

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.298/2014

(Nitin s/o Murlidhar Agrawal ..vs.. Shantabai wd/o Shyamrao Balbudhe and ors.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. S. C. Mehadia, Advocate for appellant.

Mr. N. Y. Thengre, Advocate for respondents.

CORAM : A. B. CHAUDHARI, J.

DATE : FEBRUARY 23, 2016

I have heard learned counsel for the rival parties. I have perused the record. In the light of the submissions made before me, I find that there are concurrent finding of facts recorded by both the courts below that the will was not proved in accordance with the provisions of the Evidence Act. The learned counsel for the appellant contended that in the cross-examination, Arun Balbudhe (PW1) admitted that by virtue of will names of defendant nos.2 to 4 were recorded in the record and, therefore, that was an admission in accordance with law and admittedly, there was no need to prove the will independently in the light of the said admission. In this connection, it would be appropriate to quote paragraph 10 of the judgment of that rial Court, which reads thus:

“10. However, to prove Will Deed it is for propounder to establish that executor of Will Deed was fit in mental and physical condition. He had followed nature of alleged disposition by Will Deed and had signed Will Deed in disposable state of mind. From nature of cross-examination and answers given by witness PW-1 Arun, it nowhere appears that there was any question to this witness about disposable state of mind of executant, or that at the time of execution of Will Deed, testator was in fit mental condition. What this witness has admitted is existence of Will Deed; that itself will not amount admission of due execution of Will Deed. By admitting such existence of Will Deed, propounder cannot relieved from his duty cast upon him to prove due execution.”

I have no difficulty in agreeing with the above observations in paragraph 10. That apart, there is an obligation on the propounder of the will in this case when it was the foundation of this case that he received the property by legal and valid title on the strength of the Will in favour of his father. The provisions of the Evidence Act clearly provided for proof of will by evidence of the attesting witnesses but in the present case, the appellant did not produce any witness to prove the will. The

provisions of the Evidence Act about proof of Will have been held to be mandatory and not only that it is for the propounder of the will to prove the will in accordance with the provisions of the Evidence Act. The submission that the will was admitted, does not appear to be correct since the appellate Court also observed in paragraph 12 that the nature of the suit and the pleadings of the plaintiff do not show any attempt as such. Also, there is a most important aspect, which cannot be lost sight of i.e. the copy produced before the court was a photocopy of the will and not original document of the will. By no stretch of imagination, the photocopy of the will could be regarded as primary evidence and there is no attempt made to lead the secondary evidence.

In that view of the matter, I find no merit in the present second appeal. Hence I make the following order.

ORDER

(i) Second Appeal No.298/2014 is dismissed summarily.

JUDGE