

(2004) 04 BOM CK 0094
In the Bombay High Court
Case No : Second Appeal No. 637 of 1990

Matyabai " Parbatabai Kutarhe and Others	APPELLANT
Vs	
Godabai Sulakhe	RESPONDENT

Date of Decision : 23-04-2004

Acts Referred:

Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (2004) 3 ALLMR 769 : (2004) 4 MhLj 85

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : A.V. Khare, on behalf of Anand Parchure, for the Appellant; A.S. Mardikar, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—By invoking jurisdiction of this Court u/s 100 of the Code of Civil Procedure, this appeal is directed against the judgment dated 15th September, 1990 passed by the learned Additional District Judge in Regular Civil Appeal No. 58 of 1987 whereby the appeal came to be allowed and the impugned judgment and decree passed by the trial Court on 27th February, 1987 was set aside and it was declared by the appellate Court that the Will deed dated 10-9-1976 alleged to have been executed by Sumanbai, has not been duly proved and consequently the respondent-plaintiff is entitled to 1/3rd share in the entire suit property and directing the partition of the same by metes and bounds by sending precept to the Collector.

2. Relevant facts are required to be stated as under :

The genealogical tree of the parties has not been disputed

Fandu = Sumanbai (Died in 1970) (Died on 28-2-1985) |
----- | | Godabai Matyabai Tarasanbai =
Bakru (Pltff.) (Defdt.1) (Defdt. 2) (Defdt. 3)

The plaintiff Godabai and defendant No. 1 Matyabai and defendant No. 2 Tarasanbai are real sisters and are the daughters of deceased Fandu who died in the year 1970 leaving behind him his widow Sumanbai. Sumanbai also died on 28-2-1985 and defendant No. 3 is the husband of defendant No. 2. It is contended that the plaintiff and defendant Nos. 1 and 2 are entitled to 1/3rd share in the suit property, i.e. movable and immovable property owned by deceased Fandu. Sumanbai had executed the Will in favour of defendant No. 3 Barku on 10-9-1976 and it is contended that the said Will is a fabricated and forged document and got executed from Sumanbai who was an old lady of the age of 75 years. It is contended that Sumanbai had no authority to execute the Will deed in respect of ancestral property left by deceased Fandu. The plaintiff demanded partition and separate possession of her 1/3rd share in the suit property on 15-2-1985 but the defendants flatly refused to give her share. Even the registered notice dated 26-3-1985 could not fetch any favourable response from the defendants, and therefore, the plaintiff filed the suit for partition and separate possession of her 1/3rd share in the suit property and also sought declaration that the Will deed dated 10-9-1976 is null and void.

3. The defendants resisted the claim by filing their written statement and though admitted the relationship, contended that defendant Nos. 1 and 2 orally relinquished their share in that property and the suit property was solely in possession of Sumanbai since the time of death of her husband. It is contended that defendant No. 3 who is husband of Tarasanbai was brought up by deceased Fandu as "Ghar-Jawai" and he was staying with Fandu and Sumanbai and was looking after their welfare and also managing the suit property. It is further contended that Sumanbai, before her death bequeathed the suit property to defendant No. 3 by executing the registered Will deed dated 10-9-1976 out of love and affection for him. The plaintiff and the defendant Nos. 1 and 2 had full knowledge of the said Will deed and they never raised any objection challenging the said Will deed and therefore, the same is binding upon the plaintiff and the defendants. It is contended that after the death of Sumanbai, Barku (Defendant No. 3) became the owner of the suit property on the basis of the said Will and he has also been in exclusive possession of the same and therefore, the plaintiff cannot claim any right, title or interest in the suit property.

4. On the aforesaid pleadings, the trial Court framed the issues and the parties adduced evidence in support of their contentions. The trial Court on consideration of the evidence tendered before him by the parties, has recorded the finding that the Will deed dated 10-9-1976 is perfectly valid under law and consistent with this finding, he dismissed the suit of the plaintiff. Being aggrieved by this judgment and decree passed by the trial Court, the plaintiff carried appeal to the District Court. The learned Additional District Judge on hearing the learned counsel for the parties, allowed the appeal and set aside the judgment and decree passed by the trial Court and declared that the Will dated 10-9-1976 has not been duly proved and as such is not binding on the plaintiff and that the plaintiff is entitled to 1/3rd share in the entire suit property and therefore,

directed partition of the same by metes and bounds by sending precept to the Collector by the judgment dated 15-9-1990. This judgment of the appellate Court is under challenge in this second appeal.

5. Mr. A.V. Khare, the learned counsel for the defendants contended that the Will deed was executed by Sumanbai on 10-9-1976. This document of Will has been exhibited as Exh. 33 by the trial Court. He contended that Sumanbai died on 28-2-1985 and till her death she was in possession of the suit property and she had a right to execute the Will of at least 1/4th share in the suit property in favour of the defendant No. 3 Barku who is the husband of defendant No. 2 Tarasanbai. He contended that photocopy of the Will deed has been rightly exhibited by the trial Court and admitted in evidence especially when no objection has been raised by the parties to the suit during the trial and therefore grievance about non production of the original Will cannot be made by any party at the belated stage. He contended that the Will deed dated 10-9-1976 has been duly proved by examining the attesting witness Sadaram (D. W. 1) and therefore, has been duly proved as per the provisions of Section 68 of the Indian Evidence Act, 1872. He contended that the plaintiff in the plaint itself has admitted the execution of the Will by deceased Sumanbai and therefore, the trial Court was justified in coming to the conclusion that the Will is not void or invalid.

6. He contended that the Will was executed by Sumanbai because the defendant Nos. 1 and 2 had relinquished their share in the suit property by their conduct. He contended that the defendants did not claim any share in the suit property in the life time of Sumanbai and since they have orally relinquished their rights in the suit property, Sumanbai was competent to execute the Will in favour of the defendant No. 3 and therefore, the Will deed is binding on the plaintiff and the appellate Court has committed an error in drawing conclusion that the Will has not been duly proved in accordance with the provisions of law. He further contended that the appellate Court has committed an error in granting decree for partition and separate possession of 1/3rd share in favour of the plaintiff directing partition by metes and bounds and therefore, the judgment of the appellate Court cannot be sustained in law. In support of these submissions, he relied on the decisions of the Supreme Court in the case of Baban Girju v. Namdeo Girju 1998(3) M.L.J. 743 and also in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, .

7. Mr. Khare further contended that the appellate Court did not framed points for determination and therefore, the judgment of the appellate Court is vitiated. In support of these submissions, he relied on the decision of this Court in the case of Anita M. Harretto Vs. Abdul Wahid Sanaullah, .

8. Mr. A. S. Mardikar, the learned counsel for the respondent-plaintiff contended that there is no cogent evidence adduced by the defendants on record to show that they had orally relinquished their rights in the suit property in favour of Sumanbai and as such the propounder was not competent to execute the will of the entire suit property in favour of Barku, defendant No. 3 who is the husband

of Tarasanbai, defendant No. 2. He contended that the Will is required to be proved as per Section 68 of the Evidence Act by examining the attesting witnesses and in the present case the original Will deed was not produced on record and it was totally wrong on the part of the trial Court to exhibit the xerox copy of the Will deed. He contended that simply because the Will deed has been exhibited, it did not follow that the contents of the Will bequeathing the entire suit property in favour of defendant No. 3 have been proved. He contended that only one attesting witness Sadaram (D. W. 1) has been examined who is uncle of the legatee Barku being interested witness, his evidence has been rightly rejected by the appellate Court. He contended that Fattulal, the another attesting witness has not been examined and in such circumstances, the impugned judgment of the appellate Court is perfectly legal and valid. In support of these submissions, he relied on the decision of this Court in the case of Bharat R. Desai v. Naina Mohanlal Bhal 2004(II) M.L.J. 901 : 2004 (2) All 290 and also on the decision of the Supreme Court in the case of The Roman Catholic Mission Vs. State of Madras and Another, .

9. He further contended that though the appellate Court did not frame points for determination, the judgment is well reasoned and it did not follow that the entire judgment, is vitiated. In support of these contentions he relied on the decision of this Court in the case of Krishna Laxman Bhatkar v. Vithal Ganesh Athavale 2003(5) M.L.J. 577 : 2004(1) All 406.

10. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. The genealogical tree is not in dispute. It is also not disputed that Fandu is the original owner of the entire suit property and he died in the year 1970 leaving behind him widow Sumanbai and three daughters namely; Godabai (plaintiff), Matyabai (Defdt. 1) and Tarasanbai (Defdt. 2). The defendant No. 3 Barku is the husband of Tarasanbai, Sumanbai also died on 28-2-1985 and before that she is said to have executed the Will deed dated 10-9-1976 bequeathing the suit property in favour of defendant No. 3.

11. It is necessary to reproduce Section 68 of the Indian Evidence Act, 1872 which reads thus;

"Proof of execution of document required by law to be attested.-- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

12. Reading of the aforesaid provisions of law would indicate that in order to prove Will, it is necessary to examine at least one attesting witness. By attestation, it is meant the signing of a document to signify that the attestor is a witness to the document. Attesting witness is one who signs the document in presence of the executant after seeing the execution of the document or after receiving the personal acknowledgment of the executant with regard to the execution of the document. A scribe is a competent witness to prove a Will as an attesting witness. In the present case the scribe of the Will has not been examined. However, it would reveal that the original Will deed has also not been produced on record before the trial Court. The trial Court has exhibited this Will and made observations that the Will was executed by Sumanbai in favour of Barku and it was also registered and the same have been duly proved through the evidence of Sadhram (D. W. 1). The trial Court observed that the contents of the Will are true and correct and that Sumanbai was keeping good health and she had fully understood the contents of the said Will and thereafter she had put her thumb impression on this document. The trial Court has also held that the photocopy of the said Will is at Exh. 33 and it has been proved through the evidence of the attesting witness. It is pertinent to note that the original Will has not been produced on record and even the photocopy of the Will is also not on record. Perusal of this document, would show that it is simple xerox copy of the Will. No reason has been assigned by the defendant's as to why the original Will deed was not placed on record and what was the reason for tendering the xerox copy of the Will, on record. Thus, the Will exhibited is in the nature of secondary evidence and would not be admissible in evidence.

13. However, it would clearly reveal that only one attesting witness i.e. Sadhram (D.W.-1) has been examined to prove the Will and he is uncle of the legatee Barku. The another attesting witness Fattulal has not been examined and even the scribe of the Will has also not been examined and in such circumstances, it is difficult to hold that the Will deed dated 10-9-1976 has been duly proved. The judgment of the trial Court is very much cryptic and did not reveal as to why the Will is held to be valid. The appellate Court has considered the evidence of the attesting witness together with the contents of the Will and rightly recorded finding that the defendants did not relinquish their right to have a share in the suit property and Sumanbai could not have executed the Will in favour of Barku, the husband of Tarasanbai. If at all Sumanbai wanted to execute the Will, she would have bequeathed the suit property to any of her daughters, i.e. the plaintiff or defendant Nos. 1 and 2 and therefore, the circumstances brought on record indicate that the execution of the Will deed itself is suspicious.

14. The appellate Court has rightly considered the evidence produced on record and recorded the finding that the aspect of the relinquishment deed put-forth by the defendants has not been proved and moreover since Sadhram, the only attesting witness is examined to prove the Will is interested witness and since the original Will has not been produced, xerox copy cannot be made admissible in evidence.

15. The Will though has been exhibited by the trial Court, it did not follow that the contents of the same have been proved. The decision of this Court in the case of Baban Girju Bangar v. Namdeo Girju Bangar and Anr. 1998(3) M.L.J. 743 relied on by the learned counsel for the defendants is not applicable to the facts and circumstances of the case for the simple reason that the execution of the Will has been disputed by the plaintiff in the plaint itself. It is not possible to accept the contentions of the learned counsel that in the plaint, the execution of the Will has been admitted.

16. Similarly, the learned counsel for the defendants contended that since there was no objection from the side of the plaintiff, and the xerox copy of the Will was exhibited, it would be admissible in evidence. This submission of the learned counsel is misconstrued and cannot be accepted in the facts and circumstances of the present case because Sumanbai is said to have executed the Will in favour of third party i.e. Barku who is the husband of Tarasanbai, defendant No. 2. If Sumanbai would have an intention to bequeath the property to her daughter Tarasanbai, then she would have executed the Will in her favour and hence it is clear that the Will is executed in suspicious circumstances and in such situation, the decision of the Supreme Court in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, is also not applicable to the facts and circumstances of the present case.

17. The learned counsel for the plaintiff rightly relied on the decision of this Court in the case of Bharat R, Desai v. Naina Mohanlal Bhal 2004 (2) M.L.J. 901 : 2004(2) All MR 290 wherein this Court took the view that; exhibiting of a document is an Administrative Act. It is true that a document which is produced in Court is ordinarily exhibited after its proof. But, exhibiting a document does not mean that the document is proved and non-exhibiting a document does not mean that the document is not proved. A document is required to be proved in accordance with the provisions of the Evidence Act. Merely for administrative convenience of locating or identifying a document, it is given an Exhibit number in courts. Exhibiting a document has nothing to do with the proof though, as a matter of convenience, only the proved documents are exhibited.

18. The learned Counsel for the plaintiff also rightly relied on the decision in the case of The Roman Catholic Mission Vs. State of Madras and Another, wherein the ratio has been laid down that the copies of original documents are not admissible in evidence and foundation must be laid for establishment of right to give secondary evidence.

19. In the present case, no foundation was laid by the defendants to show as to why the xerox copy of the Will dated 10-9-1976 was tendered in evidence without production of the original. The defendants also did not assign any reason as to why the scribe of the Will has not been examined, who would have been the best witness to prove the contents of the Will in addition to the evidence of the attesting witness including Sadhram (D.W.1) and other attesting witness Fattulal who is not examined. In these circumstances, it is difficult to hold that

the plaintiff being a daughter of deceased Fandu, is not entitled to 1/3rd share in the suit property in absence of any cogent evidence to show that she had relinquished her right to claim the share. On close scrutiny, it is obvious that the judgment of the appellate Court is well reasoned and the findings have been recorded after consideration of each and every aspect of the matter on the basis of the evidence, and the appellate Court has taken into consideration even the preponderance of probabilities. Therefore, though the appellate Court did not frame the points for determination, it did not follow that the judgment is vitiated on this count. The decision of this Court in the case of Anita M. Harretto Vs. Abdul Wahid Sanaullah, relied on by the learned counsel for the defendants has no bearing on the facts and circumstances of the present case. On the contrary, the learned counsel for the plaintiff rightly relied on the decision of this Court in the case of Krishna Laxman Bhatkar v. Vithal Ganesh Athavale 2003 (5) M.L.J. 577: 2004(1) All MR 406 wherein the ratio has been laid down that merely because the points for determination were not framed like framing of issues, the judgment" of the appellate Court is not vitiated. This Court while taking into consideration this view relied on the decision of the Supreme Court in the case of R. Ramachandran Ayyar Vs. Ramalingam Chettiar, and thus, in the present case it is not possible to accept the contention of the learned counsel for the defendants that the judgment of the appellate Court is vitiated for want of framing of points for determination. 20. The judgment of the appellate Court is well reasoned and there is no reason for this Court to take a different view of the matter and therefore, it is quite obvious that the Will dated 10-9-1976 which is said to have been executed by Sumanbai has not been duly proved and consequently in absence of any evidence to show the relinquishment of the right to claim 1/3rd share by the plaintiff, the later would be entitled to claim the share and therefore, the appellate Court was perfectly justified in directing partition by metes and bounds and declaring that the plaintiff is entitled to 1/3rd share in the entire suit property. In the result, there is no merit in the appeal, which is liable to be dismissed and the same is dismissed with costs, throughout.