

(2007) 02 MP CK 0053
In the Madhya Pradesh High Court

Basantilal (dead) through L.Rs.	Vs	APPELLANT
Smt. Shusheeladevi and Others		RESPONDENT

Date of Decision : 09-02-2007

Acts Referred:

Citation : (2007) 3 MPLJ 296

Hon'ble Judges : Brij Mohan Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Brij Mohan Gupta, J.

Comparative status of the parties:

Names In the Appeal In the original suit

Smt. Susheela Devi Respondent No. 1 Plaintiff No. 1 Smt. Anita Respondent No. 2 Plaintiff No. 2 Smt. Meena Respondent No. 3 Plaintiff No. 3 Basantilal (dead) Appellant Defendant No. 1 through L.Rs. Marobai Respondent No. 4 Defendant No. 3 Kanchanbai (dead) Respondent No. 5 Defendant No. 2

For sake of convenience, the parties will be referred to as per their status in the original suit.

The instant first appeal has been filed by defendant No. 1 Basantilal (since dead now through L.Rs.) impugning the judgment and preliminar decree dated 22-12-94 passed in favour of plaintiffs by Second Additional District Judge, Guna in Civil Suit No. 4-A/94.

The facts in brief are, that the aforementioned suit was filed on 1st August, 1986 by the plaintiffs Smt. Susheela Devi, Anita and Meena. Anita and Meena being minors, suit was filed on behalf of them by plaintiff No. 1 Susheela Devi being their mother as guardian. Undisputedly, the plaintiffs are the widow and daughters of deceased Gendalal Sahu, who was the brother of deceased

defendant No. 1 Basantilal. Kanchanbai was the mother of Gendalal and Basantilal and Marobai is the daughter of Kanchanbai. Kanchanbai was defendant No. 2 in original suit. By mistake, she could not be arrayed as respondent in this appeal. When during arguments, the attention of appellant was drawn, by way of amendment, she has been arrayed as above. It has been alleged in the suit that the disputed house which is situated in Ashok Nagar Town, the rough sketch of the same has been enclosed with the plaint, plaintiffs are having 1/3rd share. This house was ancestral property of Puran @ Punna, who was the father of Basantilal and Gendalal. Puran was original resident of in Village Magrana Tehsil, Guna. He was well to do person of the village, having his own house and agricultural land. On account of a dispute with some persons of the village, he left the village after disposing of his property and settled at Ashok Nagar, where he purchased a plot out of the receipts of the aforementioned ancestral property and constructed a kachha house there on (hereinafter referred to as disputed house). Plaintiffs are also residing in this disputed house. In the year 1980, the husband of plaintiff Susheela Devi died. After some time when she went to her parental home for rakhi festival then defendant No. 1 Basantilal, behind her back, got executed one Will dated 13th July, 1982 of the disputed house in his favour from Puran. At that time Puran was sick and suffering from paralysis also. He was about 85 years of age and was not mentally sound. It has also been alleged that her necklace of two tolas gold was also kept by defendant Basantilal. When plaintiff Shusheelabai returned from her parental home, she came to know about the Will. She obtained certified copy and filed this suit for declaration of her 1/3rd share in the disputed house, for partition of the same and claimed the possession of her share as per the partition. Relief of permanent injunction has also been claimed, that till disposal of the suit, defendant No. 1 Basantilal be restrained from dispossessing them from the disputed house and he be directed to return her necklace.

Joint written statement was filed on behalf of Basantilal and his mother Kanchanbai, countering of the allegations of the plaintiff with regard to the status of the disputed house as its being ancestral and of joint family property and also the claim of 1/3rd share of plaintiffs. It has also been mentioned in the written statement that at the time of the execution of Will, the testator Puran was competent to execute the Will and was not sick. He was of sound mind and was the sole owner of the house, as the disputed house was his self acquired property. The claim of the plaintiffs about two tolas of golden necklace has also been countered in the written statement.

Marobai, defendant No. 3 despite service, did not appear in the Court and did not file any written statement hence, ex parte order was passed against her on 16-8-04. Here, in this appeal, her service was dispensed with on the application of appellant vide order dated 30-8-06.

The learned Judge after concluding the trial, has come to the conclusion that the disputed house was purchased from the same amount which was received by

Puran out of the sale of his ancestral property situated at Magrana, hence the status of this disputed house is that of joint property in which plaintiffs are having 1/3rd share. It is also concluded that the disputed Will is not the actual Will of the deceased Puran nor it was executed by his free Will and also that he was not entitled to disinherit the plaintiffs. Hence this appeal.

During the course of arguments, Shri T.C. Singhal, the learned Counsel appearing on behalf of the appellants, has submitted that it is nowhere averred, stated or proved by the plaintiff that the disputed house was purchased/ constructed by the same amount which was the consideration received by the deceased Puran after selling the property at the Magrana village. In fact, the house is self acquired property of Puran. He was the owner of the house and being the owner, he was rightful to execute the Will in favour of one of his sons.

Countering the contentions, Shri Rathi, while supporting the impugned judgment, has argued that the approach of the Court below is justified, hence the appeal ought to be dismissed.

On perusal of the pleadings of the parties as well as pressed by them during arguments, the following three main questions are to be decided for the just decision of this appeal:

- (1) Whether, the disputed house has been purchased/constructed out of the sale consideration of the ancestral property, if any, situated at Village Magrana or whether the disputed house is self acquired property of Puran ?
- (2) Whether, Puran was rightful and mentally/physically competent to execute the disputed Will in favour of one of his sons.
- (3) Whether the suit is barred by time ?

10-A. It is specifically alleged by the plaintiff in Para 7 of the plaint that Puran was resident of Village Magrana where one big ancestral house was situated and he was well to do person. It is also mentioned that after selling that property, Puran came to Ashoknagar and purchased the plot of disputed house out of that sale proceeds. It was purchased within Rs. 400 to 500/- and thereafter the house was constructed. On the contrary it is alleged in Paragraphs 7 and 8 of the written statement that there was no ancestral property owned by deceased Puran. However, it is admitted in the written statement that a plot on which the disputed house is situated was purchased but the same was purchased out of the earning through labour by deceased Puran. In support of her pleadings, witness Susheela Devi (P.W. 1) has stated that after selling the ancestral property situated at Magrana, Puran came to Ashoknagar and purchased one house out of the sale proceeds received. She further states in Paragraph 4 that this knowledge was given to her by her father-in-law Puran himself. Witness Phoolchand, who is the father of the plaintiff Susheelabai, has also stated that one house of Magrana, owned by deceased Puran, was shown to him by Puran during his life time. Although there is no admission by the defendants in their written

statement about ancestral house at Magrana yet it is admitted by defendant Basantilal (D.W. 1) in Para No. 5 in the words:

5- --- xzke exjkuk esa okinknksa dk edku ?k ftls esjs firk us csp fn;k ?k A tc v? ksduxj vk, ?s A rc esjs firk us xzke exjkuk es ,d edku 500 # dk cspk ?k vkSj nwljh edku 1000 # es cspk ?k ----

He further states in Para 7 that:

7- --- ?kg edku okinknks ds ?s vkSj dPps fe?h ds cus gq, ?s ----

However, he denied this fact in Para 8 that out of the sale proceeds received by Puran from Magrana the disputed house was purchased. But this statement of defendant Basantilal appears to be false on the ground that his witness Banshilal CD.W. 3) in Para 2 speaks against it that:

2- --- xzke exjkuk es iqUuk dh tehu tk;nkn iqLrsuh ?h A iqUuk viuh iqLrsuh tehu tk;nkn ysdj v?ksduxj vk, ?s A iqUuk exjkuk es tks laifr cspdj vk;k ?k mlh laifr ls v?ksduxj esa edku cuok;k ?k A ----

The disputed house has also not been mentioned in the disputed Will Exh. P-1, as the self acquired property of the testator deceased Puran. Thus, even from the statements of the defendant and his witnesses, the case of the plaintiff becomes proved that the disputed house has been purchased/constructed out of the sale proceeds received by deceased Puran after selling his ancestral property situated at Magrana. As such, in my considered opinion, this approach of the learned Judge in the impugned judgment deserves to be sustained.

10-B. Undisputedly parties are Hindus. As per the relevant provisions of Hindu Law, Puran who received ancestral property, was having only two sons, Gendalal and Basantilal. All these three were the co-parceners, having equal share in the ancestral property. As proved, the disputed house is the outcome of the sale receipts of the ancestral property. The plaintiffs being heirs of deceased Gendalal are having 1/3rd share. Hence, there appears no irregularity or illegality in this approach of the learned Judge in the impugned judgment.

11-A. The execution and existence of Will Exh. P-1 is not disputed that it was executed in absence of the plaintiffs, who are also having shares in the disputed house. It has been pleaded by the plaintiff that the Will was got executed by defendant Basantilal from his father, when he was not physically and mentally fit. On perusal of the Will Exh. P-1, it appears that although it is averred in the Will that the plaintiffs are the widow and daughters of his predeceased son Gendalal and the existence of his daughter Marobai as alive, but they will not get anything from the house. Neither any property has been bequeathed to these heirs nor any reason has been mentioned as to why these heirs are disinherited. This is very important fact which creates doubt on the Will about execution of the same in full senses of the testator and also attacks at the validity of the Will. This view gets support from the observations of the Apex Court in the following judgments:

(1) Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, .

(2) Ram Piari Vs. Bhagwant and others, .

11-B. It is specifically averred in the plaint that at the time of execution of the sale deed, the testator deceased Puran was brought to the office of the Registrar on a Thela. He was of 85 years of age, was not well, was suffering from paralysis and was not mentally sound. This fact has been denied in written statement. In support of the plaint, plaintiff Shusheelabai in Paragraphs 1 to 3 has stated on oath. Witness Phool Chand (D.W. 2) has also corroborated the statement of Shusheelabai so far as the ailment of testator deceased Puran is concerned. This fact has been countered by defendant Basantlal (D.W. 1). He has stated that his father was not suffering from paralysis and was not sick at the time of execution of the Will. But this statement of this witness also appears to be false on the ground that his own witnesses Banshilal (D.W. 3) and Gorelal (D.W. 4) have stated against him. These two are the attested witnesses of the Will. Banshilal has stated in Paras 2 and 3 of his statement that--

2- --- vk[kjh VkbZe ij iqUuk pkjkbZ ij iMs+ iMs+ djkrj jgrs ?s A vkSj mB cSB ugha ikrs ?s A ydok ls eqag VssssM+k gks x;k ?k ysfd u gk? iSj dke ugha djrs ?s A

3- --- iqUuk vius ejus ds 3 lky igys ls chekj gks x;k ?k A ----

Witness Gorelal has stated in Para 2 that

2- --- iqUuk dks ydos dh chekj ?h A ijUrj gkyr vPNh ?h A iqUuk ds gk? o iSj ij ydok ?k A mls mBkuk ugha iM+rk ?k A iqUuk dk iyax ij ls mBkuk iM+rk ?k A iqUuk dks pkj ifg, ds Bsyk ij Mkdyd ofl;rukek djkus ys x, ?s A ----

11-C. Witness Banshilal has also stated that when he reached at Tehsil, Will had already been typed. At that time, it was mentioned by the testator Puran that plaintiff will remain in that part of the disputed house in which she is presently living but she will not be entitled to sell the same. It was further stated by him that he put his signatures on the Will only on this condition that the plaintiffs, will live in the same part of the disputed house in which they are living and this condition was accepted by the testator. However, nothing with regard to this fact has been mentioned in the Will. Witness Gorelal has stated that the Will was dictated and got typed by defendant Basantlal. These statements of defendant's witnesses support the contention of the plaintiff and her case. Not a single witness states that the Will was dictated or written by the testator. On the contrary, they have stated that he was not well and suffering from lakua (paralysis). On these grounds the validity of the Will becomes doubtful, and this approach of the learned Judge ought also to be sustained.

In appeal the decision of issue No. 8 has also been contested but during the course of argument, it has not been pressed. On perusal of Para 9 of the impugned judgment, it appears that after the knowledge of the Will on 12-6-86, this suit has been filed impugning the Will dated 13th July, 1982 is within time.

Cause of action accrues after the knowledge because as per the allegations of plaintiff, in absence of the plaintiffs, Will was executed and the plaintiff No. 1 Shusheelabai came to know about the Will on 12th June, 1986. This suit has been filed on 1st August, 1986, i.e., within a period of less than one year. In view of this, suit does not appear barred by time. Hence, the finding of the learned Judge on this point is also upheld.

Consequently appeal is dismissed.