

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 18 OF 2017

1. Chandrakant Ambadas Mahajan
age 68 years, occ. Agriculture
R/o Shivoor, Tq. Vaijapur
Dist. Aurangabad.
2. Pandmakar Ambadas Mahajan
age 65 years, occ. Pensioner
R/o Verul, Tq. Khultabad
Dist. Aurangabad.
3. Vimalbai Suryakant Mahajan
age 63 years, occ. household
R/o Bhavani Nagar, Aurangabad.
4. Sanjay Suryakant Mahajan
age 40 years, occ. Service,
R/o Bhavani Nagar, Aurangabad.
5. Rajendra Suryakant Mahajan
Age 38 years, occ. Agriculture
R/o Shivoor, Tq. Vaijapur
Dist. Aurangabad.
6. Dr. Vijaya Suryakant Mahajan
age 35 years, occ. Medical practitioner
R/o Shivoor, Vaijapur
R/o Bhavani Nagar, Aurangabad.
7. Baby alias Pratibha Padmakar Joshi
age 33 years, occ. Household
R/o Aurangabad.
8. Shoba Sudhakar Joshi
age 31 years, occ. Household
R/o Aurangabad.

9. Jagdish Chandakant Mahajan
age 37 years, occ. Agriculture
R/o Shivoor Tq Vaijapur
Dist. Aurangabad.

Appellants

Versus

Smt. Shakuntala Kantrao Joshi
(Deceased through LRs)

- a. Kantrao Uttamrao Joshi
age 70 years, occ. Retired
R/o Bhavani Nagar,
Back side of Old Marketyard,
Aurangabad.
- b. Sandhya Kantrao Joshi
@ Sandhya Arvind Kapse
age 47 years occ. Housewife,
R/o Gurujan Housing Society
In front of Dr. Roplekar Hospital,
Aurangabad.
- c. Ganesh Kantrao Joshi
Age 48 years, occ. Business,
R/o Bhavani Nagar,
Back side of Old Marketyard,
Aurangabad.
- d. Vidya Kantrao Joshi
@ Vidya Shripad Limye
age 42 years, occ. Housewife,
R/o Bhavani Nagar,
Back side of Old Marketyard,
Aurangabad.
- e. Prashant Kantrao Joshi
age 40 years, occ. Labour work
R/o Bhavani Nagar,
Back side of Old Marketyard,
Aurangabad.

Respondents

Mr. P. S. Paranjape, Advocate holding for Mr. R. J. Godbole, Advocate for the appellants.

Mr. D. K. Kulkarni, Advocate for respondents.

CORAM : R. M. JOSHI, J.

RESERVED ON : 20th MARCH, 2023.

PRONOUNCED ON : 29th MARCH, 2023.

JUDGMENT :

1. Appellants are original defendants in Regular Civil Suit No. 355/2007 filed by respondent/original plaintiff for partition and separate possession of suit property i.e. land bearing Gut No. 1422 admeasuring 9 H 23 R situated at village Safiyabadwadi, Shivoor, Tq. Vaijapur. Appellants are aggrieved by the judgment and decree dated 7th January, 2015 passed in Regular Civil Suit No. 355/2007 by the Civil Judge, Junior Division, Vaijapur and confirmation of the said decree in Regular Civil Appeal No. 10/2015 by judgment and decree dated 12th July, 2016. For the sake of convenience, the parties are referred to by their nomenclature in the original proceeding.

2. Plaintiff Shakuntala Kantrao Joshi is the sister of the defendants. It is her contention that plaintiff, defendants No. 1 and 2 and deceased Suryakant were the children of Ambadas who died on

29th May, 2006. Plaintiff has filed suit with specific averment that there is a joint family of defendants No. 1, 2 and deceased Suryakant and Ambadas and that there was no partition of the ancestral properties held by the joint family. It is further contended that since Ambadas was of old age, the suit land was cultivated by defendant No. 1 Chandrakant and deceased Suryakant. It is alleged that without knowledge of Ambadas, mutation entries were effected in respect of the said land in the name of defendants. She claims to have sought partition of the suit land on 30th December, 2006 and since the same was denied by the defendants, the suit came to be filed.

3. Defendants No. 1 to 6 and 9 filed written statement wherein relationship between the parties is not disputed. It is claimed that there was oral partition of the suit property and other assets in the year 1985 and on that basis, mutation entries were effected in the revenue record. It is also averred that Ambadas executed will-deed dated 16th January, 2006 excluding plaintiff by bequeathing the properties to the defendants. It is also claimed that the house and suit land are self-acquired properties of Ambadas.

4. Learned counsel for appellants argued that the Trial Court and the First Appellate Court committed serious error of law by not considering the fact that the suit property was self-acquired property of Ambadas and it was within his right to bequeath the same in favour of the defendants even by excluding plaintiff. It is argued that on the basis of evidence of Daulat Jadhav (Exhibit 90), the defendants have proved execution of will by Ambadas being attesting witness thereof. He also drew attention of this Court to the evidence on record which according to him, suggests that mutations were effected in the year 1985 itself and in absence of any challenge thereto by the plaintiff, present suit is barred by limitation. He places reliance on the judgment of Gujrat High Court in the case of State of Gujrat and others Vs. Shivarjsinh Harishchandrasinh and others, **2018 SCC Online Guj. 25**, to deny right of plaintiff-daughter in the suit property.

5. Per contra, learned counsel for the plaintiff drew attention of the Court to the pleadings wherein the plaintiff has specifically stated about jointness of the family and the suit property being ancestral property. It is stated that plaintiff by examining herself and also by extracting admissions in the cross-examination of

witness of defendants i.e. Balasaheb Narode has proved that the suit property is ancestral property of plaintiff and defendants and also that the relationship between deceased Ambadas and plaintiff was cordial and therefore, there was no reason to exclude her from the property. It is argued that even otherwise, Ambadas had no right to execute will in respect of the entire properties and that since the defendants have failed to remove the cloud of suspicion over execution of the will, the learned Trial Court and the First Appellate Court have rightly rejected the same.

6. Before dealing with the question raised in the appeal, it will be appropriate to consider the scope of Section 100 and 103 of the Code of Civil Procedure which reads thus :

“100. Second appeal – (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.”

Section 103 – Power of High Court to determine issues of fact – In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts reason of a decision on such question of law as is referred to in section 100.

7. Reverting back to the facts of the case, in the background of the pleadings of the plaintiff and defendants, the learned Trial Court has rightly placed initial burden on plaintiff to show that the suit land is a joint family property and thereafter burden was cast upon the defendants to establish their case about oral partition of the properties in the year 1985. They were also called upon to prove that Ambadas executed will in question and bequeathed the properties to the defendants excluding the plaintiff. The issue of limitation is also framed and duly answered by the Trial Court.

8. Plaintiff in order to discharge the initial burden on her, examined herself at Exhibit 44 and has deposed in accordance with the plaint. In the cross-examination, nothing is elicited by the defendants in order to show her admission about suit property not being ancestral property or previous partition of the suit property or any other properties in the year 1985. As against this, testimony of defendant No. 1 Chandrakant (Exhibit 63) indicates that he candidly

admitted in the cross-examination that he has no evidence about the properties belonged to his father Ambadas. Infact, he categorically stated about the properties being inherited after death of Anantrao i.e. father of Ambadas, i.e. devolved upon Ambadas. He admitted the letters written by his father Ambadas (Exhibit 67 to 71) and the photographs (Exhibit 72 and 73). He further claimed that there was oral partition in the presence of Daulat Jadhav, Balasaheb Narode and Sarjerao Jadhav.

9. Defendants examined Balasaheb Narode at Exhibit 74. He was essentially examined for the purpose of proving will deed dated 16th January, 2006. However, his admission in the cross-examination that Ambadas had already signed the said will and since the signature of bequeathor was not made in the presence of this witness, his evidence cannot be considered for the purpose of proving the will. Daulat Jadhav, who was examined on behalf of the defendants however has stated about execution of will in his presence. According to him, will (Exhibit 47) was signed by Ambadas in his presence. Thus, defendants claim that execution of the will deed is duly proved through this attesting witness.

10. Hon'ble Apex Court while dealing with the issue of removal of suspicion over the execution of will in case of H. Venkatachala Iyengar vs. B. N. Thimmajamma and others, **AIR 1959 SC 443**, has held that "It is true that if a caveat is filed alleging exercise of undue influence, fraud or coercion in respect of execution of will propounded, such plea must have to be proved by caveator, but even without such plea circumstances may raise doubt as to whether the testator was acting of his own free will executing the will and in such circumstances it would be a part of initial onus to remove any such legitimate doubt in the matter".

11. In the instant case, plaintiff by examining herself has discharged initial burden on her to challenge will in question. Perusal of cross-examination of Daulat Jadhav would show that Ambadas was not possessing good health for two to four months before his death and he was bed ridden. Ambadas died on 29th May, 2006 and will was executed on 16th January, 2006. The period between the date of execution of will deed and death of deceased Ambadas is so short in view of the evidence on record to show illness of Ambadas that it was incumbent on the part of the defendants to establish that at the time of execution of the will, Ambadas was in fit

mental and physical state. Though appending of medical certificate to will is not mandatory requirement of a valid will, however, considering the age and sickness of deceased, it was necessary for the defendants to show that at the time of execution of the will deed, Ambadas was in disposable state of mind. From the admission in the cross-examination of Daulat, there is reason to believe that Ambadas may not be in a proper state of mind to execute the will deed. Moreover, Babasaheb, witness of defendants, has candidly admitted cordial relationship between Ambadas and plaintiff, which is duly corroborated by the documentary evidence on record i.e. letters written by Ambadas (Exhibit 67 and 71) and photographs (Exhibit 72 and 73). The evidence on record unerringly shows that relationship between father and daughter was not strained and there was no reason to exclude her from the property.

12. In view of settled position of law the entire burden is on the propounder of the will to remove all suspicious circumstances surrounding the will. In the present case, the evidence on record indicates that at the relevant time, Ambadas was suffering from ailment. He did not sign the will in the presence of atleast one attesting witness. Similarly, there is reasonable doubt about

exclusion of plaintiff considering the evidence on record that the relationship between Ambadas and plaintiff was cordial. All these facts create suspicion over execution of will by Ambadas. Defendants being the propounders of the said will, were unable to remove the cloud of suspicion over execution of the said will by deceased. In such circumstances, learned Trial Court was fully justified in keeping the said will out of consideration.

13. There is a strong presumption about jointness of the family in Hindus. The burden is on the person who claims partition thereof. In the instant case, defendants have claimed oral partition of the properties in the year 1985 and it was also claimed that the same was done in presence of the persons named hereinabove. Out of the said persons, Balasaheb Narode was examined by defendants. However, he did not vouch that the oral partition being done in his presence. On the contrary, he stated in examination-in-chief that Ambadas had told him that he has given share to his sons, excluding daughter. This statement of witness goes to show that share was given in will which indicates that there was no previous partition as claimed by defendants. From evidence of Daulat also, it is clear that there was no oral partition of the properties between Ambadas and

his sons. Except for mutation entry, there is absolutely no evidence on record to show previous partition between the parties. Merely because the mutation of the suit land was done in favour of defendant No. 1 and Suryakant, this does not lead to the conclusion that there was partition. More particularly, the evidence on record shows that the names of these persons were mutated in the revenue record in view of the fact that the other brothers were staying separately due to their employment. Similarly, non raising of objection to the mutation entry does not lead to the conclusion that the plaintiff has accepted the factum of partition. On the basis of evidence on record, there was no escape from the conclusion that the properties of the joint family were not partitioned previously as claimed by the defendants.

14. The next contention of defendants is about the suit land being self acquired property of Ambadas. There is specific pleading to that effect in the written statement and hence the burden is squarely on these defendants to prove that the suit land is his self acquired property. The admission in the cross-examination of defendant No. 1 -Chandrakant demolishes the said case, when he clearly admits that there is no evidence to show that the property

belonged to his father Ambadas. He further admits that the properties were inherited after the death of his father i.e. Anantrao meaning thereby the case of the plaintiff about the suit property being ancestral property is admitted by this defendant. Apart from this, Daulat Jadhav, the witness examined by defendants, has also clearly accepted that the suit property is ancestral property of defendants. Thus, there is ample evidence on record to hold that the suit land was ancestral property and inherited by plaintiff and defendants.

15. The learned trial Court as well as the First appellate Court have considered the evidence on record in its proper perspective. The appellants herein have failed to show any perversity of whatsoever nature in the findings recorded by both the courts below. Thus, no error on facts or law occurred while passing impugned judgments to call them as perverse. No substantial question of law therefore is involved in this second appeal.

16. In the result, the second appeal being devoid of merit stands dismissed. No order as to cost.

17. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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