

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 4503 OF 2018

Sau. Ratnabai Rambhau Tekade
Aged about 52 years, Occ. Agriculturist
and Household
R/o Old City, Gadge Nagar, Washim
Road, Akola, Tah. & Dist. Akola

...Petitioner

// VERSUS //

1. Dipak Shrikrushna Lone,
Aged about 28 Years, Occ.
Agriculturist
2. Bhagirathibai Wd/o Shrikrushna Lone,
Aged about 73 years, Occ. Household
Nos. 1 and 2 R/o Phule Nagar,
Shegaon, Tq. Shegaon, Dist. Buldhana
3. Sau. Kusum Dhanraj Turkhade,
Aged about 43 Years, Occ. Household
R/o Kapurstalni, Tq. Anjangaon Surjee
Dist. Amravati
4. Sau. Lata Nitin Dhake, Aged about 40
years, Occ. Household R/o Borakhedi,
Tq. Motala, Dist. Buldana
5. Sau. Surekha Shrirang Kawadkar, Aged
about 38 Years, Occ. Household R/o
Sinnar near Gawtha Vitthal Mandir,
Pune-Shirdi road, Tq. Sinnar, Dist.
Nashik
6. Sau. Vanita Rajeshwar Morkhada, Aged
about Occ. Nil R/o Dasala Tq.
Chikhali, Dist. Buldana
7. Ku. Sulbha Shrikrushna Lone Aged
about 18 years, Occ. Household R/o

Phule Nagar, Shegaon, Tq. Shegaon,
Dist. Buldana

8. Vijay Bhaurao Deshmukh Aged about
49 years, Occ. Agriculturist/Business
R/o Phule Nagar, Shegaon, Tq.
Shegaon, Dist. Buldana

9. Mahendra Punjabrao Kadam
(Deshmukh), Aged about 45 years,
Occ. Agriculturist R/o Dhotra, Tah.
Karanja Lad, Dist. Washim

... Respondents

Shri A.V.Bhide, Advocate for the petitioner.

Ms. Naina Dhoke, Advocate h/f Shri M.V.Rai, Advocate for the respondent
no. 1.

CORAM : ANIL S. KILOR, J.

DATED : 6th FEBRUARY, 2023.

ORAL JUDGMENT :

Heard. Rule. Rule made returnable forthwith by consent of
the parties.

2. Application moved by the petitioner Exh.34 under Order
XIV Rule 5 of the Code of Civil Procedure (in short referred as 'CPC')
for framing of additional issue came to be rejected vide order dated 6th
July, 2018, the same is under challenge in this writ petition.

3. In this matter, the suit was filed by the plaintiff/petition for
partition, separate possession and incidental reliefs wherein paragraph 9 it
was pleaded that the Will-deed dated 9th April, 1999 is illegal and
unauthorised.

4. Defendant no.1 filed his written statement and took a specific plea that as per the Will-deed dated 9th April, 1999 he become the owner of the suit property.

5. Learned trial Court framed the issue as regards Will which read thus :

Does plaintiff prove that Will executed by deceased Shrikrushna dated 9th April, 1999 is illegal ?

6. The plaintiff therefore, moved an application Exhibit 135 for framing of the additional issue to the following effect:

“Does the defendant no.1 prove that Shrikrushna Naru Lone has executed the legal and valid will-deed on 9th April, 1999 in favour of him ?”

7. The said application came to be rejected by the impugned order dated 6th July, 2018, on the ground that considering assertion of the plaintiff issue no.3 is framed as per the provisions of Evidence Act and therefore the application is not tenable.

8. Learned counsel for the petitioner submits that the application moved by the plaintiff under Order XIV Rule 5 of CPC is not for recasting the issue, but for framing of additional issue. It is submitted that unless the attesting witness is examined the Will cannot be proved and for that purpose, the burden will lie upon the defendant no.1 as he is

claiming ownership through the Will. He therefore submits that without considering the legal position, the learned trial Court has rejected the application.

9. On the other hand, Shri Naina Dhoke, learned counsel for the respondent supports the order and submits that the learned trial Court has rightly rejected the application.

10. It is a settled law that for proving the will attesting witness needs to be examined and further considering the fact that the application moved by the plaintiff was not for recasting the issue but for framing of the additional issue in light of the pleadings made by the defendant no.1 in paragraph 8 of the written statement that, he become owner to the suit property in pursuance of the Will-deed dated 9th April, 1999.

11. Thus, in addition to the issue no.3, I am of the opinion that the issue proposed by the plaintiff i.e. Does the defendant no.1 prove that Shrikrushna Naru Lone has executed the legal and valid Will-deed on 9th April, 1999 in favour of him, is necessary.

12. Considering the pleading of the defendant no.1, I have no hesitation to hold that the learned trial Court has committed error in rejecting the application Exhibit 135 filed by the petitioner. Accordingly, I pass the following order.

i. Writ petition is allowed;

ii. The impugned order dated 6th July, 2018 passed by the learned Civil Judge, Junior Division, Shegaon in Regular Civil Suit No. 54 of 2009 is hereby quashed and set aside and thereby application Exhibit 135 is allowed.

[ANIL S. KILOR, J.]

SACHINDANAND
K NAIR

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by
SACHINDANAND
K NAIR
Date: 2023.02.16
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