

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

**SECOND APPEAL NO. 451 OF 2018
WITH
CIVIL APPLICATION NO. 14319 OF 2018
IN SA/451/2018
WITH
CIVIL APPLICATION NO. 9361 OF 2021
IN SA/451/2018**

Arundas S/o Shivrao Kanegaonkar,]
Age : 79 Years, Occu. : Pensioner,]
R/o Anand Laxmi - 98, Gandhinagar,]
Padampura, Fire Brigade,]
Railway Station Road, Aurangabad.]

... Appellant.
(Orig. Defendant No.3.)

Versus

01. The State of Maharashtra,]
Through the Collector, Nanded.]

02. The Tahsildar, Tahsil Office,]
Nanded, Dist. Nanded]

(Orig.Deft. Nos.1 and 2)

03. Madhavrao S/o Abaji Patil,]
Age : 59 Years, Occu. : Agril.,]
R/o Wajegaon, Tq. & Dist. Nanded.]

04. Praveen S/o Omprakash Pokharna,]
Age : 37 Years, Occu. : Agril.,]
R/o New Mondha, Nanded,]
Tq. & Dist. Nanded.]

05. Sk. Abid S/o Khajamiyan,]
Age : 40 Years, Occu. : Agril.,]
R/o Peer Nagar, Nanded,]
Tq. & Dist. Nanded.]

06. Sk. Rashid S/o Mohd. Sab,]
Age : 40 Years, Occu. : Agril.,]
R/o Labour Colony, Nanded,]
Tq. & Dist. Nanded.]

07. Sk. Hyder Hussain S/o Sk. Pasha,]
 Age : 43 Years, Occu. : Agril.,]
 R/o Itwara, Mafco Road, Nanded,]
 Tq. & Dist. Nanded.]
08. Wasioddin S/o Rayajoddin Mujawar,]
 Age : 50 Years, Occu. : Agril.,]
 R/o Peer Nagar, Nanded,]
 Tq. & Dist. Nanded.]

... Respondents.

(Resp. Nos.3 to 8-Orig. Plaintiffs)

ALONG WITH

**SECOND APPEAL NO.50 OF 2018
 WITH
 CIVIL APPLICATION NO. 813 OF 2018
 IN SA/50/2018**

01. Shaikh Abid S/o Khajamiya,]
 Age : 40 Years, Occu. Agriculture,]
 R/o Peer Nagar, Nanded,]
 Tq. & Dist. Nanded.]
02. Shaikh Haidar Hussain S/o Shaikh Pasha,]
 Age : 50 Years, Occ. : Agri.,]
 R/o Mafco Nanded, Tq. & Dist. Nanded.]

... Appellants.

(Orig. Platfs. Nos.3 & 5)

Versus

01. The State of Maharashtra,]
 Through the Collector, Nanded.]
02. Tahsildar, Tahsil Office,]
 Nanded.]
03. Arundas S/o Shivrao Kanegaonkar,]
 Age – 73 Years, Occu – Pensioner,]
 Anant Laxmi – 98, Gandhinagar,]
 Padampura, Fire Brigade,]
 Railway Station, Aurangabad.]

Resp. Nos.1 to 3 are Orig.

Deft. Nos.1 to 3

- | | | | |
|-----|------------------------------------|---|----------------------------|
| 04. | Madhavrao S/o Abaji Patil, |] | |
| | Age : 53 Years, Occu - Agril. |] | |
| | R/o Wajegaon, Dist. Nanded. |] | |
| 05. | Praveen S/o Omprakash Pokharna, |] | |
| | Age : 31 years, Occu – Agril., |] | |
| | R/o New Mondha, Nanded |] | |
| 06. | Sk. Rashid S/o Mohd. Sab, |] | |
| | Age : 34 Years, Occu – Agril., |] | |
| | R/o Labour Colony, Nanded. |] | |
| 07. | Wasioddin S/o Rayajoddin Mujatwar, |] | Resp. Nos.4 to 7 are Orig. |
| | Age : 44 Years, Occu - Agril., |] | Plaintiff Nos.1, 2, 4 & 6. |
| | R/o Peernagar, Nanded. |] | ... Respondents. |

. . .

Mr. S. V. Adwant a/w Ms. N. B. Kamble, Advocate for Appellant in SA/451/2018 and
for Respondent No.3 in SA/50/2018.

Mr. N. T. Bhagat, A.G.P. for Respondent Nos.1 and 2 - State

Mr. G. R. Syed, Advocate for Appellants in SA/50/2018 and for Respondent Nos.3 to
8 in SA/451/2018.

. . .

CORAM : MANGESH S. PATIL, J.

DATED : 05 MAY 2022

ORDER :

1. Heard the learned advocate Mr. Adwant for the appellant in Second Appeal No. 451 of 2018, learned A.G.P. Mr. Bhagat, who appears for respondent nos.1 and 2 – State and also the learned advocate Mr. Syed, who appears for the respondent Nos.3 to 8 in that appeal.

2. Respondent Nos.3 to 8 had filed a suit arraying the respondent Nos.1 and 2 – State as defendant nos. 1 and 2 and the appellant as defendant no.3 seeking declaration of their title to the suit property and for perpetual injunction.

3. It appears that the appellant contested the suit by propounding a will of his natural mother Laxmibai and claimed to have received the suit property in bequest. The trial court *inter alia* framed Issue No.2-A regarding the will being propounded by the appellant and answered it in the affirmative, albeit by holding that the respondent nos.3 to 8 had failed to prove their title and possession over the suit property, it dismissed the suit.

4. Respondent Nos.1 and 2 – State preferred an appeal under section 96 of the Code of Civil Procedure (for short, “CPC”) only against the finding recorded by the trial court against issue No.2-A pertaining to the will being propounded by the appellant. By the judgment and order under challenge in the second appeal, the lower appellate court has allowed the appeal and has reversed the finding of the trial court in respect of issue No.2-A.

5. Second appeal was admitted on following substantial question of law :-

“(I) Whether the respondent nos.1 and 2 - State could have

preferred an appeal under section 96 of the Code of Civil Procedure against only a finding recorded by the trial court and whether the lower appellate court had jurisdiction to decide it under section 96 of the Code of Civil Procedure?”

6. Learned advocate for the appellant Mr. Adwant relies upon following decisions :-

- 1) *Smt. Ganga Bai V/s. Vijay Kumar & Ors.; (1974) 2 SCC 393,*
- 2) *Konda Lakshaman Babu Ji. V/s. The State of A.P. & Ors.; AIR 1977 AP 427,*
- 3) *Banarsi & Ors. V/s. Ram Phal; (2003) 9 SCC 606, and few others.*

He strenuously submits that the respondent Nos.1 and 2 – State had no right to prefer any appeal under section 96 of the CPC only against a finding to the issue No.2-A and the lower appellate court had no jurisdiction to sit in appeal in exercise of the powers under that provision. He would therefore submit that for this reason alone, apart from the merits, the second appeal deserves to be allowed and the impugned judgment and order is liable to be quashed and set aside.

7. Learned AGP supports the judgment and order and submits that the lower appellate court in paragraph no. 65 onwards has elaborately dealt with and has recorded an objective finding to demonstrate that the appellant was not able to establish the bequest.

8. Learned advocate Mr. Adwant would further submit that though the original plaintiffs i.e. respondent nos.3 to 8 had not preferred any appeal under section 96 of the CPC against the judgment and order of the trial court dismissing their suit, they are not entitled to prefer any appeal under section 100 of the CPC directly without there being any appeal under section 96 of the CPC. He would therefore submit that second appeal No.50 of 2018 preferred by original plaintiffs is not maintainable.

9. Learned advocate Mr. Syed who appears for the respondent Nos.3 to 8 – original plaintiffs, on instructions seeks leave to withdraw the second appeal No.50 of 2018 unconditionally.

10. The substantial question of law as formulated herein-above, in fact is no more *res integra*. In catena of judgments including the ones cited by the learned advocate Mr. Adwant, make it abundantly clear that no appeal under section 96 of the CPC would be maintainable against only a finding to an issue. Only a decree is susceptible to a challenge under the provision. There could be some orders against which a right to prefer an appeal is provided by a statute like section 104 read with Order XLIII of the CPC.

11. Admittedly, respondent Nos.1 and 2 who represent the State were the defendant Nos.1 and 2 and the appellant was the defendant No.3 against whom the respondents/original plaintiffs had sought a declaration of their title to the suit property and perpetual injunction. The suit was dismissed. As a result, no decree was passed against the respondent Nos.1 and 2 – State which could have made them entitled to prefer an appeal under section 96 of the CPC. It is quite evident that they were merely aggrieved by the finding recorded against issue no.2-A holding the appellant to have become owner on the basis of the bequest.

12. The merits of the reasoning given by the trial court as also by the lower appellate court on this issue apart, the finding to that issue had no direct bearing on the title being sought to be established by the original plaintiffs/defendant no.3 to 8. Even if he would have failed to prove his ownership and possession over the suit property, the findings to the issue Nos.1 and 2 would have been sufficient to dismiss the suit. In spite of such state of affairs, for the reasons best known to the persons at the helm of the affairs, a decision was taken to challenge the finding to issue No.2-A and accordingly respondent Nos.1 and 2 – State preferred the appeal under Section 96 of the CPC in which the impugned judgment and order has been passed.

13. As is observed herein-above, no right to prefer any appeal under section 96 of the CPC is available to a party only against the finding, when the substantive litigation has terminated in its favour. Though the issue regarding maintainability of the appeal does not seem to have been raked up before the lower appellate court; it was imperative for it to have borne in mind the limitations on its powers to be exercised under section 96 of the CPC.

14. For this reason, when the respondent Nos.1 and 2 State were not entitled to prefer any appeal under section 96 of the CPC and the lower appellate court had no jurisdiction to sit in appeal in exercise of the powers thereunder, I answer this substantial question in favour of the appellant.

15. Second appeal no. 451 of 2018 is allowed.

16. The impugned judgment and order of the lower appellate court is quashed and set aside.

17. Second appeal no. 50 of 2018 is dismissed as withdrawn.

18. All pending applications are disposed of.

(MANGESH S. PATIL, J.)

Tandale/-