
(2005) 08 BOM CK 0152
In the Bombay High Court
Case No : S.A. No. 492 of 1990

Sheshrao M. Kuratkar (D) by LRs.

APPELLANT

Vs

Keshavrao M. Kuratkar

RESPONDENT

Date of Decision : 01-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 100
Evidence Act, 1872 — Section 45, 47, 63, 65, 67
Succession Act, 1925 — Section 59, 63

Citation : AIR 2006 Bom 33 : (2006) 3 ALLMR 660

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

Bench : Single Bench

Advocate : M.A. Bapat, for the Appellant; Anand Gode, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—Invoking the jurisdiction of this Court u/s 100 of the Code of Civil Procedure, this appeal takes an exception to the Judgment and decree dated 30-6-1989 passed by the Additional District Judge in Regular Civil Appeal No. 202/1985, whereby the appeal is allowed and the Judgment and decree dated 15-10-1985 passed by the trial Court in Regular Civil Suit No. 119/1981 has been set aside by which the respondent-defendant was directed to deliver the possession of the suit house, cattle shed and the open space forming the suit property to the plaintiff with further direction to hold enquiry into the mesne profits under Order 20, Rule 12 of the Code of Civil Procedure.

2. Brief facts are as under:

The plaintiff owns a house on the area admeasuring 150 x 150 quibits. This property was owned formerly by the Krushna Sada Kuratkar, who made a gift of the same to Mahadeo Zolbaji, the father of the plaintiff as well as the defendant. Thereafter, on 11-1-1950 Mahadeo had executed the will bequeathing the property exclusively to the plaintiff as it was his self acquired property. Mahadeo died on 23-4-1958. The defendant is real brother of the plaintiff. He had no

separate house for residence, and therefore, he was inducted into the suit house as a licensee. The licence was terminated by serving notice dated 17-8-1981 to which the defendant had given reply on 14-9-1981 and he disputed the ownership of the plaintiff. The defendant did not dispute the previously the property was owned by Krushna Sada who had gifted the said property to the father of the plaintiff and defendant by name Mahadeo and that Mahadeo died on 23-4-1958. The defendant has contended that he is in possession of the suit house as an owner. The property was not self acquired property of Mahadeo and he could not have executed the Will in favour of the plaintiff in exclusion of the defendant.

3. The trial Court on appreciation of the evidence, recorded the finding that the plaintiff has proved that by virtue of will deed dated 11-1-1950, he became the owner of the suit property as the said will was the last will of the testator Mahadeo and it was legal and valid will. The trial Court also recorded the finding that the defendant was a licensee in the suit premises and did not acquire title to the suit property by adverse possession. Consistent with these findings, the trial Court decreed the suit and directed the defendant to deliver the possession. Being aggrieved by this judgment and decree passed by the trial Court, the defendant carried appeal to the District Court. The learned Additional District Judge by his judgment dated 30-6-1989 allowed the appeal and set aside the Judgment and decree passed by the trial Court and dismissed the suit. This judgment and decree passed by the lower appellate Court is under challenge in this appeal.

4. Mr. Bapat, learned Counsel for the plaintiff contended that the trial Court has correctly appreciated the evidence on record and recorded findings that the certified copy of will (Exh. 34) was made admissible in evidence as per Section 65 of the Indian Evidence Act and due to the fact that the original will though not filed on record but produced before the Court was a thirty years old document and the defendant on the other hand had tried to rebut this document by saying that it was got executed by the plaintiff by using misrepresentation and undue influences on deceased Mahadeo but this contention of the defendant is not supported by any oral evidence. Mr. Bapat further contended that the trial Court has rightly relied on the decision of the Apex Court in the case of Kalidindi Venkata Subbaraju and Others Vs. Chintalapati Subbaraju and Others, to support the proposition that the production of the copy of the Will purporting to be 30 years old, is admissible in evidence and the presumption u/s 90 of the Evidence Act is in relation to the execution, attestation, etc. in support of Will can be drawn if the document of Will, is more than 30 years old. He contended that the appellate Court has failed to consider material and relevant evidence which if considered, would have led to opposite conclusion, and therefore, this Court can very well interfere into the findings recorded by the appellate Court u/s 100 of the CPC for setting aside the erroneous reasonings and conclusion drawn by the appellate Court. In support of these submissions, he relied on the decision of the single Bench of this Court in the case of Gulabrao v. Bhagwan 2001 (2) Mh. LJ.

5. The learned Counsel for the defendant contended that the judgment of the appellate Court is well reasoned and the appellate Court has rightly observed that the original Will was with the party who wanted to prove it and it is difficult to accept the reasonings given by the trial Court that the certified copy of Will would suffice the matter when it is necessary as per the provisions of Section 63 of the Indian Succession Act, to show that the signature or the mark of the testator is so placed that it shall appear that it was intending thereby to give effect to the writing as a Will. He contended that the appellate Court rightly appreciated the evidence adduced on record and has come to the conclusion that even though the document of will, was 30 years old, cannot be made admissible in evidence u/s 90 of the Evidence Act and consistent with these findings, the appellate Court has rightly set aside the judgment and decree passed by the trial Court. He contended that no substantial question of law arises in this appeal and the same may kindly be dismissed.

6. This Court has given thoughtful consideration to the contentions canvassed by the learned Counsel for the parties. The law in relation to the proof of will is almost settled by the series of decisions of the Supreme Court. This Court may usefully make a reference to the decision of the Apex Court in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, wherein it has been observed as under:

The party propounding 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, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the 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. 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. 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 will 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.

7. In the case of Kalidindi Venkata Subbaraju and Others Vs. Chintalapati Subbaraju and Others, it has been held that production of copy of Will purporting to be 30 years old does not warrant presumption of its execution or attestation. Presumption u/s 90 arises in respect of original document.

8. In the present case the appellate Court has rightly observed in para 12 of the judgment that the original will was with the party who wanted to prove it, and therefore, it is difficult to accept the reasoning given by the learned trial Court that the certified copy of the will would suffice the matter when it is necessary as per the provisions of Section 63 of the Indian Succession Act, to show that the signature or the mark of the testator is so placed that it shall appear that it was intending thereby to give effect to the writing as a Will.

9. According to the plaintiffs witness Sheshrao, he was present with Mahadev when the will was executed. The other witness Deshpande does not support the plaintiff in so far as the attestation of the document is concerned. The plaintiff has come forward to adduce all form of proof about execution of the will. The evidence of these two witnesses does not suggest that at the time of execution of the document, Mahadev was knowing the nature of disposition. Deshpande has stated that it was Watnipatra. Sheshrao is silent about it. Sheshrao's evidence does not show that the recitals of the will were read over to Mahadev. According to P.W. Shankar, Mahadev was not pulling on well with his son Bapurao. There is nothing on record to show that Mahadev had no desire to give share in the property to his other sons, i.e. Keshav, Ramdas, etc. All these circumstances do cast suspicion in execution of the will and as to whether it was a last will of Mahadeo. Evidence of P.W. Sheshrao that his all brothers were living over the suit plot even during the life time of Mahadev, shows that Mahadev had no differences as such with either of his sons or wife. The wife of Mahadev was living with his two sons, who were teenagers in the year 1960. The presence of Sheshrao with Mahadev and evidence of Deshpande that he was asked to sign on Watnipatra is sufficient to create a doubt as to whether Mahadev really was knowing the nature of disposition. The evidence adduced by plaintiff is also not sufficient to show that the document was properly attested. The plaintiff did not file the original will on record for the reasons best known to him, when the original is available. It is difficult to understand why the party wanted to adduce secondary evidence by filing certified copy which in itself cannot be held as a proper evidence. In such cases, the original document must be on record to show that signature of the testator is so placed that it would appear that the testator wanted to create the same document. The same document is not before the Court nor was it before the trial Court at the time of delivery of judgment. This further creates a doubt about execution of the will by Mahadev, now deceased and it can-not be presumed that it was his last Will. The evidence falls short to show that it was the last will of deceased Mahadev and the suspicion is not removed by the proper and cogent evidence.

10. In the case of Uma Devi Nambiar and Others Vs. T.C. Sidhan (Dead), the

apex Court has followed the decision of Constitution Bench of Apex Court in Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, and reproduced para 4 of the said judgment which is as under:

The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the Court accepts the Will as genuine. Where the caveat or alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations.

11. In that view of the matter, it is obvious that no presumption of law can be drawn in respect of the document which is 30 years old document in respect of the will which has not been produced on record though it was available and thus it is clear that so called will which is said to have been executed by Mahadev was not duly proved as is required by law as per the provisions of Sections 63, 67 and 68 of the Indian Evidence Act and in view of the ratio laid down by the Supreme Court in the case of H. Venkatachala v. B.N. Thimmajamma (cited supra). Therefore, this Court is of the considered opinion that no substantial question of law is involved in this second appeal and the same stands dismissed with no costs.