

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

Second Appeal No. 434 of 2019

Smt.Beena W/o Raju Mahajan

Vs.

Nitin Nilkanth Joglekar (since deceased thr.LRs)

Shubhlaxmi wd/o Nitin Joglekar and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr.U. Dastane, counsel for the appellant.

Mr.A.V.Khare, counsel for respondent Nos.1 to 3.

CORAM : ANIL S. KILOR, J.
DATED : 20.01.2023.

Heard.

2. In this second appeal, the judgment and decree dated 14/06/2019 passed by the *Ad hoc* District Judge-2, Nagpur in Regular Civil Appeal No.618 of 2012, confirming the judgment and decree dated 28/02/2001 in Civil Suit No.713 of 1999 passed by the learned 5th Joint Civil Judge, Senior Division, Nagpur, dismissing the suit of appellant for possession and specific performance, is under challenge.

3. I have heard the learned counsel for the respective parties.

4. This Court vide order dated 01/10/2019 framed the following substantial questions of law:

- “i) Whether the appellate Court was justified in dismissing the appeal and confirming the order passed by the trial Court in the present case without deciding application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 filed by the appellant whereby order dated 24.01.1984 passed by the 2nd Extra Assistant Judge, Nagpur, in the context of adoption and a registered will deed dated 08.01.1987 was sought to be placed on record, when there was specific order permitting production of the said documents and decision on such application had been specifically deferred to the stage of final hearing of the appeal ?*
- ii) Whether the appellate Court ought to have exercised jurisdiction under Order 41 Rule 27 (b) of the C.P.C. to allow the aforesaid two documents to be brought on record, considering that they form the basis of the claim raised by the appellant?”*

5. In this case the learned counsel for the respondents fairly admits that the application bearing No.3266 of 2004 moved under Order XLI Rule 27 of the Code of Civil Procedure (CPC) was not decided by the lower Appellate Court.

6. It is a settled law that application under Order XLI Rule 27 of the CPC should be decided at the time of final hearing and in this case, it seems that inadvertently no order was passed on the said application.

7. The appeal was earlier filed in the High Court and this Court had observed vide order dated 12/07/2006 that the said application will be heard at the time of final disposal. However, because of enhancement of peculiar jurisdiction, the matter was transferred to the *Ad hoc* District Judge-2, Nagpur and before the *Ad hoc* District Judge-2 another application under Order XLI Rule 27 of the CPC was moved and the same was decided and in that respect findings were recorded in para-15 of the impugned judgment and decree. But, the application under Order XLI Rule 27 of the CPC, bearing No.3266 of 2004 was not decided by the learned lower Appellate Court.

8. In the circumstances, the matter needs to be remanded back to the lower Appellate Court for decision on the Application No.3266 of 2004 under Order XLI Rule 27 of the CPC, accordingly, I answered the first substantial question of law in affirmative. Further as this Court has arrived at the conclusion to

remand the matter to decide the Civil Application No.3266 of 2004 under Order XLI Rule 17 of the CPC and then the appeal shall be decided afresh, there no need to answer the second substantial question of law and the same is kept open. Accordingly, I pass the following order.

ORDER

- (1) The second appeal is partly allowed.
- (2) The judgment and decree dated 14/06/2019 passed by the Ad hoc District Judge-2, Nagpur in Regular Civil Appeal No.618 of 2012 is hereby set aside and the matter is remanded back for a fresh decision after deciding the Civil Application No.3266 of 2004 filed under Order XLI Rule 17 of the CPC.
- (3) Needless to mention here that the learned lower Appellate Court shall decide the Civil Application No.3266 of 2004 after giving sufficient opportunity to both the parties, including the opportunity to file reply by the respondent.

[ANIL S. KILOR, J.]