



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

APPEAL AGAINST ORDER NO.03 OF 2019

(Shrikrushna Champatrao Dharmik and others Vs. Maroti Govindrao Parate (dead)
thr. LR's and others)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. K. S. Narwade, Advocate for Appellants.
Mr. A. P. Kalmegh, Advocate for Respondent Nos.1(a) to 1(d) and 2.

CORAM: R. M. JOSHI, J.

DATE: 2nd JULY, 2025.

1. This is a peculiar case wherein Regular Civil Suit No.54/2009, the original plaintiff during the course of the trial practically admits the photo-copy of the Will produced on record by the defendants to be the Will of the deceased. As per record, this Will was sought to be proved before the learned trial Court and the witness was examined, statement is recorded by the Counsel for the plaintiff for admitting the said document for its exhibition. In the light of these facts and with exhibition of the said document the trial proceeded further.

2. However, while passing judgment and decree the learned trial Court has held that the defendants have failed to prove the Will of the deceased. Being faced with such peculiar situation, an application came to be moved under Order 41 Rule 27 of the Code of Civil Procedure for leading additional evidence in the appeal preferred against the

judgment and decree of the trial Court. While considering the said application, the appellate court remanded the suit back to the learned trial Court for decision afresh permission was granted for production of the original Will of the deceased with liberty to frame additional issue if necessary. Plaintiff being aggrieved by this order has preferred this appeal under Order XLII of the Code of Civil Procedure.

3. By order dated 12.09.2024, following substantial question of law was framed by this Court.

Whether the appellate Court was justified in remanding the matter before the trial Court after allowing the application of the respondents for placing the original will-deed and to adduce evidence in support of the said will, despite the fact that Issue No.7 giving burden on the shoulder of the respondents to prove the will, was framed by the trial Court and the original defendant No.1 did not examine the attesting witnesses of the will?

Learned Counsels were heard on the said question of law.

4. Counsel for the appellant/original plaintiff contends that in view of the provisions of Section 68 of the Evidence Act, it is duty of the person who propounds the Will to prove the same by examining at least one of the attesting witnesses. Without such examination of witness the Will cannot be said to be proved. To support this submission reliance is placed on the judgment of the Hon'ble Supreme Court in case of ***Meena Pradhan and others v. Kamla***

Pradhan and another (2023) 9 SCC 734. He drew attention of the Court to the judgment of the Hon'ble Supreme Court in case of ***Union of India v. Ibrahim Uddin and another (2012) 8 SCC 148*** more particularly by referring to paragraphs 37 to 40 to state that the party or his inability to understand the legal issues involved or the wrong advice of the pleader or negligence of the pleader etc. will not become a ground for admitting the evidence in appeal. In so far as the order passed by the appellate court of remand, he opposes the said order on the ground unless the case is covered by Rule 23, Rule 23-A or Rule 25, the question of there being jurisdiction with the Appellate Court to remand the suit for decision afresh does not arise. To support this submission he has placed reliance on judgment in the case of ***Syed Rahimunnisa v. Malan Bi (dead) by legal representatives and another (2016) 10 SCC 315***. Finally it is argued that unless the requirement as contemplated by Order 41, Rule 27 of the CPC are satisfied, question of permitting the party to lead additional evidence would not arise and on these counts order impugned is not sustainable in law.

5. Counsel for the respondents/original defendants – appellants before the first Appellate Court supported impugned order.

6. There is no dispute about the fact that the defendants propounded the execution of Will of the deceased. In order to substantiate the same, the photo-copy of the Will was placed on record. Notes of evidence brought

before this Court for its perusal indicate that the Counsel for the plaintiff has admitted the said document and recorded no objection for exhibiting the same. Pertinently while giving consent, it was not subject to not admitting contents of the document. It is for the first time before this Court it is sought to be argued on behalf of the plaintiff/appellant that the contents of the documents are in dispute. Since this was not specific case sought to be made out before the learned trial Court nor it is not open for appellants/plaintiffs to claim so now.

7. Needless to say that, consequence of this has resulted into exhibition of the document and giving understanding to the defendant that the document has been proved. Even during the cross-examination nothing was brought on record in order to indicate that the said document is sought to be disputed by the plaintiff either in respect of its execution or contents thereof.

8. In spite of no such issue being raised with regard to the genuineness or contents of the document, learned trial Court while deciding the suit has decided it against the defendant by holding that the document has not been proved in accordance with law.

9. In such circumstances it could be safely said that there was due diligence on the part of the defendant to produce the document may be a photo-copy on record. The order passed by the Court of exhibiting the document on admission of the plaintiff has led to the situation that the

defendant was not required to produce the original on record. The said stage arose after trial Court held that Will is not proved. Immediately after getting knowledge that for want of original on record and its proof the suit has been held against him, he filed application before the Appellate Court under Order 41, Rule 27 of the CPC. No more due diligence is required to be shown by the party than the shown by the respondent herein. Thus this case is duly covered under the said provision for permitting leading of additional evidence.

10. There is no dispute about the proposition of law that the document more particularly Will is required to be proved by examining the at least one attesting witness. The question comes before for consideration of this Court is that whether it is permissible for any party to claim that the document has not been proved after the same has been admitted before the Court of law. A candid answer hereto has to be in negative. The basic principle of proof of any document starts with the objection to the said document by other side. One genuineness of the document has been admitted, and contents are not disputed during trial to say in final order without notice that the document has not been proved has resulted in denying opportunity of hearing and which has certainly led to miscarriage of justice.

11. As far as the order of remand is concerned, it cannot be said that the Appellate Court is not vested with the jurisdiction to remand the case. Order 41 Rule 24 contemplates that whenever there is sufficient evidence on

record the Appellate Court may determine the case finally. Herein this case the learned trial Court has refused to accept the said evidence in the final judgment. In the peculiar facts of the case it cannot be expected from the defendant to try to convince the Appellate Court on the very same document and to run a risk of rejection thereof. Instead, he is seeking original Will to be produced on record and to be proved in accordance with law.

12. A specific query was made to the learned Counsel for the appellant as to whether he admits the said original document and if it is so then there is no question of remanding the matter back to the learned trial Court for fresh decision as the same would not be required to be proved by leading evidence. Learned Counsel for the appellant has not admitted the same for obvious reason.

13. Now question arises as to when there was no sufficient evidence before the Appellate Court was it is possible for the Appellate Court to decide the said appeal in absence of the evidence. It is pertinent to note that passing of the judgment and decree by the learned trial Court essentially is based upon the finding that the defendants have failed to prove the Will executed by the defendant. If outcome of the suit depends upon the said finding, there would be no other option for the Appellate Court but to call upon the Trial Court to decide the issue afresh, as recording finding of fact on the issue for the first time would lead to deny right of first appeal to the aggrieved party on such findings.

14. In the facts of the case and for reasons recorded above, there is no merit in the appeal. The question of law as framed is answered in affirmative.

15. Appeal stands dismissed.

(R. M. JOSHI, J.)

NSN