

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

Second Appeal No. 0547 of 2017

District : Nandurbar

1. Smt. Sarjubai Lacchiram Nayak,
Age : 91 years,
Occupation : Household,
R/o. Natavad, Devpur,
Taluka & Dist. Nandurbar.
2. Shri Ghanshyam Lacchiram Nayak,
Age : 56 years,
Occupation : Agriculturist.
3. Shri Ajabsingh Lacchiram Nayak,
Age : 44 years,
Occupation : Agriculturist.
4. Shri Ranjitsingh Lacchiram Nayak,
Age : 39 years,
Occupation : Agriculturist.
5. Shri Sunil Rameshwar Nayak,
Age : 34 years,
Occupation : Agriculturist.
6. Shri Kanhiya Rameshwar Nayak,
Age : 32 years,
Occupation : Agriculturist.

All resident of Natavad,
Devpur,
Taluka & Dist. Nandurbar.

.. Appellants
(Original
plaintiff)

versus

1. Smt. Shevantibai w/o. Morsingh
Nayak,
Age : 70 years,
Occupation : Household,
R/o. Kothade, Post Natavad,
Taluka & Dist. Nandurbar.

2. Shri Atmaram Morsingh Nayak,
Age : 39 years,
Occupation : Agriculturist.
3. Shri Mevalal Morsingh Nayak,
Age : 31 years,
Occupation : Agriculturist.
4. Shri Ambalal Morsingh Nayak,
Age : 29 years,
Occupation : Agriculturist.
5. Smt. Gayatri Atmaram Nayak,
Age : 34 years,
Occupation : Household.

All resident of Kothade,
Post Natavad,
Taluka & Dist. Nandurbar.

.. Respondents
(Original
plaintiffs)

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*Mr. Subodh P. Shah, Advocate, instructed by
Mr. Rakesh N. Jain, Advocate, for the appellants.*

*Mr. Ruchir S. Wani, Advocate, for respondents
no.01 to 05.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22ND APRIL 2019

ORDER :

01. Present appeal has been filed by original plaintiffs. They had filed Regular Civil Suit No. 51 of 2007 for declaration of ownership. The said suit came to be dismissed by learned Civil Judge Junior Division, Nandurbar, on 08-01-2013. They had filed Regular Civil Appeal No. 10 of 2013 before Distirct

Court, Nandurbar. The said appeal was heard by learned District Judge-1, Nandurbar and came to be dismissed on 02-05-2017. Hence, this second appeal.

02. Heard learned Advocate Shri. S. P. Shah i/b Advocate Shri. R. N. Jain for appellants / original plaintiffs and learned Advocate Shri. R. S. Wani for respondents / original defendants.

03. It has been submitted on behalf of appellants that, both the Courts below have not appreciated the evidence and law points involved in the matter properly and thereby arrived at a perverse finding. Suit properties were belonging to one Bhavsing. Mangalibai claimed to be his wife. In earlier round of litigation, High Court had allotted share to her in Appeal No. 424 of 1969. However, it can not be said that she had got absolute right and could bequeath the suit properties by executing will. She has disposed of more property than she had received as per said order. Both the Courts below have failed to consider that plaintiffs are the legal heirs of Bhavsing. Though Mangalibai was held to be his wife, after her death, plaintiffs have succeeded to the properties. Moresing was not held to be the adopted son of Mangalibai by High Court and therefore, the properties could have reverted back to the heirs of husband of Mangalibai. The alleged will executed by her is not a valid will. It is alleged that Mangalibai had sworn the affidavit

in presence of Executive Magistrate, however, will Ex. 34 does not bear signature of such Magistrate. The said document has not been proved properly as required under Section 68 of Evidence Act. Both the Courts ought to have granted declaration as prayed. Therefore, substantial questions of law are arising in this case.

04. Per contra, the learned Advocate for respondents supported the reasons given by both the Courts below and submitted that when the suit itself was not maintainable as it was filed only for declaration, then question of substantial question of law does not arise. Share was given in the property of Bhavsing by High Court in appeal to Mangalibai and accordingly she had received the properties. It was her exclusive property and therefore, she had every right to dispose it of by executing will. The will has been duly proved. Even though there is no signature of the Executive Magistrate, yet its execution has been proved by examining attesting witness. Therefore, plaintiffs can not be said to have any ownership rights over the suit properties.

05. At the outset, it can be said that since this is a Second Appeal under Section 100 of the Code of Civil Procedure it is required to be seen as to whether substantial questions of law are arising in this matter or not. As a general rule, when there is

concurrent findings, this Court would be slow in proceeding with the matter, however, if it is shown that both the Courts below have not considered the evidence as well as legal points correctly, then definitely a Second Appeal is maintainable and can be entertained. The ratio laid down in Gurnam Singh (D) by LRs. & Ors. vs. Lehna Singh (D) by LRs. in Civil Appeal No.6567 of 2014 decided by the Apex Court on 13.03.2019 is required to be considered, wherein it has been observed that the existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of CPC. Reliance can also be placed on the decision in Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar reported in (1999) 3 SCC 722, wherein it has been held that :-

“In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence.”

Therefore, bearing in mind these pronouncements, it is required to be seen any case is made out for admitting the second appeal.

06. In this case, the facts with which the plaintiff had come are that they are the owners of the suit property and still they wanted a declaration to that effect. Interestingly, they had claimed only the relief of declaration and no consequential relief / reliefs were prayed. Under said circumstance, both the Courts below, after relying the legal position in *Ram Sharan v/s. Smt. Gangadevi* [AIR 1972 SC 2685] and Section 34 of Specific Relief Act have correctly held that suit for mere declaration was not maintainable.

07. This Court while deciding Appeal No. 424 of 1969 on 19-10-1977 had held that Mangalibai was also the legally wedded wife of Bhavsing. Half share was granted to her in the properties left by Bhavsing. The said decree has achieved finality and executed. Plaintiffs could not have reagitated the same issue in the suit herein. Mangalibai became exclusive owner of the properties on the strength of said decree and execution. She had every right to dispose of the properties received by her.

08. Mangalibai had executed will in favour of Moresing. He was not held to be her adopted son by this Court in the said appeal. However, Moresing could get the properties by virtue of said will Ex. 34. What has been bequeathed is her entire property and not more than her entitlement. At no earlier point of

time, plaintiffs had made attempt to take back the properties from Mangalibai on the ground that she has received more than her entitlement. The said will Ex.34 has been held to be proved by both the Courts below. No legal point has been raised in respect of proof of the will by the appellants. Thus, even if it is accepted that Moresing could not have got the properties as adopted son, but then he can independently claim the ownership on the basis of will left by Mangalibai.

09. Both the Courts below have appreciated evidence properly and the law points have also been discussed properly. There is no substantial question of law arising in this matter, requiring admission of this appeal. Hence, the Second Appeal is disposed of as **"Not Admitted"**.

(Smt. Vibha Kankanwadi)
JUDGE

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