
(2004) 07 BOM CK 0039
In the Bombay High Court
Case No : S.A. No. 189 of 1986

Harischandra Vithoba Narawade and Others APPELLANT
Vs
Smt. Vatsalabai Shinde RESPONDENT

Date of Decision : 22-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(4), 11
Hindu Succession Act, 1956 — Section 6

Citation : (2005) 1 CivCC 217 : (2004) 4 MhLj 897

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : Pradeep Deshmukh and K.M. Babulgaonkar, for the Appellant; K.G. Ghute Patil and S.S. Shinde, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Dabholkar, J.—Original defendants in Regular Civil Suit No. 137 of 1975, on the file of Joint Civil Judge, Junior Division, Osmanabad, challenge the judgment and decree passed by learned Joint Civil Judge, Junior Division, Osmanabad, vide his judgment dated 30-10-1980 and confirmed by District Judge, Osmanabad, vide his judgment and order dated 13-3-1986, while dismissing the Regular Civil Appeal No. 95 of 1981 filed by the defendants/present appellants, (Now onwards, parties shall be referred as "plaintiff and "defendants" for the purpose of convenience.)

2. Plaintiff Vatsalabai had approached Civil Court by Regular Civil Suit No. 135 of 1975 instituted on 19-8-1975, seeking a decree for partition and separate possession of her share in the property, as also past mesne profits. She approached the Court With following averments.

Sadhu was the common ancestor, who had two sons, namely, Baba and Vithoba. Plaintiff Vatsalabai is daughter of Baba, Whereas, defendants are legal heirs of Vithoba, defendant No. 4 Kasabai is widow of Vithoba and defendants No. 1 to 3, namely, Harischandra, Narayana and Govinda, are their sons.

As many as, 11 pieces of land totally admeasuring about 34 acres and a house, both situate at Raghuchiwadi, was the subject property regarding which, partition was sought. The property was ancestral property, i.e. the property descended from Sadhu and after his death, Vithoba was Karta of joint family of himself and Baba. During lifetime of Vithoba and Baba, families were joint and even after death of Vithoba, families continued to be joint. Baba was serving at Bombay for 10 to 12 years before his death. After return of Baba to village from Bombay, plaintiff Vatsalabai was residing with him. This was because, although she was married, she was deserted by her husband. Because the defendants refused to give share in the joint family property, deceased Baba filed Regular Civil Suit No. 62 of 1973 on 25-6-1973 against the defendants for partition and separate possession of his share. On 5-11-1973, an application for withdrawing the suit unconditionally came to be filed in the Court, and the Court permitted to withdraw the suit unconditionally. It is alleged that, the defendants, taking disadvantage of the old age and illness of Baba, practiced misrepresentation on him and obtained from him the application for withdrawal of the suit and placed the same before the Court. It is, therefore, contended that, the decision of the said suit is not binding upon the plaintiff. Baba, the father of the plaintiff, was suffering from acute bronchitis and was seriously ill. He was admitted in civil hospital, Osmanabad, when the above suit was withdrawn. Baba expired in the hospital on 18-11-1983. Being the only issue of deceased Baba, plaintiff Vatsalabai claimed to be owner and entitled to XA share in the ancestral property.

3. It is also contended that there are rumors about defendant Nos. 1 to 4 having obtained a Will from deceased Baba, during his illness. According to the plaintiff, the same is obtained by fraud and taking disadvantage of the ill-health of deceased Baba, who was not in a sound mental condition. Thus, according to the plaintiff, her father had not executed any Will of his free Will and thus, the Will, if any, obtained by defendants, is fictitious and forged one.

4. Defendant Nos.1, 2 and 5 resisted the suit by their Written Statement. Relationship between the parties is not disputed. It is also admitted that, Baba had filed Regular Civil Suit No. 62 of 1973 against the defendants but it is denied that withdrawal purshis of Baba was obtained by defendants, by misrepresentation or taking undue advantage of ill-health of the deceased.

Baba is said to be liquor addict and as the defendants tried to persuade him against liquor consumption, Baba was instigated by his friends to file a partition suit. Baba voluntarily withdrew the suit after realizing his mistake. Since the suit was unconditionally withdrawn,,it is contended by defendants, that they were looking after Baba and, therefore, as a result of love and affection towards defendants, Baba executed a registered Will on 6-11-1973 and bequeathed his share in the joint family property in favour of defendant No. 2 Narayan. According to defendants, Baba did so while he was in sound health and mental condition. According to the defendants, on the basis of the Will, the plaintiff is left with no interest in the property. They prayed for dismissal of the suit.

5. Upon considering oral and documentary evidence on record, learned Trial Judge held that the withdrawal of earlier suit No. 62 of 1973, was obtained by misrepresentation exercised on Baba, and by taking disadvantage of his old age. Withdrawal of the suit is, therefore, not binding upon the plaintiff Vatsalabai. He also held that the suit is not barred by res judicata because of withdrawal of earlier suit. Observing that, the defendants have failed to establish execution of a valid Will by Baba in favour of defendant No. 2 Narayan, the learned Judge has decreed the suit for partition and separate possession, as also past and future mesne profits.

6. The learned District Judge, while dismissing the Appeal, confirmed the finding that, the withdrawal of earlier suit No. 62 of 1973 did not bar the present suit; that the defendants had failed to prove execution of a valid Will while in sound state of mind and health by deceased Baba and consequently, the plaintiff was entitled to V2 share in the ancestral property. The decree passed by the Civil Judge is, thus, confirmed by the learned District Judge.

7. The Second Appeal is admitted by this Court vide order dated 13-8-1986, which reads as follows :-

"Admit.

Grounds No. 1, 2 and 3 are substantial question of law."

Three grounds, on which the Second Appeal is admitted, are as follows :-

"(1) Whether the interpretation of the proviso of section 6 of the Hindu Succession Act, 1956, made by the learned Judge is correct or not is the substantial question of law.

(2) Whether the suit of the plaintiff for partition is maintainable or not is the substantial question of law, especially because the father of the plaintiff had not died intestate.

(3) Unless and until plaintiff gets a decree to the effect that the Will deed executed by her father Baba is null and void. Plaintiff does not accrue any right to file suit of partition, or separate possession or a coparcenary property in view of proviso to section 6 of the Hindu Succession Act, 1956. The plaintiff had not accrued any right over coparcenary property in view of the Testamentary Deed/ Will Deed. Therefore, the findings given by the Appellate Court in respect of Issues No. 3 and 4 are contrary to the law. Whether the plaintiff can file a suit for partition and separate possession in the circumstances of the present case is a substantial question of law, which require close scrutiny and examination by this Hon'ble Court to have the correct interpretation of the legal possession (position)."

8. Heard respective Advocates for the respective parties. The points those are required to be considered, can be stated in brief as follows :

1. Whether present suit is barred due to withdrawal of Regular Civil Suit No. 62

of 1973, either due to principle of res judicata as embodied in section 11 of the Code of Civil Procedure, or due to bar as contained in sub rule (4) of Rule 1 of Order 23 of the Code of Civil Procedure?

2. Whether, the plaintiff can claim title to Vi share by inheritance through her father Baba, in the light of Will dated 6-11-1973 in favour of defendant No. 2 Narayan?

9. Almost all the facts averred by both the parties stand admitted by other party. The contention of the plaintiff that, the withdrawal of earlier suit, as also execution of the Will, is obtained by defendants No. 1 and 2, by misrepresentation, fraud and taking undue advantage of ill-health and mental condition of Baba, is upheld by both the lower courts, by concurrent findings,

10. So far as bar to present suit is concerned, the same was pleaded by relying upon two different provisions. Firstly, coming to the principle of res judicata as contained in section 11 of the Code of Civil Procedure, which reads as follows :

"Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The ingredients of principle need not be reproduced in analyzed form. Suffice it to say that, although all other ingredients stand satisfied by the fact situation in the matter at hand, the ingredient emphasized by the underlining, is not attracted because, earlier suit No. 62 of 1973 was disposed of by withdrawal. The withdrawal is not a decision, wherein the matter can be said to have been heard and finally decided by the Court.

It has been laid down by Hon"ble the Supreme Court in the matter of Sheodan Singh Vs. Smt. Daryao Kunwar, that, in order that, the matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits. It is also illustrated that, if the former suit was dismissed for want of jurisdiction, for default of plaintiff's appearance or, on technical grounds, such, as non-joinder or mis-joinder of parties, the decision not being on merits, would not be res judicata in a subsequent suit. In the matter at hands, the former suit is disposed of by withdrawal and without contest and finding on merits. The principle of res judicata, therefore, does not operate as a bar against the plaintiff in prosecuting the present suit.

11. Order 23, Rule 1(4) of the Code of Civil Procedure, relied upon by learned Counsel for the appellants, reads as follows :

"1. Withdrawal of suit or abandonment of part of claim.-

(1)xxxxxxxxxx

(2)xxxxxxxxxx

(3)xxxxxxxxxx

(4) Where the plaintiff

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of the claim without the permission referred to in Sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

On going through sub-rule (4) of Rule 1 of Order 23, there is nothing to indicate that successor-in-title of the plaintiff, who has unconditionally withdrawn the suit, is prohibited from instituting the suit in respect of such subject-matter or such part of the claim, which was abandoned/withdrawn by the predecessor-in-title. Eventually, section 11, which is another provision creating bar for second litigation about the same subject matter between the same parties, is reproduced hereinabove and the clause "between the same parties, or between the parties under whom they or any of them claim, litigating under the same title", as incorporated in section 11, is not provided in Order 23, Rule 1(4). Thus bar created by sub-rule (4) does not seem to operate against the successor-in-title.

The learned District Judge has, in paragraph 9 of his judgment, referred to observations of the Supreme Court in the matter of Vallabh Das Vs. Madan Lal and Others, . While interpreting the expression, "same subject-matter" as contained in Order 23, Rule 1(4), the Hon"ble Supreme Court observed.

"Subject-matter" in Order 23, Rule 1 means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. "

12. Thus, for the purpose of expression "same subject-matter", the court has to consider not only the relief, but also the cause of action . In the matter at hands, prima facie, cause of action when the father filed a suit for partition and, when the daughter Vatsalabai approached the Court, cannot be said to be the same. Father approached for partition, probably because, he was denied his share. When the daughter approached, she had further bundle of facts to add, i.e. persuasion of the father by misrepresentation for withdrawal of earlier suit and the act of the defendants in obtaining the Will, thereby divesting the plaintiff of her title. No doubt, the plaintiff has not expressly prayed for a declaration but, by the contents in the plaint, impliedly, she has invited a declaration that the

withdrawal of the suit and execution of the Will in favour of the defendants by deceased, was a result of misrepresentation plus ill-health and ill-mental condition of the deceased. Thus, viewing the matter from second angle also, subsequent suit by daughter for partition and separate possession cannot be obstructed by withdrawal of former suit for partition, which was instituted by the father.

13. The bar under Order 23, Rule 1(4) of the Code of Civil Procedure, shall operate only against the plaintiff, who institutes a suit and withdraws the same, and not against his successor-in-title, can also be demonstrated by disastrous results, which may occur in case the bar is held to operate against the successor-in-title, e.g. two brothers in a generation quarrel over the property and one files a suit for partition. Subsequently, they come to terms and decide to continue as joint family and hence the plaintiff-brother withdraws the suit for partition. If this withdrawal is to operate as a bar even against the successor-in-title by inheritance, in the next generation the descendants of the plaintiff-brother will practically stand divested of their proprietary rights in the ancestral property. This would be adjudication against their title without finding of court. Illustration should confirm that bar under Order 23, Rule 1(4) operates against the plaintiff and only against the plaintiff, who withdraws the suit. It does not operate against the successor-in-title, either by inheritance or otherwise.

It must, therefore, be held that withdrawal of Regular Civil Suit No. 62 of 1973 by father Baba would not operate as bar for grant of relief in favour of daughter Vatsalabai in the present suit.

14. So far as interpretation of proviso to section 6 of Hindu Succession Act, 1956 is concerned, the section and proviso read as follows:-

"6, Devolution of interest in coparcenary property.- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

15. Both the lower courts have held that, being a daughter and thus legal heir of Class I as per Schedule u/s 8, the plaintiff Vatsalabai is entitled to inherit the property to the extent of share of her father Baba. On reference to section 6 and proviso thereto, it is evident that, although worded as "proviso", the proviso is an "exception" to the section. Ordinary rule of section 6 regarding devolution of interest in a coparcenary property, so far as Mitakshara male dying intestate is concerned, is that, the property would devolve by survivorship upon the

surviving members of coparcenary, and not under this Act. Thus, only surviving coparcener (male member) would share the property of Mitakshara male Hindu dying intestate. However, the proviso carves out an exception to this rule. In case, the deceased has left behind surviving female relative specified in Class I of Schedule u/s 8, or a male relative who claims through a female relative specified in Class I, (e.g. son of pre-deceased daughter), the interest of the deceased in the Mitakshara coparcenary property, has to devolve, either as per testament, or by proviso for intestate succession as contained in Hindu Succession Act, and not by survivorship.

The plaintiff Vatsalabai being female relative and heir in Class I, the exception is applicable to the facts of the case and not the general rule regarding devolution of interest of Mitakshara coparcener. No doubt, such devolution is subject to any testamentary document that might have been executed by deceased Hindu male. In other words, it can be said that, so far as mitakshara coparcenary property is concerned, female heirs classified in Class I only, will be able to inherit the property of Mitakshara coparcenary, provided there is no testamentary document executed by the deceased coparcener. The proviso does contain reflection of provision under old Hindu law that, the coparcener included only male descendants. Karta of joint Hindu family thus is not in a position to execute a testament divesting other coparceners of their rights, but during his life time, he can divest a female relative of her interest, that would otherwise devolve upon her by intestate succession.

16. Both the lower courts cannot be said to have erred in observing that, the plaintiff Vatsalabai has V% share in the coparcenary property. This is because, the courts recorded such a finding, only after arriving at a conclusion based on the fact that the Will executed by the deceased Baba in favour of defendant No. 2 Narayan was not proved as validly executed Will. The lower courts could not have recorded a declaration, nor those could have decreed the suit for partition and possession on the face of Will, but after observing that, the Will was not validly executed, the courts, were justified in upholding the contention of the plaintiff Vatsalabai that, she is owner of XA share and entitled to inherit the same through her father Baba.

17. The appeal is not admitted for any challenge against the concurrent finding of both the lower courts that the Will is not validly executed. However, it may be said that, the learned District Judge has discussed at length in paragraph 11 of his judgment, the circumstances which demonstrate that the withdrawal of the suit, as well as execution of the Will, must have been obtained by the defendants, by unlawful means. Only few circumstances may be reproduced.

Admittedly, Baba had come to reside at village from Bombay because of his ill-health as he was suffering from bronchitis. Plaintiff-Vatsalabai was residing with Baba since his return to village, because she was deserted by her husband. It is her claim that Baba was taken to the Sub Registrar's office for registration of Will and to the court for presenting an application for withdrawal of suit, while he

was hospitalized. Her claim that, she found her father missing from the hospital and then went to Osmanabad Court, contacted her lawyer Wagholikar and thereafter two of them found Baba lying in a bullock cart in front of Sub Registrar's office, is fully supported by the lawyer, by entering into witness box. That Baba must have been hospitalized, can be inferred from admission of Harischandra that, immediately after execution of Will, Baba was reached to the hospital. Withdrawal of the suit is on 5-11-1973, on which date stamp paper for the Will is purchased and the Will is registered on 6-11-1973. Baba expired on 18-11-1973 i.e. on 12th day since execution of the Will. The learned District Judge has also ventured to compare the thumb impression of the deceased at the bottom of the Will and at the top of the stamp paper, as thumb impression of a purchaser. It is risky to compare finger prints by naked eye. But, even ignoring those observations of the learned District Judge, the plaintiff has pointed out enough suspicious circumstances surrounding the execution of the Will.

The contents of the Will is the best illustration enabling us to draw an inference that this may not be a genuine Will. The learned District Judge reproduced part of the contents of the Will in paragraph 11 of his judgment, which are as follows:

"I have given gold etc, to my daughter and had got her married with a good man. She is happy at her house. Nothing is to be given to her."

As a natural course of human conduct, parents always have more affection and sympathy towards weaker children amongst offsprings. Plaintiff Vatsalabai was daughter deserted by husband, staying with father since her desertion. The defendants have not brought on record any evidence, showing any disagreement between the father and daughter that could have created hatred towards daughter.

It may be said that, the contents to the effect that, the daughter is happy at her house (matrimonial house) as contained in the Will, are patently false. The portion reproduced by the District Judge from the Will is clear indication of the psychology to grab the property.

Advocate Shri Babulgaonkar for the defendants urged that the plaintiff has not proved the Will to have been obtained by fraud or misrepresentation. Fraud or misrepresentation that was tried to be played upon Baba, was certainly not in presence of the plaintiff and, therefore, except surrounding circumstances, she cannot be expected to discharge further burden of proof. Moreover, as a rule of evidence, when the defendants propound acquisition of title by Will, it is their responsibility to lead evidence; demonstrating execution of a valid Will while executor was in sound health, and mental condition. The lower courts have rightly held that adverse inference needs to be drawn against the defendants, who did not produce any medical evidence regarding sound health and mental condition of the executor of the Will. Even this finding of fact, which is cursorily examined, does not call for any interference.

18. For the reasons discussed above, neither section 11, nor Order 23 Rule 1(4)

of the Code of Civil Procedure, can operate as bar against the present suit. Admittedly, the plaintiff is the sole legal heir of deceased Baba, specified in Class I of the Schedule u/s 8 of the Hindu Succession Act, and the defendants have not discharged the burden of proof that the Will dated 6-11-1973 was validly executed by the deceased in their favour.

The concurrent findings and decree, therefore, call for no interference. The Second Appeal is dismissed with costs i.e. the defendants shall pay costs of the plaintiff incurred at all three stages of the litigation, and bear their own.