
(2004) 04 BOM CK 0029
In the Bombay High Court
Case No : Second Appeal No. 239 of 1994

Smt. Shewantabai Ingle

APPELLANT

Vs

Sau. Chandrakalabai Udakhe

RESPONDENT

Date of Decision : 12-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12(1), 100
Evidence Act, 1872 — Section 63, 65, 68

Citation : (2004) 4 ALLMR 40 : (2005) 107 BOMLR 1482

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

Bench : Single Bench

Advocate : Rajeev C. Madkholkar, for the Appellant; S.P. Kankale, holding for S.D. Patil, for the Respondent

Judgement

S.T. Kharche, J.—By invoking the jurisdiction of this Court u/s 100 of the Civil Procedure Code, the original defendant has filed this appeal being aggrieved by the judgment dated 15th April, 1994 passed by the learned Additional District Judge in Regular Civil Appeal No. 50 of 1991, whereby the appeal is dismissed and the judgment and decree passed by the trial Court on 27th March, 1991 allowing the suit by directing the appellant/defendant to deliver the possession of the suit field Survey No. 8/2, admeasuring 12 acres 33 gunthas, with enquiry into future mesne profits under Order 20 Rule 12(1)(c) of the CPC is confirmed.

2. The respondent/plaintiff filed suit for possession of the southern side of agricultural land bearing Survey No. 8/2 of her share to the extent of 5 hectares 33 Ares on the contentions that her father Kisanrao Sambhaji Ingle died on 27th April, 1976 and before his death he had executed a Will on 1st September, 1975 whereby the agricultural land which was a self-acquired property was bequeathed to the parties. It is contended that by virtue of the said Will, out of Survey No. 8/2, 12 acres and 33 gunthas were bequeathed to the plaintiff and the remaining land was bequeathed to the daughter Panchfulabai and the field survey No. 9/3 admeasuring 4 acres 26 gunthas was allotted to the share of his

wife Shewantabai/defendant till her life time and thereafter it was to pass over to Panchfulabai. It is contended that the plaintiff has become owner of her share by virtue of the Will and, therefore, she filed the suit for possession and mesne profits. The defendant resisted the claim and filed her written statement. It is contended that the so-called Will is a fabricated document on the basis of which the plaintiff cannot claim any right or title. It is contended that the plaintiff had also filed Regular Civil Suit No. 5 of 1977 for rectification of the mutation entries and the said suit was dismissed on 17th June, 1982 and, therefore, the present suit is barred by the principles of res judicata. The trial Court on the basis of the pleadings framed the issues. Thereafter the parties adduced evidence in support of their contentions. The trial Court on considering the evidence recorded the finding that plaintiff's father Kisanrao had executed the Will dated 1st September, 1975 bequeathing the suit property to her and she became the owner of the same. Consistent with these findings the trial Court decreed the suit and directed the defendant to deliver the possession of 12 acres 33 gunthas of agricultural land out of Survey No. 8/2 and further directed enquiry into future mesne profits. The defendant being aggrieved by this judgment and decree passed by the trial Court carried appeal to the District Court. The learned Additional District Judge dismissed the appeal and confirmed the findings of the trial Court. It is thus judgment and decree which is under challenge in this appeal.

3. Mr. Madkholkar, learned Counsel for the appellant/defendant contended that the so-called Will (Ex. 3) has not been duly proved as is required by the provisions of Section 65 of Indian Evidence Act 1872. He contended that the Will is a registered document and therefore, as per Sub-section (f) of Section 65, the certified copy of the Will ought to have been produced on record. He contended that the copy of the Will produced on record is a typed copy which does not bear the signature of the propounder or the attesting witnesses and, therefore, it is inadmissible in evidence. He contended that even if it is said that the original Will has been lost, the plaintiff could have produced on record the photo state copy or the certified copy of the said Will in view of the provisions of Section 63 of the Evidence Act. He contended that the Will is required to be proved by examining the attesting witnesses in view of Section 68 and though in the present case the attesting witnesses have been examined, the Will which is a typed copy cannot be made admissible in evidence in the nature of secondary evidence. He contended that both the Courts below have committed an error in observing that the photo state copy of the Will has been produced on record, when in fact the same has not been produced and, therefore the impugned judgment has resulted into miscarriage of justice. He, therefore, contended that both the Courts below have committed an error of fact and law and the impugned judgment cannot be sustained in law. In support of these submissions, he relied on the decision of Supreme Court in Kalyan Singh Vs. Smt. Chhoti and Others, and also on the decision of Allahabad High Court in the case of Ganesh Prasad Vs. Badri Prasad Bholanath and Others, .

4. Mr. Kankale, learned Counsel, holding for Mr. Patil Advocate for the respondent/plaintiff, contended that the plaintiff has examined the attesting witness Kisan (P.W. 2) who admitted that he was in service of deceased Kisanrao for about two to three years for the relevant period and according to him the propounder Kisanrao had executed the Will in his presence, which was scribed by one Madhukar. The other attesting witness Shanker (P.W. 3) was also present along with the plaintiff and the defendant, another daughter Panchfulabai of deceased Kisanrao, was also present and the contents of the Will were read over by Madhukar before Kisanrao put his signature on the Will. Though this witness identified the signature on the photo state copy of the Will as it is as per original, according to Mr. Kankale there is a concurrent finding of both the Courts below that the Will has been duly proved and, therefore, no interference into the same is warranted. He contended that by virtue of the Will the plaintiff being a legatee has acquired title to her share and, therefore, both the Courts below were perfectly justified in directing the defendant to deliver the possession of the field admeasuring 12 acres 33 gunthas out of field Survey No. 8/2. He contended that no substantial question of law arises in this appeal and the same may kindly be dismissed. In support of these submissions, he relied on the decision of the Supreme Court in the case of Sheel Chand Vs. Prakash Chand, .

5. This Court has given thoughtful consideration to the contentions canvassed by the Learned Counsel for the parties. It is not in dispute that the land survey No. 8/2 situated at village Lankanath is admeasuring 21 acres and this land is a self-acquired property of deceased Kisanrao. It is also not in dispute that the plaintiff Chandrakalabai is the daughter and defendant Shewantabai is the widow of deceased Kisanrao, who died on 27th April, 1976.

6. Deceased Kisanrao is said to have executed a Will on 1st September, 1975 and this Will is said to have been proved through the evidence of attesting witnesses Kisan (P.W. 2) and Shankar (P.W. 3). It is well settled that the Will can be proved through the examination of attesting witnesses. In this context, this Court may usefully refer Section 68 of the Evidence Act which contemplates that "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." It would thus be dear on reading of this provision that by attestation it is meant signing of the document and attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving the personal acknowledgment of the executant with regard to execution of the document, even if the scribe to prove this Will is an attesting witness. But in the present case, the scribe Madhukar has not been examined.

7. In Kalyan Singh Vs. Smt. Chhoti and Others, , it has been observed in para 20 that "it has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.

8. In the present case, both the Courts below have made erroneous observations in their Judgments that the Will has been duly proved through the evidence of the plaintiff as well as the attesting witnesses Kisan (P.W. 2) and Shankar (P.W. 3) without perusal of the typed copy of the Will (Ex. 30). What is pertinent to note is that the Will is neither a certified copy nor a photo state copy of the registered Will. Perusal of the same would reveal that it is a simply typed copy on which the plaintiff Chandrakalabai has put her signature certifying that the said copy is the true copy of the Will. Therefore, this Court is of the considered view that without going into the merits of the case, in order to meet the ends of justice the matter will have to be remanded to the trial Court for affording an opportunity to the plaintiff to produce the photo state copy of the Will or the certified copy of the Will. Therefore, the impugned judgment is set aside and the matter is remitted to the trial Court for fresh decision in accordance with law after affording an opportunity to the parties to adduce evidence in support of their contentions so far as the Will said to have been executed by the deceased Kisanrao on 1st September, 1975 is concerned. Since the matter is petty old, the trial Court shall decide the same expeditiously, preferably within six months as far as possible, in accordance with law without being influenced by any of the observations made in this judgment Costs shall be the costs in the cause. Parties are directed to appear before the trial Court on 14th of June, 2004. Record and proceedings be sent back to the trial Court immediately without any delay.