

(2006) 07 BOM CK 0082
In the Bombay High Court
Case No : Second Appeal No. 315 of 1993

Bhagwat Sheshrao Choudhary	Vs	APPELLANT
Chakradhar Tukaram Thakare		RESPONDENT

Date of Decision : 17-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 68

Citation : (2007) 2 BomCR 896 : (2006) 4 CivCC 620 : (2007) 2 CivCC 375 :
(2006) 6 MhLj 204 : (2007) 5 RCR(Civil) 293

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : J.J. Chandurkar, for the Appellant; V.G. Wankhede, for the Respondent

Judgement

B.P. Dharmadhikari, J.—The original defendant has filed this Second Appeal challenging the reversing trial Court's judgment. The present respondent is the legal heir of original plaintiff Kisnabai. The original plaintiff has died during pendency of the Regular Civil Appeal and the present respondent has come on record in her place on the strength of Will (Exh.-18) executed by Kisnabai in his favour. The suit by Kisnabai was for partition and separate possession. The suit came to be dismissed but the trial Court granted her maintenance. The said order was challenged by her by filing Regular Civil Appeal u/s 96 of the CPC vide Regular Civil Appeal No. 98/1985 and the appellate Court has allowed the appeal and held that the original plaintiff was entitled to half share in the suit property. The suit property is land Survey No. 17/1 of Alampur.

2. The case of plaintiff was that it is an agriculture land admeasuring 3 Acre 69 Gunthas having a well, electric motor pump and residential house at Alampur, owned by Ramchandra and Sheshrao. The husband of plaintiff, namely Ramchandra, died on 13-9-1974. His brother Sheshrao used to look after affairs of the property. Sheshrao died on 18-10-1975 and after his death, Kisnabai was denied the share and crops. She, therefore, claimed partition and separate

possession. The present appellant/defendant in that suit, took the defense that he was son of Sheshrao and Ramchandra executed a Will in his favour on 20-5-1974 (Exh.65). He stated that there was partition between Ramchandra and Sheshrao as also their mother Parvatabai and Ramchandra and Sheshrao were separate. He contended that death of Ramchandra, in view of the Will, he has become owner of the property of Ramchandra. The trial Court accepted the defense and relied upon the Will at Exh.-65. It, therefore, dismissed the suit of plaintiff. The plaintiff then filed appeal and expired during its pendency on 18-2-1990. The present respondent, who came on record as her legal heir, contended that on 8-2-1980 she has executed a Will (Exh.-18) in his favour and, therefore, he is entitled to succeed the share of Ramchandra. Thus, the appellant is son of brother of Ramchandra and respondent is the son of brother of widow of Ramchandra viz Kisnabai.

3. I have heard Mr. Chandurkar, Advocate for the appellant/original defendant and Mr. Wankhede, Advocate for respondent/original plaintiff. Advocate Chandurkar has contended that the trial Court has erroneously refused to accept the Will at Exh.-65. He contends that Will at Exh.-65 has been duly proved but the appellate Court has refused to accept it on account of five suspicious circumstances, which according to him, do not in the eye of law constitute a reason to over rule a valid Will. He contends that as the Will Exh.-65 is duly proved, the original plaintiff/deceased Kisnabai did not become owner at any point of time and Will Exh.-18, executed by her did not confer any title upon the present respondent. He, then argues that, Will Exh.-18, is also not genuine and a valid Will because Kisnabai, at the relevant time, was suffering from Cancer of neck and the Will was not read over to her and when the Will was scribed, she was not even present there. He contends that all these facts are brought on record by leading evidence and he invites attention to the evidence of one Sahebrao to substantiate these things. He further contends that Kisnabai died on the tenth day after execution of the said Will. According to him, therefore, reliance upon the Will at Exh.-18 is misconceived. He argues that if the Will Exh.-65 and Will Exh.-18 are both ignored, the present appellant, being the brother's son of deceased Ramchandra is Class II heir as per the provisions of Hindu Succession Act and, therefore, entitled to succeed to the share of deceased Ramchandra in preference to the present respondent. He relied upon the judgment of the Hon''ble Apex Court in Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, and Pentakota Satyanarayana and Ors. v. Pentakota Seetharatnam and others AIR 2005 SCW 5085 to substantiate his contention. He also relied upon the judgment of Kerala High Court in P. Subramanian and Others Vs. Ramachandran and Others, to point out that the appellate Court was not justified in observing that burden of explaining suspicious circumstances was upon the propounder. He argues that the existence of suspicious circumstances is first required to be proved, as a matter of fact, by the person opposing the Will and, thereafter, only the propounder can be called upon to explain the same.

4. Mr. V. G. Wankhede, Advocate appearing on behalf of respondent/original plaintiff, has stated that the appellate Court has given reasons at length for recording a finding a finding and Will at Exh.-65 is shrouded by suspicious circumstances. He contends that those suspicious circumstances are not at all explained anywhere by the present appellant and hence the appellate Court has rightly refused to rely upon and to implement the said Will. He further argues that the Will, in favour of the respondent, executed by Kisnabai is a registered document, of which execution and registration is both duly proved and there are no suspicious circumstances. He contends that even the chance witness accepts that Kisnabai was before the Sub Registrar for the purpose of execution of Will and the Will bears her thumb impression and signature of attesting witnesses. He contends that the mere fact of her death after 10 days of execution and registration of Will deed, is not, by itself a circumstance sufficient to invalidate the Will. He argues that once the Will at Exh.-65 is ignored the property comes to Kisnabai widow of Ramchandra and, thereafter, because of Will (Exh.-18) it devolves upon the respondent. He states that, therefore, no interference is warranted in this Second Appeal.

5. In the facts of the present case, I find that the question: Whether Will at Exh.-65 is shrouded by any suspicious circumstance? is the first substantial question of law, which falls for consideration. Answer to all other contentions depend upon answer to this question.

6. The respondent has not contended that execution of Will at Exh.-65 is not proved as contemplated by Section 68 of the Indian Evidence Act or the contents of Will are not proved. He urged that Will is shrouded by suspicious circumstances. The appellate Court has accepted this story and, therefore, has refused to act upon the Will at Exh.-65. These circumstances are narrated by the appellate Court in paragraph 14 to 18 of its judgment. In paragraph 14, the appellate Court has stated that because of evidence of Babarao, an attesting witness, it has become apparent that Babarao was not present at the time of execution of Will. It has drawn this inference from the finding that the details given by Babarao were not incorporated in the Will Exh.-65. Second circumstance, which is given is about the time required to prepare and execute the Will. The Court, in paragraph 15, has found that the attesting Witness Vishvnath has stated that time of half an hour was required for typing the Will while Babarao stated that time of about 1 1/2 hours was required. In paragraph 16, the Court has found that Kisnabai, being wife of Ramchandra, ought to have been given some share in the property or some provision ought to have been made for her maintenance in the Will. The appellate Court finds that the said provision is not at all made and hence the Will is doubtful. Lastly, in paragraph 17, it has considered the fact that the Will Exh.-65 itself clearly shows that it has been obtained by the present appellant from the deceased Ramchandra. It mentioned that in the Will it is never so stipulated and, therefore, this has been treated as suspicious circumstances. It has, thereafter, in paragraph 18 found another stipulation in the Will that brothers Ramchandra and Sheshrao were

shown to be living jointly but in fact from the evidence, it was proved that they were living separately. In view of these five circumstances, it has refused to act upon the Will Exh.-65 holding it to be invalid.

7. Insofar as the evidence of Babarao and Vishvanath about the time taken for execution of Will is concerned, it should be noted that the Will at Exh.-65 is written on a full escape paper on its both sides in hand writing and it is not a registered or typed document. The witness Vishvnath stated that he was not aware about the exact time required but he stated that about half an hour was required to write the Will. As against this when cross-examination of Babarao is looked into, Babarao has stated that 1 1/2 hour was required to execute the Will. Babarao has also given details like the writer reading over the Will to all of them before obtaining the signature. It is, therefore, clear that both the witnesses had given time required for different processes and not only for writing of the Will. The appellate Court has erroneously used the words "typing" in place of "writing". It is, therefore, clear that the suspicious circumstance pointed out by the appellate Court, in paragraph 15 of its judgment, was never in existence.

8. In paragraph 14, the appellate Court has used a line "No doubt he did not so that Ramchandra signed in presence of himself and Vishvnath and they signed in presence of Ramchandra..." When this was compared from the original, the correct sentence is found to be "No doubt he did say. that Ramchandra signed in presence of himself and Vishvnath and they signed in presence of Ramchandra..." The use of word "so" by the appellate Court is obviously wrong because it has to be "say" to fit in that sentence. The word "not" is not appearing in the original paragraph 14 of the judgment. The appellate Court has found that though the attesting witnesses are not expected to know contents of the Will but when they speak about the contents of the Will, the same must appear as deposed by them in the Will. In view of this finding recorded by the appellate Court, the Will Exh.-65 was looked into and it has been found that the contents of the Will are exactly as deposed by Babarao. It makes mention of everything that is deposed to by Babarao and considered by the appellate Court in paragraph 14. It is, therefore, clear that the inference, on the basis of alleged omissions, which is reality are not in existence, by the appellate Court is clearly erroneous. Again, therefore, a finding has to be given that there is no suspicious circumstance in existence as contemplated in paragraph 14 of the judgment of the appellate Court.

9. The appellate Court has further, in paragraph 17 found that the present appellant Bhagwat, has mentioned himself as the person procuring the Will. The perusal of Will at Exh.-65 reveals that mention therein is of Bhagwat Sheshrao Chaudhary as the person getting the Will executed and the name of Ramchandra has been mentioned as the person executing the Will. The execution of Will has been established as required by law. Merely because the name of Bhagwat has been mentioned as the person getting Will executed in his own favour that, by itself, cannot be a suspicious circumstance. If Bhagwat wanted to play any fraud

in this respect, he could have definitely avoided mention of his name as the person getting the document executed. Therefore, the circumstance treated as suspicious circumstance in paragraph 17 is again not in existence.

10. Though in the Will at Exh.-65, the properties like well and electric pump are mentioned, it also mentions that the share of Sheshrao was different and it also mentions that there is a well and electric pump and entire share in that well and electric pump has been given to Sheshrao. It is further mentioned that the residential house of Mouje Achalpur in the name of Ramchandra would be given to the present appellant. It is, therefore, not correct to observe that the Will shows that Ramchandra and Sheshrao were living jointly. On the contrary, the Will mentions that Ramchandra was required to reside with his brother Sheshrao because his wife Kisnabai/original plaintiff had deserted him and his efforts to bring her back being failed. He, thereafter, mentioned that the agricultural field described therein belonged to him and was possessed by him. This shows that suspicious circumstance, as mentioned by appellate Court in paragraph 18, is factually not in existence.

11. The another suspicious circumstance, mentioned by the appellate Court in paragraph 16, namely the act of Ramchandra in not giving anything to his wife Kisnabai. The discussion above unequivocally reveals that Kisnabai was not staying with Ramchandra and the Will also states that she was under the control of her brother. The Will also discloses that Ramchandra was living with his brother. Sheshrao and family of Sheshrao was looking after Ramchandra. The rulings, on which the learned Counsel for the appellant has placed reliance, state that a Will can be executed in favour of any person and merely because a near relation or blood relative are excluded that, by itself, cannot be a suspicious circumstance. The judgment of the Hon'ble Apex Court in *Pentaknta Satyanarayana and Ors. v. Pentakota Seetharatnam and Ors.* (supra) in paragraph 27 holds that; merely because natural heirs were excluded and legally wedded wife was given lesser share that, by itself, is not sufficient to hold that there is any suspicious circumstance. It has further observed that the whole idea behind execution of Will is to interfere in normal line of succession and so natural heirs would be debarred in every case of Will. The same view is also taken by the Hon'ble Apex Court in its judgment in *Rabindra Nath Mukherjee and Anr. v. Panchanan Banerjee (dead) by LRs. and Ors.* (supra) in paragraph 4. The appellate Court has not pointed out any other material on record coupled with this to hold that not giving share to Kisnabai is, therefore, a suspicious circumstance. The finding that share is not given to Kisnabai, by itself, cannot be a suspicious circumstance.

12. The learned Counsel has also relied upon judgment in *P. Subramanian and Ors. v. Ramchandran and Ors.* (supra) to contend that unless and until existence of suspicious circumstance is established by the person opposing the Will, propounder cannot be called upon to show the absence of such circumstance or to explain them. In view of findings reached above, this ruling is not relevant

here.

13. It is, therefore, apparent that the appellate Court was not justified in rejecting the Will at Exh.-65 and it, therefore, follows that the appellate Court was duty bound to implement and act upon the said Will. It again becomes clear that as the property did not devolve upon Kisnabai, Kisnabai, therefore, was not competent to execute any Will in favour of the present respondent. The Will at Exh.-18 executed by Kisnabai is, therefore, of no consequence. It is, therefore, not necessary for this Court to look into the other arguments advanced by the learned Counsel for the appellant in the matter.

14. In these circumstances, the Second Appeal is allowed. The Judgment and Decree dated 6-8-1993 delivered by Additional District Judge, Achalpur in Regular Civil Appeal No. 98/1985 (new 14/1991) is hereby quashed and set aside. The judgment and decree of trial Court dated 21-12-1984 in Regular Civil Suit No. 71/1980 is restored.

In the circumstances of the case, there shall be no order as to the costs.