

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 265 OF 2021**

Jayram Lakhma Gaikar and Ors.

...Appellants**(Orig. Defendants)****V/s.**

Ashok Ramchandra Gaikar

...Respondent**(Orig. Plaintiff)**

Mr. Satish S. Raut, for the Appellants.*None for the Respondent.*

CORAM : SANDEEP V. MARNE, J.**DATED : 16 February 2024.****P.C. :**

1. By this Appeal, the Appellants challenge the Judgment and Order dated 30 November 2019 passed by the District Judge-1, Raigad-Alibag in Regular Civil Appeal No.108 of 2014 by which the Judgment and Decree passed by the Civil Judge Senior Division, Alibag in Special Civil Suit No.20 of 2014 is partly set aside. The first Appellate Court has decreed the suit and granted probate of Will dated 26 June 1990.

2. The Second Appeal was admitted by this Court on 7 February 2023 by formulating following substantial question of law :

Whether the Regular Civil Appeal No.108 of 2014 filed in the Court of District Judge-1, Raigad-Alibag is maintainable in view of the decision of Division Bench of this Court in **Nola Jonathan Ranbhise vs. The Union of India & Ors. ?**

3. The Respondent appeared in the Appeal and is represented by an Advocate. However, the Advocate for the Respondent has consistently remained absent when the Appeal was called out for hearing. Therefore, on 14 February 2024 this Court granted last chance for appearance on behalf of the Advocate for the Respondent while listing the Appeal today. Today again, none appears for the Respondent. The Court is therefore left with no alternative but to proceed with the hearing of the Appeal in absence of any representation for the Respondent.

4. The Appeal involves a narrow question of law about maintainability of the Appeal before the District Court against the order passed by the Trial Court refusing to grant probate by dismissing the suit. The issue is no longer *res-integra* and is covered by the judgment of Division Bench of this Court in **Nola Jonathan Ranbhise vs. The Union of India & Ors.** (2014) 2 AIR Bom R. 465 in which this Court has held in para-50(a) as under :

50(a). It is hereby declared that sub-sections (2) and (3) of Section 28A of the Bombay Civil Courts Act, 1869 are inconsistent with and

repugnant to the provisions of Section 299 of the Indian Succession Act, 1925 and consequently the same stand impliedly repealed. Accordingly, every order made by the District Judge under the Indian Succession Act, 1925 or every order made by a Civil Judge invested with the powers of a District Judge or a District Court, as the case may be, under the Indian Succession Act, 1925 in terms of sub-section (1) of Section 28A of the Bombay Civil Courts Act, 1869 shall be subject to appeal to the High Court in accordance with the provisions of Code of Civil Procedure, 1908, applicable to appeals.”

5. Thus, as per the ratio laid of the judgment in ***Nola Jonathan Ranbhise*** (supra), every order made by a Civil Judge invested with the powers of District Judge under the Indian Succession Act, 1925 would be subject to Appeal to the High Court and the order passed by a Civil Judge passed under the provisions of Indian Succession Act, 1925 shall not be appealable before the District Judge. In that view of the matter, the Order passed by the first Appellate Court would be without jurisdiction.

6. Accordingly, the Judgment and Order dated 30 November 2019 passed by the District Judge-1, Raigad-Alibag in Regular Civil Appeal No.108 of 2014 is set aside. The Plaintiff/Respondent shall however be at liberty to institute an Appeal before this Court for challenging the Judgment and Decree dated 28 February 2014 passed in Special Civil Suit No.20 of 2014. The substantial question of law formulated by this Court is answered accordingly.

7. As directed by this Court in *Nola Jonathan Ranbhise*, the Plaintiff/Respondent would be at liberty to file Appeal before the District Court within 30 days. In order to enable the Plaintiff/Respondent to do the same and considering the fact that Respondent is not being represented today, the Counsel for the Appellant to serve the present order by Registered Post A.D. on the Respondent/Plaintiff after its uploading on the High Court Website.

8. The Appeal is **partly allowed** to the above extent. There shall be no order as to costs.

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SANDEEP V. MARNE, J.