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

**APEAL FROM ORDER NO. 28 OF 2018 WITH
CIVIL APPLICATION NO. 4386 OF 2018**

**SHABANABEE SHAIKH NAJIRKHAN
VERSUS
ZUBEDABEE SHAIK CHAND**

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Advocate for the Petitioner : Shri A. G. Godhamgaonkar
Advocate for the Respondent : Shri S. S. Rathi

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 03rd DECEMBER, 2018.

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PER COURT :

1. The Appellant is aggrieved by the judgment and order dated 18/01/2018 delivered by the Appellate Court in RCA No. 41/2011 that was preferred by the original defendant and RCA No. 48/2011 that was preferred by the original plaintiff. By the impugned judgment, both the Appeals are allowed. The judgment of the Trial Court dated 30/06/2011 in RCS No. 218/2018 has been quashed and set aside.

2. I have considered the strenuous submissions of the learned Advocates for the respective sides. With their assistance, I have gone through the petition paper book as well

as the copy of the plaint tendered across the bar by the respondent – original plaintiff.

3. The Trial Court had observed in the operative part of its order as under :-

- "1. The suit is decreed partly with costs.
2. It is hereby declared that the will dated 02-12-2003 executed by deceased Shaikh Chand at serial no. 6646/03 is not binding on plaintiff to the extent of 2/3rd share in the suit properties mentioned in the will but binding on the Plaintiff to the extent of 1/3rd share of the defendant.
3. It is hereby declared that the partition-deed in respect of land gat no. 527 admeasuring 80R situated at village Pusegaon is not binding on the plaintiff.
4. It is hereby declared that plaintiff is also the owner to the extent of $\frac{1}{2}$ portion in 2/3rd share in land gat no. 526 admeasuring 36R land, gat no. 527 admeasuring 33 R land and house property bearing no. 654 situated at village Pusegaon.
5. It is further declared that plaintiff is owner to the extent of $\frac{1}{2}$ portion in land gat no. 527 ad measuring 80R situated at village

Pusegaon, Tq. Sengaon.

6. *Plaintiff is entitled for possession of $\frac{1}{2}$ portion in 2/3rd share in suit land gat no. 526 admeasuring 36R, land gat no. 527 admeasuring 33R, house property bearing no. 654 situated at village Pusegaon, Tq.Sengaon.*

7. *Plaintiff is further entitled for possession of $\frac{1}{2}$ portion in land gat no. 527 admeasuring 80 R situated at village Pusegaon, Tq. Sengaon.*

8. *Possession of the landed suit properties be delivered to Plaintiff through Collector, Hingoli by issuing precept to him and for delivery of possession in respect of house property Court commissioner be appointed.*

9. *Inquiry u/o. 20 R. 12 of CPC be held for mense profit.*

10. *Preliminary decree be drawn up accordingly."*

1. *Both the appeals are allowed.*

4. By the impugned judgment, the Appellate Court has issued the following order :-

1- *Both the appeals are allowed.*

2- *Impugned Judgment in R.C.S. No. 218/2008 dated 30.06.2011 passed by Civil Judge (Junior Division), Sengaon is set aside.*

3- *The suit is remanded back to the Trial Court.*

4- *Trial Court is directed to frame issue,"Whether defendant prove that she is daughter of Shaikh Chand."*

5- *Defendant is directed to pay Rs. 1500/- (Rupees one thousand five hundred) per month to the plaintiff for her maintenance till disposal of the suit from the date of his appeal.*

6- *Defendant shall pay arrears of maintenance amount awarded to the plaintiff within two months from day.*

7- *Decree be drawn up accordingly.*

8- *Parties are directed to remain present before the Trial Court on 01.02.2018.*

9- *Record & Proceeding be sent to the Lower Court.*

10- *The original judgment be kept in RCA No. 41/2011 and copy in RCA No. 48/2011."*

5. The contention of the defendant is that the will deed Exhibit 53 was executed by the deceased Shaikh Chand who has stated in the registered document that the defendant is his daughter. An attesting witness was examined to prove the execution of the will. The Trial Court, therefore, concluded that the will deed Exhibit 53 appears to be a genuine

document. It is, therefore, submitted that the Appellate Court has committed an error in concluding that the will deed is not proved.

6. I find from the observations of the Trial Court which are a bit guarded in observing that, " *The said document appears to be genuine one. Therefore, it cannot be said that it is a bogus document*". Issue is that the preparation of the document appears to be proved in the view of the Trial Court. This is distinct from proving the contents of the will wherein the deceased Shaikh Chand declares that the defendant is his daughter. The Trial Court failed to take cognizance of the pleading of the plaintiff in paragraph 3 of the plaint that the defendant was never the biological daughter of Shaikh Chand since the mother of the defendant was already married to Kundlik Dhabe and the defendant was the daughter born to the said lady on account of her relations with Kundlik Dhabe. It was, therefore, categorically pleaded that the defendant is the biological daughter of Kundlik Dhabe and not of the deceased Shaikh Chand.

7. The Appellate Court in my view has rightly considered the said aspect by concluding that the contents of the will deed have not been proved. Examining an attesting witness who has witnessed the preparation of the will deed is distinct and different from proving the contents of the will deed in view of a categorical denial by the plaintiff about the biological relation of the defendant with the deceased Shaikh Chand, who was the husband of the plaintiff. On this count, the Appellate Court has recorded that the will deed is not proved as the relations of the defendant with the husband of the plaintiff Shaikh Chand, was not proved. As such, the said conclusion does not call for an interference.

8. Insofar as the direction by the Appellate Court to the defendant to pay maintenance to the plaintiff is concerned, the contention of the learned Advocate for the defendant is that this prayer was not put forth and, therefore, such a relief cannot be granted.

9. I find that the Appellate Court has recorded that the plaintiff is 80 years of age. She is issueless. Nobody has been

taking care of her. The property of her deceased husband Shaikh Chand is presently in possession of the defendant. Considering these aspects, the Appellate Court has directed the defendant to pay a paltry amount of Rs. 1500/- per month so that the plaintiff could keep her body and soul alive.

10. Considering the above and merely because a second view could be possible, I do not find that any interference is called for in the impugned judgment. This A.O. is, therefore, rejected. Pending Civil Application does not survive and, therefore, stands disposed off.

11. Taking into account the age factor of the plaintiff, I find it appropriate to expedite the suit. The Trial Court is, therefore, directed to decide RCS No.218/2008 as expeditiously as possible and in any case on or before 30/06/2019.

(RAVINDRA V. GHUGE, J.)

shp/-