
(1994) 08 BOM CK 0001
In the Bombay High Court
Case No : First Appeal No. 238 of 1983

Kasabai Thakre

APPELLANT

Vs

Vithal Tukaramji Mahalley and others

RESPONDENT

Date of Decision : 03-08-1994

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 13

Citation : (1995) MhLj 23

Hon'ble Judges : A.A. Desai, J

Bench : Single Bench

Advocate : K.R. Gohokar, for the Appellant; A.M. Bapat, for the Respondent

Final Decision : Dismissed

Judgement

A.A. Desai, J.—Appellant Kasabai filed a suit for recovery of possession of suit property against the respondent No. 1 her adopted brother. According to her, she derived the title to suit property from will dated 9-9-1979 (Exh. 54) executed by her mother Chindhabai. The suit claim was resisted on the ground that execution of will is fictitious and secondly, in view of section 13 of the Hindu Adoptions and Maintenance Act, 1956, Chindhabai was not competent to dispose of the suit property. The trial Judge held that plaintiff could not successfully prove the execution of will. He, therefore, dismissed the suit.

2. In this appeal, Mr. Bapat, the learned Counsel for defendants/respondents, tried to support the findings for quite sometime. He urged that deceased Chindhabai was not in a disposing state of mind. Bequeathing entire property in favour of her daughter Kasabai/plaintiff creates a serious doubt. The learned Counsel urged that Chindhabai had another daughter living at the time of execution of will. However, nothing was given to her under the will. Mr. Bapat, however, could not pursue this argument since it is shown that other daughter of Chindhabai was not alive at the time of execution of will. The plaintiff was the sole and only daughter at the relevant time.

With the assistance of the learned Counsel for the parties, I have gone through the evidence of PW 2 Atmaram, who was one of the attesting witnesses. His evidence is clinching, convincing and could not be shattered in cross-examination. He has categorically stated that Chindhabai, at the relevant time, was mentally alert, conscious and also in disposing state of mind. She herself instructed for drafting the will. It was read over to her in presence of witnesses. She put her thumb mark in presence of witnesses and they have attested the same. The plaintiff thus proved execution of will. The reasoning of the learned trial Judge in this regard is patently erroneous.

3. The main question in this appeal is whether Chindhabai was competent to dispose of the property in question by executing a will. There is no dispute that property in question was the absolute property of Chindhabai. By Adoption Deed dated 22-4-1977 (Exh. 60), she adopted respondent No. 1 as her son. Will was thereafter executed on 9-9-1979 and she died on 17-10-1979.

4. Mr. Gohokar, the learned Counsel for the appellant-plaintiff, urged that adoption by itself does not create any impediment in the absolute right of the adoptive parents. As such, Chindhabai was competent to execute a will. The learned Counsel referred to section 13, which reads as thus :

"Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will."

Mr. Gohokar contended that as envisaged by section 13, unless there is immediate divesting, right of adoptive parents remains intact. In support, he placed reliance on a decision in Banabai Bhoraji Patharkar and others vs. Wasudeo Bhoraji, 1979 Mh.L.J. 133. The Authority dealt with an Adoption Deed, which contained a recital that the adopted son acquired all rights of a natural born son and further he had acquired the same ownership right like a natural born son over all movable and immovable properties. This Court held that -

"the deed of adoption could not be construed as conveyance; that the widow having become full owner on her husband's death, the transfer by her could not be challenged as the adoption did not divest her of the property."

Section 13 does not refer to any conveyance. Section 13 reasserts the absolute right of the adoptive parents in disposing of the property. However, this right is circumvented by an agreement to the contrary. It envisages an agreement, which indicates an intention to curtail the absolute right, which could otherwise be exercised by the adoptive parent.

In a case before His Lordship, it does not refer to any agreement to the contrary. The recital in the Adoption Deed merely refers to a position of law that after adoption, son will acquire all rights of a natural son. As such, the authority on which reliance is placed, could not assist the learned Counsel for the appellant.

In the instant case, Adoption Deed (Exh. 60) refers to position of law as in the

case cited supra. Besides this, recital contained is that adopted son alone would become owner of the property. It is further added that daughter of adoptive mother or any other legal heir would not get any right or interest in the property. These recitals in the Adoption Deed (Exh. 60) declared the intention of adoptive mother, which constitute an agreement to contrary as envisaged by section 13 of the Act. The property in question was completely vested in the adoptive mother. Adoption does not divest her right. However, her further absolute right to dispose of the property being contrary to the agreement, could not be exercised. As such, the will bequeathing entire property referred to in the Adoption Deed, in favour of appellant/plaintiff was against the mandate of section 13 of the Act. The plaintiff, therefore, cannot succeed in civil action to recover possession of the property from the adopted son of testator Chindhabai.

The appeal, therefore, must fail. The appeal is dismissed. In view of this, no separate order for cross-objections. No order as to costs.