

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.134 OF 1993

Subhash Kakasaheb Patil & Ors. Appellants

Vs.

Smt. Sushilabai Tukaram Patil & Ors. Respondents

Mr. T.S. Ingale, Advocate for the Appellants.

Mr. Harshal Palve, Advocate for Respondent no.1.

Coram : Smt. R.P. SondurBaldota, J.

Date : 27th March, 2015

PC :

1 The appellants are original defendants no.1 to 7 to Regular Civil Suit No.116 of 1980 filed by respondents no.1 and 2 for partition of joint family properties and for separate possession. Originally there were three more defendants to the suit, who have since been deleted from the proceedings. The trial court, by its judgment and order dtd. 28th October, 1985, partly decreed the suit holding that respondent no.1 is entitled to 1/3rd share in the suit properties. Respondent no.2 was held not entitled for partition and separate possession of the suit properties. The decree was challenged in the appeal to the District Court. By the judgment and order dtd. 7th January, 1993, the appeal was dismissed confirming all the findings of the trial court.

2 The present second appeal was admitted on the following questions of law”:

“(c) Whether the Lower Appellate Court was justified in holding that the Will dtd.29th November, 1979 executed by the deceased Tukaram in favour of defendants no.1 to 3 is not valid and legal even after recording a categorical finding that the execution of the said Will and disposition of property by the said Will by deceased Tukaram in favour of Defendants no.1 to 3 by the said Will, he was of sound mind is established?

(d) Whether the Lower Appellate Court was justified in holding that the reasons given by the deceased Tukaram in his Will excluding his wife, plaintiff no.1 from inheriting the suit property cannot be a reason to exclude her and therefore, the Will is surrounded by suspicious circumstances and does not valid and legal ?

(j) Whether even after establishing and proving and execution of the Will dtd. 29th November, 1979 executed by the deceased Tukaram in favour of defendants no.1 to 3 bequeathing the property in their favour while he was in sound mind and in disposing condition and when the documents of said Will categorically finds valid and elaborate reasons given by deceased Tukaram to exclude his wife from inheriting the suit properties still it can be open to the Court to interpret the said Will and come to a different conclusion thereby erroneously holding that the said Will is surrounded by alleged suspicious circumstances as elaborate reasons are not given to exclude plaintiff no.1 from inheriting the suit property.?

3 Brief statement of the factual background of the appeal required to be noted for deciding the above questions is as follows:

One Ganu was the original owner of the suit properties. He died intestate in the year 1949 leaving behind his sons, Kakasaheb and Tukaram, who were residing jointly. Kakasaheb was the manager of the joint family properties. Plaintiff no.1 is the wife of Tukaram, plaintiff no.2 claims to be his daughter. This claim, however, has been rejected by both the courts below. The relationship between Tukaram and plaintiff no.1 got strained within a couple of years after the marriage. It was the allegation of Tukaram that plaintiff no.1 was indulging in extra-marital affairs, from which plaintiff no.2 was born. There were also matrimonial proceedings between the parties, which included the proceedings for maintenance, restitution of conjugal rights and divorce. Later, both arrived at amicable settlement, under which they started residing separately and Tukaram started paying yearly maintenance to plaintiff no.1.

4 Tukaram had initially by the sale-deed dtd.29th March, 1979 sold his share in the suit properties to defendants no.1 to 3 for the consideration of Rs.17,000/-. These defendants are his nephews being the sons of his deceased brother. He, however, apprehended that the sale may be affected by a Notification issued by the State of Maharashtra in relation to Warna Irrigation Project. Therefore, he also made the Will dtd. 29th November, 1979 bequeathing his share in the suit properties to defendants no.1 to 3. The Will makes provision for payment of maintenance to plaintiff no.1. The Will was duly registered.

5 Tukaram died on 5th February, 1980. Within a couple of months thereafter i.e. on 21st April, 1980, the plaintiffs filed the suit for partition contending that Tukaram had died intestate and the sale deed dtd. 29th March, 1979 executed by Tukaram in favour of defendants no. 1 to 3 is a bogus and hollow document.

6 During the course of trial, the defendants had produced the Will in evidence. The courts below found that execution of the will was duly proved by the defendants as required under Section 63 of Indian Succession Act. As regards the sound state of mind and disposing condition, the trial court held that because Tukaram was suffering from throat cancer for some time, he was fed up with life and as such was not in sound state of mind. It gave the finding in following words:

“Under such circumstances, it will have to be said here that the mental and physical condition of Tukaram must not be that of a normal human being and because of the poor health, which was badly affected due to the throat cancer. It will have to be said her that Tukaram must not be having good health and mentally sound condition.”

The appellate court however did not agree with the finding and set it aside for the following reasons.

“Such strange conclusion is drawn by learned Trial Judge in absence of evidence retrospectively applying, conditions of health about after one month of the document on 24/12/1979. On the strength of plaintiff's evidence, it can not be said Tukaram was

not of sound mind and physically unfit. So, coupled with the doctor's opinion and statement of Defendant-Subhash that Tukaram was of sound mind and in a position to execute the Will, is unshaken. I conclude testator Tukaram was of sound mind and mentally fit when he executed will on 29/11/1979”

7 Despite holding that Tukaram was in sound and disposing state of mind, the Appellate Court rejected the will because in its opinion the will was surrounded by suspicious circumstances. The reasons stated therefor read as under:

“Now only one circumstance, the plaintiff No.1-wife is excluded from the property. No reasons are given for exclusion. So, it can be said that it is unnatural will. The relations of testator and Plaintiff no.1 were good, he had love and affection considering the litigation between the parties and the compromise of payment of maintenance to both plaintiff nos. 1 and 2. No doubt, compromise may be for different reasons, plaintiff no.1 was permitted to stay in one house separately and arrangement for her maintenance at the rate of Rs.400/- per month was agreed, even such arrangement was made to pay Rs.200/- to plaintiff no.2 till her marriage or attaining 18 years whichever even happens earlier.”

“So exclusion of wife from inheriting the property while making will is suspicious circumstance. It was expected something more in the will reasons to exclude wife and arrangement for her requirements in her life time, nor there is mention arrangement dtd.14/2/1972 arrived as per compromise in proceedings Second Appeal No.1561/1979 certified copy (Exh. 58) to continue after in case the testator predeceased his wife- plaintiff no.1.”

and

“No doubt charge is created of maintenance over agricultural lands described in para-4 of the petition (exh.56). Even accepting for the moment on the strength of this compromise decree (exh.56), it can be said that arrangement is made and charge is created. Considering the fertile lands and income, the mere payment of Rs.400/- per year to the plaintiff no.1 is not sufficient to exclude her from inheriting the property of her husband when her husband intended to dispose and exclude his wife without making sufficient provisions for his wife, it can be said that this is suspicious circumstance and it is an unnatural will. The Defendant-Subhash has failed to explain this suspicious circumstance about exclusion of wife from inheriting the property.”

The appellate court concluded by saying :

“I came to the conclusion due execution and attestation of will is proved by testator- Tukaram in favour of Defendants, will is held invalid for not repelling the suspicious circumstance, exclusion of wife- the plaintiff no.1 and not giving any reasons for the same and this is not explained by defendant-propounder.”

8 Mr. Ingale, the learned advocate for the appellants submits that the appellate court clearly erred in deviating from the settled principle of interpretation of the will. He argues that if a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the statute, presumption of due execution and attestation applies and the court cannot question the actual disposition. Mr. Ingle draws support from the following decisions of the Apex Court:

1 Smt. Sushila Devi vs. Pandit Krishna Kumar Missir and others, reported in **1971(3) Supreme Court Cases**, page 146.

2 Rabindra Nath Mukherjee and another vs. Panchanan Banerjee (dead) by LRs and others, reported in **(1995) 4 Supreme Court Cases**, page 459.

3 Gurdev Kaur and others vs. KAKI and others, reported in **2007 (2) Maharashtra Law Journal**, page 863.

9 In the first decision cited, the testator had not bequeathed any property to one of his children. This was treated as unnatural and the will was disbelieved. The Apex Court held that the circumstance that no bequest was made to one of the children by the testator would make the will appear unnatural, but if the execution of the will is satisfactorily proved, the fact that the testator had not bequeathed any property to one of his children cannot make the will invalid. If the bequest is made in a will appears to be unnatural, then the Court has to scrutinise the evidence in support of the execution of the will with a greater degree of care than usual, because every person must be presumed to act in accordance with the normal human behaviour, but there is no gainsaying the fact that some individual had behaved in an abnormal manner. Judges cannot impose their own standard of behaviour on those who execute wills.

10 In the second decision cited also deprivation of natural heirs by testatrix was looked upon as suspicious circumstance. This was disapproved by the Apex Court with observations that the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will. In some case, they may be fully debarred and in others only partially. Therefore, disinheritance of an heir could not have been taken as a suspicious circumstance.

11 In the third decision cited in similar circumstance, the Apex Court held that the role of the court is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. At paragraph 77, it observes:

“77. The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the Court looks into the nature of the bequest.”

12 Mr. Palve, the learned advocate for the respondents on the other hand submits that the concurrent findings by the courts below as regards the validity of the Will cannot be a matter of consideration

in the Second Appeal. Therefore, the Court of Second appeal cannot interfere with the finding. He, however has no answer to the submission on merit advanced by Mr. Ingale.

13 The appellate court, in its order holds that the reasons stated in the Will for exclusion of plaintiff no.1 are not sufficient and observes that the relations of testator and plaintiff no.1 were good. He had love and affection considering the litigations between the parties and the compromise of payment of maintenance to both the plaintiffs. The observations are not supported by any material on record. If at all anything, it is contrary to the material on record and in particular, the will of Tukaram, which expresses his feelings. In the very first paragraph of the Will, Tukaram states that within a couple of years after the marriage, he realised that plaintiff no.1 was a woman of easy virtue. It was a big mental blow to him. He further states that the prime time of his youth was spent in fighting the litigation, which led to despair for him. It also affected his health. At paragraph 3 of the will, he again states that because plaintiff no.1 had subjected him to extreme harassment, he had no compassion whatsoever for her. Defendants no.1 to 3, his nephews, had looked after him and were his support in every respect and hence he bequeathed his entire property to them. The bequest was with condition that pursuant to the orders of the court, they will continue to pay maintenance to plaintiff no.1 during her lifetime and to plaintiff no.2 until she attained the age of 18 years. Thus, nothing from the will could have led the appellate court to hold that the relations between Tukaram and plaintiff no.1

were good or he had love and affection for the plaintiffs. He had in fact disputed the paternity of plaintiff no.2. It has been established in the present suit itself that Tukaram was not the father of plaintiff no.2. The learned Judge refers to the compromise arrived at between the parties in the matrimonial dispute to support his inference. It must be noted that the compromise was arrived at after 20 years of the litigation. Under the compromise, plaintiff no.1 was to reside separately and to be maintained by Tukaram during her lifetime. It was obviously to put an end to unsavoury matrimonial litigation. Further the compromise was not of coming together which alone could have allowed the appellate court to draw the inference, it had drawn. In the circumstance, the finding of the lower appellate court that disinheritance of plaintiff no.1 was a suspicious circumstance rendering the Will to be unnatural is clearly a perverse finding. In any case, applying the law laid down by the Apex Court in the decisions cited, it must be held that the appellate court could not have imposed its Will upon Tukaram as regards the bequest of the properties by him. The three questions of law, therefore, must be answered in the negative. The Second Appeal is therefore allowed. The order dtd. 28th October, 1985, passed by the trial court and the order dtd. 7th January, 1993 passed by the Appellate Court are set aside. Regular Civil Suit No. 116 of 1980 is dismissed with costs.

(Smt. R.P. SondurBaldota, J.)