

(2008) 06 BOM CK 0055
In the Bombay High Court
Case No : S.A. No. 137 of 2001

Parvatabai Raimane since deceased through her LR.
Jaywantabai and Others

APPELLANT

Vs

Anjanabai Hiware and Another

RESPONDENT

Date of Decision : 18-06-2008

Acts Referred:

Evidence Act, 1872 — Section 45, 47, 65, 66, 67
Succession Act, 1925 — Section 59, 63, 69

Citation : (2008) 6 MhLj 252

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : Milind Patil, for the Appellant; U.S. Malte, for the Respondent

Judgement

R.M. Borde, J.—This is an appeal by original plaintiffs raising challenge to the judgment and decree passed in Regular Civil Appeal No. 249/94 by District Judge, Jalgaon on 25-2-2000 whereby the first appeal presented by the original defendant came to be allowed and the judgment and decree passed by the trial Court came to be set aside.

2. Appellants/original plaintiffs instituted Regular Civil Appeal No. 205/80 in the Court of Civil Judge, Jr. Dn., Raver claiming relief of perpetual injunction against defendants thereby restraining them from obstructing peaceful possession of the plaintiffs over the suit lands. Suit lands are agricultural properties bearing gat No. 1501/1, 1501/2 and 1501/3 situate at Raver which according to the plaintiffs, are owned by them. According to plaintiffs, the lands were originally owned by their mother Ravakabai w/o Ziparu Hiware who had bequeathed the said property by executing registered Will-deed on 4-7-1976 in favour of the plaintiffs. On her demise, according to the plaintiffs, the property came to be inherited by them. Plaintiffs contend that they are in possession over the suit properties since 4-8-1979 and their names have been mutated in the revenue record on the strength of Will-deed. Defendants having no right, title or interest

in respect of the suit property are trying to interfere their possession. Hence, plaintiffs approached the Civil Court seeking relief as stated above.

3. Defendant No. 1 is the wife of deceased son of Ravakabai. As per contention of defendant No. 1, she is in possession over the suit property after demise of her husband. As per defendant No. 1, the property belongs to her father in law and was not of ownership of Ravakabai as contended by plaintiffs. Defendants have denied execution of alleged Will-deed in favour of plaintiffs. Defendant further contends that deceased Ravakabai had lost her eye sight and had virtually turned blind. The document alleged to have been executed is suspicious one. Mutation, according to defendant, does not confer any right of ownership upon plaintiffs. Defendant therefore prayed for dismissal of the suit.

4. Trial Court framed issue in respect of title and possession of plaintiffs over the suit property as well as entitlement of plaintiffs to secure relief of injunction and answered those issues in affirmative and accordingly awarded decree in favour of plaintiffs clamping injunction against defendants. Judgment and decree passed by the trial Court was subjected to appeal at the instance of defendants. Appeal being Regular Civil Appeal No. 249/94 came to be heard and disposed of by District Judge, Jalgaon by judgment and decree dt. 25-2-2000 who was pleased to allow the same. First appellate Court set aside the judgment and decree passed by the trial Court and has also further granted liberty to the plaintiffs to file fresh suit on the strength of alleged Will-deed executed in their favour claiming partition and separate possession of their share in the suit lands. Appellants/original plaintiffs have challenged judgment and decree passed by the first appellate Court in Regular Civil Appeal No. 249/94 by way of instant second appeal.

5. While admitting the appeal following substantial questions of law were framed and I answer the same in view of the following narration.

A) The learned judge sitting in appeal has committed grave error in law in not considering the consistent documentary evidence of mutation dt. 16-4-80 and so also entries in the revenue record of 7 x 12 at Exhibits 114 to 117 showing positively prima facie lawful possession of the appellants/plaintiffs over the suit lands on the date of suit and thereafter on the strength of the Will art. A dt. 4-3-1976 and this consistent documentary evidence has not at all been considered even by the learned judge in his impugned judgment.

B) The learned appellate judge has without any evidence on record held in para 11 of the impugned judgment that after demise of Ravakabai on 4-7-1979 the plaintiffs being the married daughters of Ravakabai and defendant No. 1 being the widowed daughter in law of Ravakabai succeeded to the suit lands as joint tenants, when this case of defendant No. 1 did not go beyond her pleadings in the written statement Exh. 19, since she did not adduce in evidence in the suit vide purshis Exh. 154 and therefore, such a finding becomes perverse and nothing else.

C) The learned Judge in appeal also erred in law in holding in para 10 of the judgment that the learned Civil Judge ought to have framed an issue as to the possession to the effect that whether the plaintiffs have proved their possession over the suit property on the date of the suit, but he did not do so. This is nothing but contrary to the records as to issue No. 1 framed by the learned trial Judge as to whether plaintiffs prove their title and possession over suit properties.

6. I have heard arguments advanced by Shri Milind Patil, learned Counsel for the appellants and Shri Malte, learned Counsel for respondent No. 1. I have also perused the reasons recorded by the Courts below. Although I do not agree with the reasons recorded by the first appellate Court, however, I am inclined to agree with the final conclusion drawn by the first appellate Court for the reasons which I propose to enumerate as here-in-below:

7. Plaintiffs in order to substantiate their case have placed reliance on a certified copy of the Will-deed alleged to have been executed by Ravakabai in their favour which is marked as Article A by the trial Court. Plaintiffs also placed reliance on ocular evidence of plaintiff No. 3 Chamelibai, her husband Tikaram and one witness namely Babu Barasu Zalte who is alleged to have put his endorsement and acted as an attesting witness for the Will-deed Article A. Trial Court on appreciation of evidence recorded a finding that the theory put up by plaintiffs regarding loss of Will-deed more specifically Will-deed alleged to have been stolen is not worthy to be relied upon. Trial Court has also recorded finding that certified copy of Will-deed cannot be accepted as secondary evidence. However, curiously enough, trial Court further has drawn conclusion in favour of plaintiffs holding that "Plaintiffs have proved execution of Will-deed by circumstantial evidence and therefore plaintiffs have got title in respect of the suit property." Reasons recorded by trial Court and the analogy derived are self contradictory. Trial Court has not clearly recorded finding as to whether the alleged Will-deed can be said to have been proved in accordance with provisions of Evidence Act and is acceptable piece of evidence or otherwise. So far as reasons recorded by first appellate Court are concerned, the first appellate Court has not at all touched the merits of the controversy involved in the matter. First appellate Court has opined that as plaintiffs have not sought declaration in respect of their title on the strength of the alleged Will-deed and as the plaintiffs have not prayed for partition and separate possession, no relief can be granted in their favour and as such has allowed the appeal.

8. With the assistance of learned Counsel appearing for the parties I have scanned the ocular as well as documentary evidence placed on record by the parties. In order to substantiate the claim, plaintiffs have placed reliance upon a certified copy which is marked as Article A by the trial Court. Will-deed is alleged to have been executed on 4-3-1976 by deceased Ravakabai in favour of plaintiffs. Will-deed is signed by one Baburao Barasu Zalte and Tikaram Zalte who is husband of plaintiff No. 3. Firstly, it has to be seen as to whether proper procedure as contemplated by provisions of Evidence Act has been adopted in

respect of placing secondary evidence on record. Section 65(a) prescribes as:

65. Cases in which secondary evidence relating to documents may be given. - Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.

Section 66 of the Evidence Act lays down rules regarding notice to produce. It prescribes as follows:

66. Rules as to notice to produce. - Secondary evidence of the contents of the documents referred to in Section 65, Clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

It is mandated by Section 66 that before placing reliance on secondary evidence for proving contents of the document as contemplated by Section 65, party proposing to give such secondary evidence is required to give a notice to the party in whose possession or power the document is. In the instant case, application was tendered at Exh. 10 requesting the Court to call upon the defendants to produce original of the Will-deed. The Court by order dt. 29-10-1980 directed to issue notice to produce document.

9. It appears from record that an application came to be tendered at Exh. 150

praying therein that defendants be directed to produce the original Will-deed in the Court. It is alleged in the application that Will-deed has been stolen by defendants after demise of Ravakabai. Defendants opposed application denying the allegations in respect of theft of the alleged Will-deed and as such requested to reject the application. Trial Court passed an order that in view of the say presented by defendants, no direction to produce can be granted. However, the effect will be decided after completing evidence of both the parties. Applications which were tendered by plaintiffs were with a view to seek order in respect of production of document alleged to be possessed by defendants and the trial Court on considering the applications refused to issue directions to defendants. From the record it does not appear that there was any permission granted in favour of plaintiffs on any application permitting plaintiffs to place secondary evidence on record. Not only that, I do not find any application tendered by plaintiffs seeking permission to lead secondary evidence in respect of alleged Will-deed. Procedure adopted therefore by the trial Court in respect of permitting plaintiffs to lead secondary evidence is not in consonance with mandate of Sections 65 and 66 of Indian Evidence Act. Plaintiffs cannot be said to have fulfilled the requirements of Sections and as such the trial Court was right in observing that certified copy of Will-deed cannot be accepted as secondary evidence of the document.

10. Apart from this aspect, it has to be seen whether the alleged Will-deed certified copy of which is placed on record inspires any confidence and the same is proved in accordance with provisions of Section 68 of the Indian Evidence Act. Will is a document required by law to be attested and therefore it shall not be used as evidence until one of the attesting witnesses is called for the purpose of proving its execution. In the instant matter, although one of the witnesses who has put his attestation on the Will-deed is examined, his evidence does not at all inspire any confidence. PW 3 Babu is a witness who has put his attestation on the Will-deed. He has not stated in his deposition that he has seen the testator putting his signature on the document and thereafter he has put his own signature thereon. He has stated that while he had been to the office of the Registrar, some vendor was scribing the document and he was called upon to put his signature and accordingly, he has put his signature on the document. The witness has specifically stated in his cross-examination that testator Ravakabai had lost her vision and she was total blind. The testimony of attesting witness therefore does not satisfy the requirements of Section 68 of the Evidence Act. It is necessary for the attesting witness to state before the Court that he has seen the testator putting his or her signature on the document and thereafter he has put his own signature as a witness to the document. In the instant case, mandatory requirements have not been stated by the witness and therefore, it cannot be said that the document is proved in accordance with provisions of law. PW 2 Tikaram although has been examined as witness who has put his signature on the alleged Will-deed, his testimony does not inspire confidence for the reason that he is husband of plaintiff No. 3 who is beneficiary under the Will-deed.

Testimony of witness PW 2 Tikaram being interested witness does not lead to any favourable inference in respect of due execution and attestation of the Will-deed. Defendant in her written statement has not only denied the document but has further stated that plaintiff is hesitating to place the same on record because of fear of any penal action in the event the document is established as forged or fabricated one. Although, the defendant has not entered into witness box, the fact remains that defendant has denied execution or existence of the document. Responsibility is on the shoulders of plaintiffs to prove the document and thereby dispel all the doubts.

11. Another factor which needs to be mentioned here is that defendant who is a daughter-in-law has been excluded totally from the benefits arising under the Will-deed. The property is alleged to have been bequeathed only in favour of the daughters. This is also one of the circumstances which caste heavy responsibility on the shoulders of plaintiffs to prove the document strictly in accordance with law and dispel all the doubts which may genuinely occur while appreciating the case put up by plaintiffs.

12. Reference can be conveniently made to the reported judgment in the matter of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . The Apex Court has observed in para No. 18 of the judgment thus:

18. What is the true legal position in the matter of proof of Wills? It is well known that the proof of Wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this Section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This Section also requires

that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

13. Learned Counsel for the appellant has placed reliance on judgments reported in *Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza*, . All these judgments relate to proving of the document by way of placing on record secondary evidence. However, all these matters relate to the documents other than Will. Proof of Will is to be established in accordance with Section 68 of the Indian Evidence Act read with Section 63(c) and 69 of Indian Succession Act. In the instant matter, I am of the opinion that the plaintiffs have miserably failed to prove the document on which reliance is placed. Plaintiffs' case therefore fails for two reasons namely that secondary evidence that has been placed on record is not by observing the procedure and the mandate of Sections 65 and 66 of Indian Evidence Act, as well as alleged document of Will has not been established in accordance with the provisions of law.

14. First Appellate Court has approached the matter from the angle that the plaintiffs were required to seek declaration in respect of title on the strength of alleged Will-deed and having not done so, the plaintiffs must fail. Although it was open for the plaintiffs to seek relief in respect of perpetual injunction on the strength of alleged Will-deed, I find that there was no request advanced by plaintiffs seeking liberty to present a fresh suit for declaration and partition of the disputed property. In the absence of such requests it was uncalled for the first Appellate Court to grant such liberty. However, for the reasons stated above, conclusion arrived at by the first Appellate Court can be supported. No interference is called for in this appeal. Appeal is therefore dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Pending civil application, if any, stands disposed of.