



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Appeal Against Order No. 31 of 2022

Gulabrao Sitaram Kumbhare
Aged about 72 years
Occ : Retired Agriculturist,
R/o Shegaon (Bu.), Tah. Warora
Dist. Chandrapur.

... Appellant

- Versus -

- (1) Anandrao Sitaram Kumbhare
Aged about 67 years, occ : service
R/o 7/B, Tapovan Complex,
Somalwada, Nagpur.
- (2) Vinod Sitaram Kumbhare
Aged about 60 years, occ : service
R/o Plot no. 3, Chintamani Nagri,
Onkar Nagar, Nagpur.
Tah. And Dist. Nagpur.
- (3) Shashikala Anandrao Dhakate
Aged about 60 years, occ : nil
R/o Shivaji Nagar, Chandrapur.
- (4) Babinanda Marotrao Barapatre
Aged about 53 years, occ : nil
R/o C/o M T. Chakole
Plot no. 48, Gedam L/o,
Mangalwari Bazar, Near MSEB
Opp. To VIP Co., Hingna Road
Nagpur
New Address:
Kamla Nehru Ward,
Near Ghorpade's Residence
Warora.

(5) Sundarabai Sitaram Kumbhare
Aged about 75 years, occ : nil
R/o 7/B, Tapovan Complex,
Somalwada, Nagpur.

... Respondents

Mr. Deoul Pathak, Advocate for the appellant
Ms. K. E. Meshram, Advocate h/f Mr. M. V. Acharya, Advocate for
respondent no. 1

CORAM : ANIL L. PANSARE, J.

Date : 21-03-2024

ORAL JUDGMENT

Heard.

2. Admit. Heard finally with consent of learned counsel
appearing for the parties.

3. The challenge is to the order dated 18-7-2022 passed below
Exhibit 1 by the District Judge-1, Warora in Regular Civil Appeal
No. 3/2019. The appellate Court found that Will dated 6-1-2005 filed
by the respondents – defendants has been not proved as the respondent
chose to not enter the witness box nor did they examine the attesting
witness. The appellate Court held that unless the Will is proved by the
beneficiary i.e. respondents, the finding regarding its genuineness as
well as the mental status of executant cannot be decided. This order
has been passed *suo moto*.

4. Learned counsel for the appellant contends that such power is not available with the first appellate Court. Learned counsel for the appellant has no grievance, if the order is set aside.

5. I have, with the assistance of learned counsel for the appellant, gone through the relevant provisions of the Code of Civil Procedure, 1908 (for short 'Code') which includes provisions under Order 41. Rule 25 of Order 41 of the Code provides that the appellate Court may frame issue and refer them to trial Court whose decree has been challenged. In the present case, the appellate Court has not framed any issue but was of the view that Will ought to have been proved.

6. Learned counsel for the appellant has invited my attention to the issues formulated by the trial Court and findings given against the issues which read thus :

Sr. No.	Issues	Findings
1	Whether plaintiff proves that defendant no. 1 forged Will Deed dated 06.01.2005 ?	<u>No</u>
2	Whether plaintiff proves that defendant no. 1 was not mentally fit to execute Will Deed dtd. 06.01.2005 ?	<u>No</u>
3	Whether the counter claim agricultural land is	<u>Yes</u>

	partitioned during life time of Sitaram Kumbhare ?	
4	Whether the plaintiff is entitled to declaration as prayed ?	<u>No</u>
5	Whether the plaintiff is entitled to partition in the suit house ? If yes, what would be shares of parties ?	<u>No</u>
6	Whether the defendant no. 4 is entitled to partition in the counter claim agricultural land ? If yes, what would be shares of parties ?	<u>No</u>
7	What order and decree	<u>No</u>

7. As could be seen, the trial Court has found that the appellant – plaintiff has failed to prove that Will under question was forged and that respondent was mentally fit to execute the Will.

8. The appellate Court must be aware of well settled principles of law that burden of proving Will is upon propounder of Will. In the present case, propounder is respondent. The appellant – plaintiff might have failed to prove that Will under question has been forged as claimed by him. However, the burden to prove that executant was in fit state of mind or that the Will is genuine is upon the propounder. Paragraph no. 19 of the judgment of the trial Court indicates that none of the defendants/respondents led any evidence in support of their pleadings. Thus, the respondents have chosen to not

lead evidence to prove the Will.

9. It is not the case before the first appellate Court that the respondents were either prevented from leading evidence or were not given an opportunity to lead evidence in support of their case. In such circumstances, without formulating issue as required under Rule 25 of Order 41 of the Code, the appellate Court could not have taken *suo moto* cognizance of a fact which it is not empowered to. The order is, therefore, unsustainable in law. Hence, following order.

ORDER

- (i) The appeal is allowed.
- (ii) Order dated 18-7-2022 passed by the District Judge-1, Warora below Exhibit 1 in Regular Civil Appeal No. 3/2019 is quashed and set aside.
- (iii) The appellate Court shall proceed to hear appeal in accordance with law.

(Anil L. Pansare, J.)