

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

**APPEAL FROM ORDER NO.60 OF 2019 WITH
CIVIL APPLICATION NO.14117 OF 2019**

Prashant @ Narayan s/o
Anantrao Deshmukh

... APPELLANT

VERSUS

Smt. Tanyabai @ Shardabai w/o
Shamrao Deshpande, Died, through L.Rs.
Dattatraya s/o Shamrao Deshpande,
Died, through L.Rs.
Smt. Indubai w/o Dattatraya Deshpande
and others

... RESPONDENTS

.....

Mr. Milind M. Patil Beedkar, Advocate for appellant
Mr. P.S. Paranjape, Advocate for R.No.1-i(a) to 1-1(d), 1-ii,
1-iv, 1-v-a to 1-v-d & 2-i to 2-iv
Mr. M.D. Narwadkar, Advocate for R.No.4(i) & 5

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CORAM : R. G. AVACHAT, J.

DATE : 3rd DECEMBER, 2021

PER COURT :

Heard. The challenge in this appeal is to the judgment and order dated 28/8/2019, passed by District Judge-2, Nanded in Regular Civil Appeal No.22/2001. By the impugned judgment and order, the judgment and decree passed by the trial Court in Special Civil Suit No.65/1976

came to be set aside, remanding the suit back to the trial Court, with a direction to record evidence in terms of order below Exhs.101 and 106 and decide the suit afresh.

2. On hearing the learned counsel for the parties herein, it was found that, it was a suit for possession of the agricultural land and house property, based on title. The respondent No.4 in the First Appeal was original defendant No.4. He passed away pending the appeal. His legal representatives were brought on record. The respondent No.5 in appeal before the first appellate Court was the subsequent purchaser. He was made a party pending the appeal. The respondent No.4 and 5 preferred application under Order 41 Rule 27 of the Code of Civil Procedure for production of additional evidence.

3. It appears that, it was the case of respondent No.4 in the suit itself that the subject matter of the suit was given to his predecessor-in-title under a Will executed by uncle of the plaintiffs. No evidence in proof of the Will was adduced before the trial Court. In appeal, therefore, applications Exhs.101 and 106 were preferred for production of additional evidence in the nature of documents and liberty

was sought to lead evidence in proof thereof. The first appellate Court, on appreciation of the submissions made before it, was pleased to remand the suit for recording of evidence in terms of applications Exhs.101 and 106, which have already been allowed by him.

4. Learned counsel for the appellant herein would submit that, the appellate Court ought not to have allowed those applications. The original defendant No.4 had an ample opportunity to lead evidence in that regard before the trial Court itself. The trial Court answered the Issue No.7, holding the defendant No.4 to have failed to prove his title to the suit land by virtue of a Will.

5. It, however, appears from Issue No.8 that, the plaintiff had also come with a case of cancellation of the Will. Be that as it may. The first appellate Court has rightly allowed the applications Exhs.101 and 106. Learned counsel for the appellant would also submit that the first appellate Court did not give findings on all the points framed in appeal.

6. The suit dates back to 1976. It being a very old suit, and the first appellate Court being the Court of facts and

law as well, ought to have allowed the parties to lead evidence before itself. To the extent of remanding the suit back to the trial Court for production of evidence in terms of applications Exhs.101 and 106, this Court is inclined to set aside the said order and direct the first appellate Court to record the evidence that may be adduced by the respondents No.4 and 5 in terms of applications Exhs.101 and 106. To that extent the other parties to the suit would have liberty to lead evidence in rebuttal. The examination-in-chief of the witnesses shall be on affidavit. The first appellate Court would do well to appoint a seasoned Advocate as a Commissioner to record evidence. Fees of the Commissioner shall be borne by the respondents No.4 and 5. During recording of evidence, if any question is objected to, the Commissioner is not expected to decide the said objection. He shall simply record it in question and answer form and submit the same to the first appellate Court. Since the appeal is very old, the first appellate Court is requested to decide the appeal at the earliest and preferably within a period of eight months from the date of receipt of copy of this order.

7. Record and proceedings be sent back to the

appellate Court immediately.

8. The appeal stands allowed in terms of the above order. Civil Applications are disposed of

**(R. G. AVACHAT)
JUDGE**

fmp/-