
(2003) 05 MP CK 0029
In the Madhya Pradesh High Court
Case No : Second Appeal No. 528 of 2002

Nand Kishore

APPELLANT

Vs

Ramesh Chandra and Another

RESPONDENT

Date of Decision : 05-05-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Succession Act, 1925 — Section 63

Citation : (2003) 4 MPHT 114

Hon'ble Judges : A.M. Sapre, J

Bench : Single Bench

Advocate : Bhagwan Singh, for the Appellant;

Final Decision : Dismissed

Judgement

A.M. Sapre, J.—It is a second appeal filed u/s 100 of CPC by the defendant No. 1 against the judgment/decreed, dated 12-9-2002, passed by learned VIIth Additional District Judge, Indore in C.A. No. 9 of 2002, which in turn arises out of Civil Suit No. 55-A of 1995, decided on 6-3-2002, by Civil Judge, Class II, Depalpur. It is being contended by the appellant in this second appeal that the appeal involves substantial question of law within the meaning of Section 100 of CPC and hence, it is liable to be admitted for final hearing. So the question that arises for consideration in this second appeal is, whether appeal involves any substantial question of law within the meaning of Section 100 ibid ?

2. The dispute relates to a suit land which originally belonged to one Onkar Lal. He died intestate leaving behind his wife Kamla Bai and two sons Ramesh Chandra and Nand Kishore, i.e., plaintiff and defendant respectively. One son, i.e., Ramesh Chandra and his mother Kamla Bai filed a suit out of which this second appeal arises against Nand Kishore for partition and possession of the entire suit land belonging to Onkar Lal on the assertion that on the death of Onkar Lal, the suit land devolved equally on the survivors, i.e., two sons and widow in equal share - each getting 1/3rd. It was alleged that defendant alone had no right to

remain in possession of suit land but he (defendant) is entitled to remain in possession of suit land to the extent of 1/3rd only, as against both the plaintiffs who are entitled to inherit and has in fact inherited 1/3rd each, i.e., 2/3rd. Since, during pendency of the suit, Kamla Bai died leaving behind her two sons but she executed a Will in favour of plaintiff - son - Ramesh in respect of her 1/3rd share. This is how Ramesh, i.e., plaintiff claimed 2/3rd share in the suit land as against defendant's share of 1/3rd. The defence of defendant was two fold. In the first place he claimed to have become owner of the suit land by virtue of adverse possession. In the second place he denied the validity and genuineness of the Will executed by Kamla Bai, i.e., his mother in plaintiff's favour. It is on the basis of this defence, the defendant contended that plaintiff is not entitled to claim any share in the suit land and hence, suit be dismissed. Parties led evidence on these pleadings.

3. Both, Trial Court as also the First Appellate court decreed plaintiff's suit. It was held that Will executed by Kamla Bai is valid and genuine. It is legal and properly executed in favour of plaintiff. It was then held that defendant has failed to prove his defence of adverse possession on the entire land and hence, has no right to remain on the entire land, as claimed by him. It is with these findings, plaintiff's suit stood decreed to the extent of 2/3rd share, i.e., his 1/3rd share which he got by inheritance from his father and 1/3rd share of his mother which he got by Will. It is against this decree, the defendant has come up in second appeal u/s 100 of CPC.

4. Heard Shri Bhagwan Singh, learned Counsel for the appellant on the question of admission.

5. Having heard learned Counsel for the appellant and having perused the record of the case, I am not inclined to admit the appeal. In other words, the appeal does not appear to involve any substantial question of law within the meaning of Section 100 of CPC and hence, appeal can not be admitted for final hearing.

6. It is not in dispute that Onkar Lal, i.e., father of parties died intestate. Under these circumstance, each of his successor in interest Will get 1/3rd share in the properties left by Onkar Lal including in the suit land.

7. The case of the defendant was that he being in exclusive possession of the entire suit land has become or acquired rights of ownership by virtue of adverse possession. This defence was not accepted by the two Courts below and in my opinion rightly. I concur with the concurrent finding recorded by the two Courts below on this issue. It is binding on me as Second Appellate Court. Even otherwise, the question, whether a person claiming a title on the strength of adverse possession is a question of fact and need to be tried on facts and evidence. Once, any finding is returned on this issue and then the same having been upheld by the First Appellate Court, it docs not call for any interference in the second appeal. It is much more so when the same is returned with proper appreciation of evidence.

8. Apart from what is observed supra, there can be no adverse possession inter se real brother or inter se co-owners for the reason that unless the partition takes place, every co-owner is held to be in possession of other co-owner. In such circumstances, the element of hostility and/or animus is totally missing. It being a settled rule of law relating to adverse possession that mere long possession in itself does not ripen into a hostile one, nor it results in conferring of full ownership on the principle of adverse possession. It has application to the facts of the case.

9. Coming to the second defence of defendant relating to legality of Will executed by Kamla Bai in favour of plaintiff, the submission of learned Counsel for appellant (defendant) was that finding on this issue by the two Courts below is perverse. It is not in conformity with the requirement of Section 63 of Indian Succession Act. It was his submission that none of the attesting witnesses have deposed in their evidence that testator has signed the Will in their presence. I do not agree to this submission firstly it was repelled by the two Courts and in my view rightly. Secondly, evidence of these two witnesses if read fully and in its correct perspective, such submission does not find place in their evidence. In the totality of entire circumstances, the Courts below were fully satisfied that execution of Will by mother in favour of her son is legal and proper and it fully satisfies the requirement of Section 63 *ibid*. What is material in such cases is the conscious of the Court in accepting the genuineness of the Will. It is also, thus, a finding of fact and being concurrent in nature binds this Second Appellate Court. I concur with finding and uphold it.

10. Appeal, thus, fails and is dismissed in limine.