

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 519 OF 2019
WITH
CIVIL APPLICATION NO. 10690 OF 2019

1. Satyabhama W/o Dnyachandra Shinde
Age: 63 years, Occu: Household
2. Narendra S/o Dnyachandra Shinde
Age: 41 years, Occu: Business
3. Ravindra S/o Dnyachandra Shinde
Age : 36 years, Occu: Labour
4. Shridhar S/o Dnyachandra Shinde
Age : 31 years, Occu: Business

All R/o Signal Camp, Latur

...Appellants
(Orig. Defendant Nos. 1 to 4)

Versus

1. Haribhau S/o Rambhau Shinde
Age : 59 years, Occu: Labour
R/o Signal Camp, Latur

...Respondent
(Orig. Plaintiff)

Mr Chaitanya C. Deshpande, Advocate for Appellants
Ms. Anjali Bajpai Dube, Advocate for Respondent/sole

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 06.12.2021

PRONOUNCED ON : 07.12.2021

ORDER :

1. The challenge in the second appeal is to the Judgment and decree passed in Regular Civil Suit No. 310/2013 by the Civil Judge, Senior Division, Latur and confirmed at the hands of District Judge-3, Latur in Regular Civil Appeal No. 149/2016.
2. The respondent/original plaintiff has filed a suit for possession and mesne profit in respect of the suit property described in the plaint. The

appellants were the defendants before the trial court. The suit went on trial and it came to be decreed with order to the present appellants/defendant Nos. 2 to 4 to hand over vacant possession of the suit property more particularly described in para No. 2 of the plaint marked as 'D' to the plaintiff by removing construction and structure raised on it within a period of two months from the date of order. That impugned Judgment and decree was challenged before the District Court at Latur and learned District Judge-3, Latur was pleased to confirm the impugned Judgment and decree passed by the trial court.

3. The appellants/original defendant Nos. 1 to 4 are therefore before this Court by way of second appeal in view of Section 100 of the Code of Civil Procedure.

4. Heard Mr C.R. Deshpande, learned counsel for the appellants and Ms. Anjali Bajpai Dube for the respondent on the point of admission of second appeal.

5. Mr Deshpande, learned counsel for the appellants vehemently submitted that both the Courts below erred in arriving at conclusion that the respondent/plaintiff has proved his ownership. The Courts below also erred in recording findings that respondent/original plaintiff has proved the will in accordance with law when no attesting witnesses to the will were examined to prove the will. He submitted that said suit went on trial in absence of appellants. The appellants/defendants were in the process to settle the dispute amicably with the respondent/original plaintiff. The First Appellate Court has also overlooked this fact. The First Appellate Court

instead of remanding the suit to the trial court for fresh decision on its own merits, decided the appeal and confirmed the findings recorded by the trial court. The courts below have committed grave error.

6. Mr Deshpande, learned counsel for the appellants invited my attention to the substantial questions of law framed in the memo of appeal more particularly, page No. 7(a) to (e).

7. Mr Deshpande, learned counsel for the appellants submitted that in view of the substantial questions of law as stated in the appeal memo No. (a) to (e) urged for admission of the appeal and stay to execution proceedings.

8. Ms. Anjali Bajpai Dube, learned counsel for respondent/original plaintiff submitted that both the Courts below have recorded concurrent findings of fact holding that respondent/original plaintiff has proved his ownership over the suit property on the basis of will. The will has been duly proved according to the provisions of law. No substantial questions of law are involved in the present appeal. The appellants/original defendants had appeared before the trial court after service of suit summons but they failed to file their written statement. The appellants/original defendants even did not bother to remain present during the trial. The plaintiff/respondent has examined himself as well as examined three more witnesses to prove his ownership. The will has been duly proved by examining son of one of the attesting witnesses. The concerned advocate, who has drafted the will and one witness who has typed the will on her typewriter are examined. Ms. Anjali Dube submitted

that both attesting witnesses are reported to be dead and as such, the plaintiff had left with no option except to invoke section 69 of the Evidence Act. The plaintiff has duly proved the will by examining the concerned witnesses as provided under section 69 of the Evidence Act. It is not a case of appellants/original defendants that the will is outcome of fraud, undue influence or coercion.

9. Ms. Anjali Dube submitted that husband of appellant No.1 and father of appellant Nos. 2 to 4 had filed a suit for declaration and perpetual injunction against the present respondent/original plaintiff in respect of the same suit property which came to be dismissed on 14.02.2006 and appeal preferred by the deceased Dnyachandra vide appeal No. 41/2006 also came to be dismissed on 08.02.2008. By taking help of above factual scenario, Ms. Anjali Dube, learned counsel for the respondent/original plaintiff submitted that the appeal needs to be dismissed in limine.

10. Perused the impugned Judgment and decree passed in Regular Civil Suit No. 310/2013 by the Civil Judge, Senior Division at Latur as well as impugned Judgment and decree passed in Regular Civil Suit No. 149/2016. Perused evidence of concerned witnesses. Both the courts below have recorded concurrent findings of fact holding that the respondent/original plaintiff has proved his ownership over the suit property. The appellants/defendants are in illegal possession of the suit property. The First Appellate Court has held that no case is made out by the appellants/defendants to remand the case to the trial court for the decision afresh.

11. On careful study of the Judgments of the courts below, it is evident that the plaintiff/respondent has put forth his claim of ownership over the suit property on the strength of will executed by his mother Kashibai. According to the stand of the plaintiff, his mother has executed will on 13.07.2006 by which she has bequeathed one half portion each to her sons (plaintiff and Dnaychandra since deceased). The plaintiff is claiming to be the owner of western side portion of $17\frac{1}{2}$ X 35 feet area according to the will. The appellants/defendants stated to be the owners of area of $17\frac{1}{2}$ X 35 feet but they are in possession of more area i.e. $5\frac{1}{2}$ X 35 feet.

12. The dispute is now centered around for area of $5\frac{1}{2}$ X 35 feet which is stated to be the suit property. The courts below have considered the evidence produced by the plaintiff and his witnesses. The plaintiff has examined himself vide Exh. 18 and three more witnesses. Mr Deepak Kulkarni vide Exh. 28/practicing advocate, who drafted the will, Smt. Pushpa Kamble vide Exh. 30, who typed the will on her typewriter and Ramkishan Subhash alias Pophale vide Exh. 32, son of one of the attesting witnesses.

13. The learned trial Judge after careful scrutiny of the evidence of above referred stock of witnesses, arrived at conclusion that plaintiff has proved his ownership on the basis of will. The will has been duly proved.

14. The First Appellate Court has also carefully gone through the evidence on record. The First Appellate Court has taken into consideration the provisions of Section 68 and 69 of the Indian Evidence Act. It is

observed by the First Appellate Court that both the attesting witnesses are reported to be dead. The plaintiff has no option except to examine the practicing advocate, who has drafted the will, son of one of the accused attesting witnesses and the lady, who has actually typed the will on her typewriter. It is held by the First Appellate Court that the will has been duly proved in view of the provisions of section 69 of the Evidence Act.

15. Section 68 and 69 of the Evidence Act provides what is the requirement to prove the will and how the will is to be proved.

16. In the present case, both the attesting witnesses are reported to be dead. No option was left before the plaintiff except to invoke section 69 of the Evidence Act. Accordingly, the plaintiff seems to have examined the practicing advocate Mr Deepak Kulkarni(PW-2), who has drafted the will as per the instructions of Kashibai (mother of plaintiff). Smt Pushpabai (PW-3) who has typed the will on her typewriter and one Ramkishan, who is son of one of the attesting witnesses deceased Subhash. The Trial Court and the First Appellate Court after assessing evidence of above referred stock of witnesses have arrived at conclusion that the will has been duly proved in accordance with section 69 of the Evidence Act. Resultantly, the courts below held that the plaintiff has proved his ownership on the basis of will and accordingly, he is entitled to get possession of the suit property which has been bequeathed by his mother Kashibai.

17. I do not see any error, both in law and facts on the part of the courts below in recording such findings having regard to the provisions of

section 69 of the Evidence Act. The First Appellate Court has even considered the argument advanced on behalf of the appellants regarding remanding the matter to the trial court afresh and the same prayer has been turned down, by assigning sound reasons.

18. It is material to note that when the trial court decreed the suit in absence of appellants/defendants and practically ex-parte decree, they did not apply to the trial court for setting aside the same by taking aid of Order 9 Rule 13 of CPC. The prayer for remanding the suit to the trial court cannot be said to be *bona fide* and genuine having regard to the facts of the case in hand.

19. It is also material to note that husband of appellant No.1 and father of appellant Nos. 2 to 4 had filed Regular Civil Suit No. 343/2001 before the trial court for the declaration of ownership and perpetual injunction against the present plaintiff/respondent in respect of same suit property which came to be dismissed on 14.02.2006. The Civil Appeal No. 41/2006 also came to be dismissed by the Adhoc Dist Judge-1, Latur on 08.02.2008. The defendants/appellants are anyhow interested to protract the litigation. The dispute is only in respect of area of 5½ X 35 feet which defendants are in possession and occupation exceeding their share.

20. There are concurrent findings of the two courts below. In view of the scheme of second appeal provided by section 100 of CPC. Interference is permissible only in case of perversity in the findings and incorrect application of law.

21. Even though appellants/defendants remained absent before the trial court and not filed written statement, the trial court has proceeded with the trial. The plaintiff has examined himself as well as examined three witnesses. On the basis of evidence on record and after appreciation of evidence, the trial court has recorded the findings against the respective issues. The First Appellate Court has also considered all the points including remand of suit to the trial court and arrived at conclusion that no case is made out by the appellants/defendants even to remand suit in view of their conduct. It is held on the basis of evidence on record that ownership of plaintiff over the suit property is proved on the basis of will.

22. Having regard to the above reasons and discussion, I arrive at a conclusion that the appeal is liable to be dismissed as no substantial question of law is involved therein.

ORDER

(I) The second appeal is dismissed in limine.

(II) In view of dismissal of second appeal, the civil application also stands disposed of.

[SHRIKANT D. KULKARNI, J.]

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