

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.150 OF 1994
WITH
CIVIL APPLICATION NO. 808 OF 2007**

Mahadeo Vithu Nivale

...Appellant

vs.

Smt. Yashodabai wife of Hari Kodalkar,
since deceased by her heirs

1A) Shri Bhanudas Dhondiram Nivale & Ors.

...Respondents

.....

Mr. S.G. Deshmukh for the Appellant.

Mr.V.S. Kapse for Respondent Nos.1A to 1C.

.....

CORAM : S.C. GUPTE, J.

DATE : 1 MARCH 2017.

P.C. :

This second appeal challenges a judgment and order passed by the District Court, Sangli in Regular Civil Appeal No.307 of 1982. By the impugned judgment and order, the learned District Judge dismissed the appeal filed by the Appellant herein and confirmed a judgment and decree passed by the Joint Civil Judge, Junior Division, Islampur in Regular Civil Suit No.409 of 1976, decreeing the suit filed by original Respondent No.1 against the Appellant and three others for possession of the suit property and mesne profits.

2 The second appeal was admitted on two substantial questions of law, concerning, firstly, the interpretation of Sections 8, 9 and 11 read with the Schedule of Hindu Succession Act, 1956, and secondly, the

provisions of Section 65(b) of the Indian Evidence Act, on the basis of which, secondary evidence of the document against the Appellant herein was admitted by the Trial Court and such admission confirmed by the First Appellate Court.

3 The Plaintiff filed the present suit on the basis of her right of possession of the suit property consisting of a house. She claimed to be the purchaser of the property from the sole owner thereof, who was arraigned as Defendant No.4 to the suit. The case of the Plaintiff before the Trial Court was that the suit property was owned by one Krishna, who was the grandfather of the Plaintiff. Krishna left behind three sons, namely, Rama (the predecessor-in-title of Defendant Nos.1 to 3), Lakhu (the predecessor-in-title of Defendant No.4, the Plaintiff's vendor) and Govinda. Defendant Nos. 1 to 3 were the grandsons of Rama. Defendant No.4 was the son of Lakhu and the real brother of the Plaintiff. The third son of Krishna, namely, Govinda, left behind him his only son Vishnu, who died issueless. According to the Plaintiff, there was a partition between Rama, Lakhu and Govinda, each having $\frac{1}{3}^{\text{rd}}$ equal share in the property. Vithu, the son of Rama and father of Defendant Nos. 1 to 3, sold his $\frac{1}{3}^{\text{rd}}$ share to Lakhu by a sale deed dated 3 January 1931. Thus, Lakhu, through whom Defendant No.4 claims, became the owner of $\frac{2}{3}^{\text{rd}}$ share in the suit property. It is the Plaintiff's case that after the demise of Vishnu, Defendant No.4 succeeded to the share of Vishnu and became the owner of the entire house, which he sold to the Plaintiff under a registered sale deed dated 24 February 1966. The Plaintiff, thus, claimed to have become the owner of the suit property. It is the Plaintiff's case that since Defendant No.3 was not having any premises for his residence, he requested the

Plaintiff to give one room for his residence and on his request, the Plaintiff gave a room admeasuring 12' x 12' in the north-east corner of the suit house for the residence of Defendant No.3. This room is the suit premises, possession of which was claimed by the Plaintiff from the Defendants (Defendant Nos.1 and 2 being brothers of Defendant No.3).

4 The Trial Court decreed the Plaintiff's suit directing Defendant No.3 to deliver possession of the suit premises to the Plaintiff and also directing recovery of mesne profits from Defendant No.3. The decree was confirmed in appeal by the District Court, holding that the Plaintiff had proved her ownership of the suit property as also unauthorised occupation of the suit room by Defendant No.3.

5 The main grounds of challenge in the present second appeal concern (i) the purported succession of 1/3rd share of Vishnu after his demise in favour of Defendant No.4, through whom the Plaintiff claims and (ii) the sale of 1/3rd share of Vithu (the son of Rama and father of Defendant Nos.1 to 3) to Lakhu, the predecessor of Defendant No.4, under the alleged sale deed of 3 January 1931.

6 It is an admitted position that Vishnu had 1/3rd share of the suit property, and he died intestate and issueless. Both the Trial Court and the First Appellate Court came to a concurrent finding that the share of Vishnu exclusively devolved upon Lakhu, the uncle of Vishnu and father of Defendant No.4. Learned Counsel for the Appellant submits that this share ought to have devolved equally upon the descendants of the branches of the Lakhu and Rama and not exclusively on the descendants of Lakhu. It is

an admitted position that Rama predeceased both Lakhu and Vishnu. On the death of Vishnu, thus, Lakhu was the only legal heir of Vishnu coming within Class II of the Schedule to the Hindu Succession Act, 1956 as the deceased's father's brother. The finding of the courts below that 1/3rd share of Vishnu in the suit property devolved upon Defendant No.4, thus, does not suffer from any error of law. In accordance with Sections 8, 9 and 11 read with the Schedule to the Hindu Succession Act, 1956, share of Vishnu is correctly held to have devolved upon Defendant No.4 through his father Lakhu.

7 The next contention of the Appellant is that secondary evidence is admissible under Section 65 of the Evidence Act only when the existence, condition and contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his legal representative in interest. It is submitted that in the present case, though the sale deed of 3 January 1931 was disputed by the Appellant, the First Appellate Court erroneously proceeded on the footing that the execution of the document was admitted by the Appellant (original Defendant). In this behalf, it is pertinent to note that originally, the trial court had admitted the document, namely, the sale deed dated 3 January 1931, on the footing that the original sale deed was shown to have been lost and that, accordingly, the secondary evidence of the document was permissible. The trial court further held that since what was produced was a certified copy of the original, the same was admissible under the provisions of Section 79 of the Evidence Act. The First Appellate Court found fault with this basis of admission of the document. The appeal court held that when the original itself cannot be directly received in evidence without the proof of its

execution being offered, the copy also cannot be admitted in evidence. The court also held that there was no ground made out for admission of secondary evidence, since no evidence of the loss of the original was adduced and no permission to adduce secondary evidence on that basis was sought. It is doubtful if these observations of the First Appellate Court and rejection of basis of admission of the document by the trial court on their footing, constitute a correct assessment in law. Be that as it may, the First Appellate Court nevertheless proceeded to admit the document on record on yet another basis, namely, admission of the document in the pleadings of the Defendants. The court observed that in the written statement of the Defendants, the transaction was not denied. The court observed that neither the execution of the document nor its nature as a sale deed was disputed by the Defendants. The Defendants' case was that the document might have been executed by the vendor Vithu when he was under the influence of alcohol. The court observed that this aspect of the matter was not proved by the Defendants and that, accordingly, on the basis of the Defendants' own pleadings, the document could be accepted in evidence. The court also analysed the evidence of the parties in this behalf. This itself affords another correct basis of admission of the document in evidence. The written statement of the Defendants denies the document of 3 January 1931 on the basis that the document appeared to have been procured from the Defendants' father Vithu without his knowledge or concurrence, taking advantage of his addiction and whilst he was under the influence of alcohol. Secondly, it is submitted that the document of sale is executed without the concurrence of Defendant Nos.1 to 3 (the Defendants being minor on the date of the transaction) without any legal necessity. In the absence of the right of Defendant Nos.1 to 3 in the share of their father

Vithu, even this ground was not found to be proved by the courts below. The defence was not of want of signature of Vithu but of want of legal authority as well as disposing state of mind of the executant. The onus to prove these grounds is always on the party who sets them up. The Defendants having failed to discharge that onus, the First Appellate Court rightly held that the document could have been admitted in evidence on the basis of the pleadings of the parties. There is, thus, no legal infirmity in the admission of the sale deed of 3 January 1931 in evidence.

8 There is no merit, in the premises, in either of the contentions of the Appellant for challenging the impugned judgment and order. The second appeal is, accordingly, dismissed. No order as to costs.

9 In view of the disposal of the appeal, nothing survives in the civil application and the same is also disposed of.

(S.C. GUPTE, J.)