



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

SECOND APPEAL NO. 523 OF 2023
WITH
CIVIL APPLICATION NO. 12638 OF 2023
AND
SECOND APPEAL NO. 524 OF 2023
WITH
CIVIL APPLICATION NO. 12639 OF 2023

Prabhakar Shankar Thore,
Age : 78 Years, Occ. Retired & Agriculture,
R/o. Plot No. 14, Abhiyanta nagar,
Kamatwade, Nasik.

.. Appellant
(Orig. Def. No.1)

VERSUS

Leelabai Shridhar Gite,
Age : 64 Years, Occ. Household,
R/o. Hatgaon, Tq. Chalisgaon,
Dist. Jalgaon.

Respondent
(Orig. Plaintiff)

....

Shri. Sanket S. Kulkarni, Advocate for the Appellant
Shri. Ramchandra S. Patil, Advocate for the Respondent.

...

CORAM : SANDIPKUMAR C. MORE, J.
DATED : 23rd AUGUST 2024

1. Heard rival submissions on admission.
2. The present Second Appeals are preferred by the appellant i.e. the original defendant No.1 in both the civil suits namely Regular Civil Suit No. 22 of 2014 and Regular Civil Suit No. 131 of 2014 filed by the present respondent/plaintiff for challenging the common judgment in Regular Civil Appeal Nos. 289 and 288 of 2017 passed by the learned First

Appellate Court i.e. the learned District Judge-6, Jalgaon. Under the impugned common judgment, the learned First Appellate Court has confirmed the common judgment and decree passed by the learned trial Court i.e. learned Civil Judge, Junior Division, Chalisgaon in the aforesaid civil suits, whereby respondent/plaintiff succeeded in getting her 1/3rd share in the suit property and declaring the Will Deed dated 28.02.2006 at (Exh.53) being void and not binding upon her.

The brief facts are as under :-

3. The plaintiff Leelabai, who is sister of the present appellant, filed Regular Civil Suit No. 22 of 2014 for partition and separate possession of the suit properties mentioned therein. Thereafter, the plaintiff again filed another suit bearing Regular Civil Suit No. 131 of 2014 in the same Court for seeking a declaration that Will Deed dated 28.02.2006 executed by her mother Parvatabai Shankar Thore in favour of the present appellant, is illegal and not binding upon her. The appellant had specifically pleaded that two separate suits for the same cause are not maintainable in view of Order II Rule 2 of the Code of Civil Procedure, but the learned trial Court clubbed both the suits and disposed of the same under common judgment and decree dated 27.07.2017. Then the appellant had preferred two separate civil appeals bearing RCA

No. 289 of 2017 and 288 of 2017 for challenging the said common judgment, before the learned First Appellate Court. However, the learned First Appellate Court, without considering Order II Rule 2 of the Code of Civil Procedure, confirmed the common judgment passed by the learned trial Court. As such, these two Second Appeals are filed by the appellant/defendant No.1 against the concurrent findings of both the learned Courts below.

4. The learned counsel for the appellant strongly submitted that the Will was executed long before the filing of first suit by the respondent/plaintiff Leelabai in the year 2014 and despite the same, plaintiff did not seek relief about the said Will in her first suit. She had also not sought any leave under Order II Rule 2 of the Code of Civil Procedure for challenging the Will later on. He pointed out that even in subsequent suit for challenging the said Will i.e. RCS No. 131 of 2014, the plaintiff did not obtain leave of the Court. Thus, in short, when at the time of filing first suit, the plaintiff was entitled for seeking relief in respect of the Will of the suit property, did not claim that relief and therefore, her second suit for that purpose was not maintainable. Thus, the learned counsel for the appellant submits that the substantial question of law involved in this appeal is, whether the subsequent suit for declaration of Will

being illegal and not binding on the plaintiff is maintainable in view of Order II Rule 2 of the Code of Civil Procedure ?

5. On the contrary, the learned counsel for the respondent/plaintiff submits that at the time of filing first suit, the plaintiff was not aware about the Will executed by Parvatabai in favour of present appellant and she became aware of the same only after filing defence/written statement by the appellant in her first suit. He further submitted that as soon as plaintiff got knowledge about the Will Deed in question, she filed second suit for declaring the same as void-ab-initio. He pointed out that both the learned Courts have considered these two suits jointly and passed common judgment and order in the same. As such, the learned counsel for the respondent/plaintiff submits that no perversity is there in the impugned judgments and prayed for dismissal of Second Appeals at the admission stage.

6. It is significant to note that while issuing notice to the respondent before admission, this Court under order dated 06.12.2023 had observed that the respondent/plaintiff became aware about the Will Deed dated 28.02.2006 executed by her mother in favour of the present appellant, when the present appellant filed written statement in her first suit for partition

and therefore, by taking it as another cause of action she filed subsequent suit for challenging the said Will Deed (Exh.53). Admittedly, as per the observation of Hon'ble Supreme Court in the case of **Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited (2013) 1 Supreme Court Case 625.** subsequent suit is not permissible when cause of action in the subsequent suit is same as in the first suit, unless leave of the Court is obtained for filing subsequent suit for omitted relief. Admittedly, under Order II Rule 2 of the Code of Civil procedure, when the plaintiff is entitled for additional relief, than the relief claimed in his first suit, then he must seek leave to file subsequent suit claiming additional relief. Further, it is not in dispute that no such leave has been obtained by the respondent/plaintiff in her both the suits. However, it is extremely important to note that the respondent/plaintiff has come with the case that at the time of filing first suit, she was not at all aware about the disputed Will and only from the defence of appellant in her first suit, she got knowledge of execution of the said disputed Will and therefore, filed subsequent suit immediately. Thus, it appears that the respondent/plaintiff was not aware of the fact that a relief of claiming declaration in respect of disputed Will was available to her at the time of filing first suit. Therefore,

the question of obtaining leave under Order II Rule 2 of the Code of Civil Procedure never arose. Therefore, it cannot be said that subsequent suit was barred under Order II Rule 2 of the Code of Civil Procedure and not maintainable. Moreover the learned trial Court has already decided both the suits by common judgment.

7. So far as relationship between the parties is concerned, there is no dispute. Further, in view of such admitted relationship between the parties, the respondent/plaintiff is definitely having share in the ancestral suit property as the revenue record clearly indicated such nature of the suit property. Further, both the learned Courts below have concurrently held that the Will in dispute was clouded with doubtful circumstances and it is significant to note that this observation has come on the basis of evidence on record. Therefore, considering all these facts, no substantial question of law as raised by the learned counsel for the appellant, appears to be involved in these appeals and therefore, both the appeals stand dismissed at admission stage along with the pending civil applications and accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)

8. After pronouncement of the order, the learned counsel for the appellant submits that the execution proceedings are going on and therefore, dismissal order needs to be stayed since it is to be challenged before the Superior Court. In view of the same, the effect of this order is stayed by further period of four weeks.

(SANDIPKUMAR C. MORE, J.)

Y.S.Kulkarni