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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.743 OF 2014

Mahadev Y. Jadhav & Ors.	...Appellants
V/s.	
Chandrakant J. Sawant & Ors.	...Respondents

Mr.S.M. Railkar for the Appellants.

Mr.S.B. Shetye for the Respondent Nos.1 to 7.

CORAM : R.D. DHANUKA, J.
DATE : 26TH SEPTEMBER, 2016.

P.C. :-

1. By this appeal filed under section 100 of the Code of Civil Procedure, 1908 by the appellants (original defendant Nos.1 to 5), the appellants have impugned the judgment and decree dated 19th July, 2015 passed by the learned Principal District Judge, Ratnagiri thereby dismissing Regular Civil Appeal No.134 of 2011 filed by the original defendant nos.1 to 3 against the judgment and decree passed by the learned trial Judge dated 28th September, 2011 in Regular Civil Suit No.129 of 2008. The appellants have restricted the challenge insofar as the order of the learned trial Judge holding that the plaintiff is entitled to have entire 8 anna share of Govind and the

order of the appellate Court upholding the said Will by the learned trial Judge is concerned.

2. The plaintiff had filed a suit for partition and separate possession of the suit property to the extent of his share. The plaintiff is from the branch of Jayram who had two sons Suryakant and Chandrakant. The defendants are the successors of Nanda. Madhav is her husband and other defendants are her sons. Jayram died in the year 1995. There was oral partition between Govind and Jayram in the year 1956. Since Yashwant died in the year 1956, his daughter Nanda was not having any share in the ancestral property. Jayram along with Govind were cultivating the property. Govind died in the year 1982. He had no issue. His wife Laxmibai has alleged to have executed a Will in favour of the plaintiff and allotted her 1/2 share to the plaintiff. It was the case of the plaintiff that the defendant nos.1 to 5 were not concerned at all with the suit property and were not bequeathed any share by the said Laxmibai.

3. The defendant no.2 filed the written statement, which was adopted by the defendant nos.3 to 5. The defendant nos.1 to 5 denied the execution of the Will and other averments made by the plaintiff.

4. The learned trial Judge framed seven issues. Insofar as the execution of the Will by Laxmibai is concerned, the learned trial

Judge framed issue no.4 i.e. “Does plaintiff prove that Laxmibai executed a Will deed and allotted 8 anna share in the suit property to him ? ”

5. The parties examined various witnesses. Insofar as the execution of the Will is concerned, the plaintiff examined one of the attesting witness. The defendant nos.1 to 5 examined Sub-Registrar as his witness to prove the procedure of registration of the document in the office of Sub-Registrar.

6. The learned trial Judge has rendered a finding insofar as issue no.4 is concerned in affirmative and has held that the plaintiff had proved that Laxmibai had executed a Will. It is not in dispute that the said Will was registered.

7. Being aggrieved by the judgment and decree dated 28th September, 2011, insofar as the learned trial Judge had held that the plaintiff was entitled to have the entire 8 anna share is concerned, the defendant nos.1 to 3 filed appeal (Regular Civil Appeal No.134 of 2011) before the learned District Court. The learned District Judge also framed an issue no.3 insofar as the execution of the registered Will and has rendered a finding in favour of the plaintiff. Being aggrieved by the said judgment and decree of the first appellate Court, the defendant nos.1 to 5 have impugned the said judgment insofar as the execution of the Will is concerned by filing this second

appeal under section 100 of the Code of Civil Procedure.

8. Learned counsel appearing for the defendant nos.1 to 5 invited my attention to the oral evidence led by the plaintiff i.e. one of the alleged attesting witness to the Will and Sub-Registrar by the defendant nos.1 to 5. He submits that the alleged attesting witness was not at all known to the alleged executor of the Will Laxmibai even remotely. He submits that the plaintiff had admittedly not examined the scribe of the alleged Will. He submits that Laxmibai had executed a power of attorney granting various powers to one of the defendant which would indicate that she was not in a position to execute any Will. He submits that the Sub-Registrar, who was examined by the defendants had also proved the procedure of registration of documents in the office of Sub-Registrar which the executor of Will had failed to follow.

9. It is submitted by the learned counsel that merely because the Will was executed that would not prove that the Will was a genuine Will and that the executor of the Will was capable of execution of such Will and was in the proper state of mind for execution of such Will. In support of this submission, the learned counsel for the defendant nos.1 to 5 placed reliance on the judgment of the Supreme Court in case of **S.R. Srinivasa & Ors. vs. S. Padmavathamma, 2010(3) CCC 146 (SC).**

10. Learned counsel for the defendant nos.1 to 5 also invited my attention to various findings rendered by the two Courts below and would submit that the entire judgment is based on the wrong interpretation of the evidence led by the alleged attesting witness. He submits that both the Courts below have decided contrary to the principles of law laid down by the Supreme Court in case of **S.R. Srinivasa & Ors.** (supra).

11. Mr.Shetye, learned counsel for the original plaintiff on the other hand invited my attention to some portions of the oral evidence of the attesting witness, who was examined by the plaintiff. He submits that the witness examined by the plaintiff in his cross-examination deposed that the scribe of the witness had explained the contents of the Will to the executor of the Will. When the document was being typed, the witness was present. He submits that there is no requirement in law that the attesting witness must be a relative of the executor of the Will. He submits that the executor of the Will had executed a power of attorney that itself would indicate that she was capable to execute the Will and was in proper state of mind.

12. It is submitted by the learned counsel for the plaintiff that the learned trial Court has appreciated the oral and documentary evidence examined by both the parties. The first appellate Court has independently considered the oral and documentary evidence and

has rendered various findings of fact. He submits that both the Courts below have rendered the finding of execution of the Will not merely on the basis that the same was registered but after considering the other evidence on record.

13. Learned counsel for the defendant nos.1 to 5 in rejoinder reiterates the submissions made before this Court and would submit that the findings recorded by the two Courts below are perverse.

14. There is no dispute that the plaintiff had not examined the scribe of the Will. A perusal of the evidence of the attesting witness however, indicates that he had deposed that he was acquainted with Laxmibai as a villager. He deposed that after preparation of the draft of the Will, he took Laxmibai to the Sub-Registrar office. The entire typing work completed after one and half hour. The house of the said attesting witness was at the distance of 1/2 k.m. from the house of Laxmibai. In his cross-examination he deposed that he has visited the office of the Sub-Registrar along with Laxmibai.

15. A perusal of the judgment and decree rendered by the learned trial Judge indicates that the learned trial Judge after considering oral and documentary evidence has rendered a finding that the Will was executed on 3rd May, 1999 and was registered. There were two persons, who had witnessed the Will viz. Kishore Tukaram Palkar and Vijay Sambhaji Shinde – Desai. The plaintiff had

examined Vijay Shinde – Desai. One Ashwin Shetye had typed the contents of the Will. It was read out to the propounder and then it was presented before the Sub-Registrar. Laxmibai had put her thumb impression in presence of the said witness. The learned trial Judge also considered the evidence of the Sub-Registrar, who was examined as a witness by the defendant nos.1 to 5 to prove the procedure of execution of the document in the office of the Sub-Registrar by a party. After considering the entire evidence, the learned trial Judge has held that the plaintiff had sufficiently established and proved the Will. It is held that the plaintiff was entitled to get 8 anna share of Laxmibai as per the Will of Laxmibai.

16. A perusal of the impugned judgment and decree passed by the first appellate Court indicates that the learned District Judge has framed five points for consideration, including the point “Whether respondent no.1 (original plaintiff) proves that Laxmibai widow of Govind bequeathed him her undivided half share in the suit property by registered Will dated 30-05-1999 and that Will is a genuine and valid Will ?” and after considering the oral and documentary evidence answered the said point in affirmative.

17. A perusal of the impugned order passed by the first appellate Court indicates that the said issue is dealt with in great detail in paragraphs nos.16 to 28 of the said judgment and decree.

The first appellate Court has rendered a finding that there were no suspicious circumstances proved by the defendant nos.1 to 5 to throw away the Will. This finding is also rendered after considering the evidence of the Sub-Registrar of Ratnagiri, who was examined by the defendant nos.1 to 5. The first appellate Court considered two judgments of the Supreme Court and one judgment of the Delhi High Court in the impugned judgment and decree and has held that it was not the case of the defendant nos.1 to 3 that at the time of execution of the Will, Laxmibai was not in fit state of mind to execute the Will and further held that it was also not the case of the defendant nos.1 to 3 that the plaintiff played any active role in execution of the Will in favour of Laxmibai.

18. There was no evidence on record to show that on the date of execution of the Will, Laxmibai was under the control of the plaintiff. There was no evidence to indicate that the plaintiff gave instructions to the scribe for drafting the Will or that as per the instructions given by the plaintiff, the scribe had drafted the Will. The plaintiff is admittedly the son of the real nephew of Laxmibai, whereas the defendant nos.1 to 5 were legal heirs of married niece of Laxmibai. The first appellate Court has held that exclusion of the defendant nos.1 to 5 cannot said to be unnatural.

19. In my view, none the Courts below have accepted that the

Will is a genuine document only on the basis of the same being a registered document as canvassed by the learned counsel for the defendant nos.1 to 5. Both the Courts have taken into consideration the entire evidence documentary as well as oral and has rendered various findings of fact about the execution of Will, about mental condition of the testator and about registration of the Will in the impugned judgment and decree. There is no dispute about the proposition of law laid down by the Supreme Court in two judgments referred to in the judgment of the first appellate Court. Those two judgments would not assist the case of the defendant nos.1 to 5 in view of the other circumstances and evidence considered by the two Courts below while rendering a finding that the execution of the Will was proved.

20. I have heard the learned counsel appearing for the defendant nos.1 to 5 at length and have perused the oral and documentary evidence produced by the parties before the two Courts below and also have perused the findings of fact rendered by both the Courts below. In my view the findings rendered by the two Courts below are not perverse and thus cannot be interfered with by this Court under section 100 of the Code of Civil Procedure. The appeal is totally devoid of merits. There are no substantial questions of law arising in this second appeal.

21. I therefore, pass the following order :-
- a). Second Appeal No.743 of 2014 is dismissed.
 - b). No order as to costs.

(R.D. DHANUKA, J.)