

(2006) 07 BOM CK 0064
In the Bombay High Court
Case No : S.A. No. 310 of 1993

Kasturibai Wankhade

APPELLANT

Vs

Sheshrao Pandhari Zamre and Others

RESPONDENT

Date of Decision : 17-07-2006

Acts Referred:

Evidence Act, 1872 — Section 63(1), 68

Citation : AIR 2006 Bom 350 : (2006) 5 BomCR 638 : (2006) 44 MhLj 330 : (2007) 5 RCR(Civil) 30

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

Bench : Single Bench

Advocate : B.T. Patil, for the Appellant; C.A. Joshi, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—This is Second Appeal filed by the appellant/plaintiff challenging the concurrent judgments, whereby the suit brought by her for partition and separate possession has been partly decreed. The trial Court has found that the plaintiff is not entitled to any share in the property of her father by way of inheritance but only on account of Will and, therefore, the trial Court has given her share as per the said Will Exh.-44. The appeal filed by the plaintiff, claiming share as heir and challenging the Will, has been dismissed by the appellate Court by maintaining the judgment and decree of trial Court.

2. No substantial question of law has been framed while admitting the appeal on 4-8-1992.

3. After hearing Advocate B.T. Patil for the appellant/plaintiff and Advocate C.A. Joshi, Advocate for respondents/ defendants, it has become clear that the only substantial question of law sought to be canvassed by the present appellant is; whether Will Exh.-44, used against her in both the Courts below, has been proved as required by Section 68 of the Indian Evidence Act?

4. The present appellant filed Civil Suit, vide Spl. Civil Suit No. 28/1977, and she

claimed share in the property left behind by her father Pandhari Zamre. The appellant is his married daughter. The claim was opposed by her step brothers and mother by pointing out that there is a Will executed by deceased Pandhari and she is entitled to inherit property only to the extent of share given to her in that Will. The parties adduced evidence. The trial Court has found that the case of present appellant that Will is not proved as contemplated u/s 68 of the Indian Evidence Act, is not substantiated. It has held that the Will is duly proved and, therefore, granted the appellant/plaintiff the share as mentioned in that Will. The appellate Court has maintained these findings.

5. Advocate B.T. Patil invites attention to the discussion as contained in both the judgments. He points out that the defendants examined two witnesses, to prove due execution of the Will. DW3 Janrao, did not speak anything about the other attesting witnesses and the other attesting witness could not have been examined as he was dead. DW 4 Gulabrao, who was Administrator appointed under the Will has, thereafter, been examined as their witness by the defendants. The said Gulabrao has stated about the signature of Pandhari in presence of the attesting witnesses and signature of attesting witnesses in presence of Pandhari. According to him, it is not sufficient compliance of Section 68 of the Indian Evidence Act. He has relied upon judgment of the Hon'ble Apex Court in *Girja Datt Singh Vs. Gangotri Datt Singh*, to contend that attesting witness DW3 Janrao, ought to have stated that other attesting witness Bankatrao also signed in presence of the deceased Pandhari and in his presence. He has also pointed out a judgment of the Andhra Pradesh High Court, in *Karri Nookaraju Vs. Putra Venkatarao and Others*, in this respect. It is argued that as the Will itself is not proved there is no question of the Courts below restricting the inheritance of appellant/plaintiff to the share as mentioned in that Will. It is argued that the share, which is devolved upon the appellant/plaintiff as per intestate succession should, therefore, be given as her share in partition and separate possession.

6. Mr. Joshi, Advocate for the respondents/defendants has contended that the requirement of Section 63(1)(c) read with Section 68 of the Indian Evidence Act has been satisfied in the facts of the present case. He invites attention to the discussion in this respect as contained in both the judgments. He further argues that the portion of evidence extracted by the appellate Court is itself sufficient to prove compliance with requirements of Section 68 of the Indian Evidence Act. He further states that the finding in this respect is concurrent.

7. The perusal of judgments, on which the learned Counsel for the appellant has placed reliance, reveals that the propounder has to show that two witnesses saw the testator sign the Will and they themselves signed the same in presence of the testator. The perusal of judgment *Karri Nookaraju Vs. Putra Venkatarao and Others*, , reveals that the attesting witness has to speak not only about the signature of the testator in his presence but he has also to speak that each of the attesting witnesses who have signed the Will in presence of the testator. The

perusal of judgment of the Andhra Pradesh High Court, particularly paragraph 14 thereof, reveals that the attesting witness, examined there, has stated that he was one of attestors and also the identifying witness on the said Will. Beyond this, he did not utter a single word. It is, in this background, that the Andhra Pradesh High Court has made those observations.

8. Here, when the evidence of PW 4 Janrao is looked into, Janrao has stated that Pandhari has executed document in his presence and he was a witness to the Will. He has further stated that Pandhari signed the Will and, thereafter, he signed it as an attesting witness and Pandhari has signed in his presence. He further stated that Bankatrao was another attesting witness and he is dead. In cross-examination, however, he has stated that it was only Pandhari, who signed in his presence. Thus, the learned Counsel for the appellant has wrongly taken this admission in the cross-examination to mean that deceased Bankatrao is not proved to have signed in presence of Janrao and, therefore, the Will is not proved.

9. The requirement in this respect, as is apparent from the above referred judgments of the Hon"ble Apex Court is that two attesting witnesses have to sign the Will in presence of the testator and testator has to either sign the Will in their presence or has to acknowledge to each of them that the Will was signed by him. The evidence of Janrao clearly reveals that Pandhari placed signature in his presence and, thereafter, he placed signature in presence of Pandhari. The Law does not require Janrao, the attesting witness, to state that Bankatrao also signed it in his presence.

10. In this background, when the evidence of DW 3 Gulabrao is looked into, Gulabrao is a person, who has been appointed as Administrator under the said Will as Exh.-44. He stated that he was present at the time" of execution of the Will and Pandhari signed it in his presence. He has further stated that the attesting witness signed the Will in presence of Pandhari. He has stated that Bankatrao, one of the attesting witnesses, signed the Will in his presence. He has further stated that other attesting witness Janrao also signed the Will in his presence. It is therefore, apparent that, the Will Exh.44 was signed by Janrao as also by Bankatrao in presence of Pandhari and also in presence of Gulabrao. It is not necessary to show that Bankatrao also signed in presence of Janrao.

11. This being the evidence on record, it is apparent that execution of the Will Exh.44 is admittedly proved in accordance with provisions of Section 68 of the Indian Evidence Act. No substantial question of law, as sought to be contended, falls for consideration in this Second Appeal. The same is accordingly dismissed with no orders to costs.