

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 553 OF 2022

1. Sachin Pandharinath Dalavi,
Age : 30 yrs, Occ: Agri.
2. Pandharinath Kundlik Dalavi,
Age : 67 yrs, Occ: Agri,
3. Ashabai Pandharinath Dalavi,
Age : 56 yrs, Occ: Agri,

All R/o. Wanjoli, Tq. Newasa,
Dist. Ahmednagar.

...Appellants
(Orig. Defendants)

Versus

Sau. Kadubai Bharatpuri Gosavi,
Age : 63 yrs, Occ: Agri. & Household,
R/o. Wanjoli, at present R/o. Sonai.
Tq. Newasa, Dist. Ahmednagar.

...Respondent

...

Mr. K. M. Nagarkar h/f Ms. S. S. Kulkarni, Advocate for
the Appellants.

Mr. R. R. Karpe, Advocate for the Respondent.

...

CORAM : R.M. JOSHI, J

RESERVED ON : MARCH 30, 2023

PRONOUNCED ON APRIL 18, 2023

JUDGMENT

1. Original defendants in R.C.S. No. 1051/2012
being aggrieved by the judgment and decree passed by
the First Appellate Court in R.C.A No. 32/2018 have
preferred this Appeal under Section 100 of Code of

Civil Procedure. Parties are referred to by their nomenclature in the suit.

2. The facts in brief which leads to the present appeal can be narrated as under:

Plaintiff filed suit for declaration to be the owner and possessor of the suit property bearing Gut No. 81/B situated at Wanjoli, Tq. Newasa, Dist. Ahmednagar. It is the case of the plaintiff that the suit property belonged to Bhanudas Khandagale, which was assigned to him on 16.06.1976 by Government. He was cultivating the suit land during his lifetime. He died as a bachelor on 30.10.2000 without leaving legal heir or any other relative behind him. It is further case of the plaintiff that her husband was a Gramsevak of village Wanjoli for the period from 1975 to 1985 and during this time, they got acquainted with Bhanudas and there was a bond of love and affection between them. Bhanudas was old aged person and plaintiff and her husband helped him during his illness from time to time. It is also claimed that since Bhanudas was unable to perform agricultural work, plaintiff and her husband were helping him. According to the plaintiff on

22.01.1990 Bhanudas prepared a will and got it registered with Sub-Registrar of Assurances and bequeathed suit property to plaintiff. She claims that she was unaware of the said will and after death of Bhanudas the said will was found. It is explained in the plaint about the incorrect mention of Gut No. 217 instead of 81/B in the will. It is also stated that on enquiry it was found that the suit land is entered in the name of Sachin Khandagale i.e., Defendant No. 1 vide mutation entry no. 876 dated 06.06.1994 and the said entry was taken on the basis of adoption deed. It is also alleged that defendant no. 1 is not cultivating the suit land and in fact plaintiff is cultivating the same by engaging labour. With these averments, suit came to be filed for declaration as owner and possession over the suit land.

3. Defendant nos. 1 to 3 resisted the suit by filing written statement at Exhibit 17. They denied the contention of the plaintiff with regard to the acquaintance with Bhanudas and that they helped him during his illness etc. It is also denied that any will executed by Bhanudas in favour of plaintiff in respect

of suit land. It is the case of these defendants that defendant no. 1 was minor at the time when he was adopted by Bhanudas and therefore, his mother — defendant no. 3 was cultivating the suit land. It is also claimed that Bhanudas was residing with them and they used to look after his basic needs. It is also contended that names of defendant nos. 1 and 2 are also recorded in the revenue record as cultivator of the land. On these grounds, they sought dismissal of suit.

4. Learned Counsel for the Defendants states that the learned Trial Court has rightly dismissed the suit, however, First Appellate Court committed error in declaring plaintiff as owner of Gut No. 81/B and directing defendants to handover the possession of the same to the plaintiff. It is his contention that the will relied upon by the plaintiff cannot be said to have substantiated the claim of the plaintiff of being owner and possessor of the suit land. It is stated that the discrepancies in the will with regard to the property held by Bhanudas is more than sufficient to discard the said will. According to him, there is evidence of adoption of defendant no. 1 by Bhanudas on

24.08.1990 and that revenue entries in particular 7/12 extract clearly shows that the suit land is in the cultivation of the defendants. Finally, it is argued that suit land cannot be transferred without permission of Authority since it was allotted to Bhanudas by Government. Thus, according to him, this is a fit case to cause interference in the judgment and decree by the First Appellate Court.

5. Learned Counsel for the Plaintiff supported the impugned judgment and decree with the contention that it is evident from the testimony of defendant no. 1 that Bhanudas holding only one property and that the said property was bequeathed through will in favour of the plaintiff. It is stated that plaintiff has proved execution of will by Bhanudas in accordance with Section 68 of the Evidence Act and hence, once will is proved, it becomes immaterial as to whether the defendant no. 1 is adopted son of plaintiff or not. He further states that from the admitted facts on record it can be said that the suit property was not ancestral property of Bhanudas and therefore, he was within his right to dispose the same as per his will.

6. Case of the plaintiff depends upon the proof of will executed by Bhanudas on 22.01.1990. Plaintiff by examining the attesting witness – Sakram Khandagale (Exh. 38) has proved execution of will as contemplated by Section 68 of the Evidence Act. This witness has also deposed about the relationship between the parties and the reason for execution of will by Bhanudas in favour of plaintiff. Defendants were unable to bring anything on record in order to create doubt about the valid execution of will by Bhanudas.

7. It is further brought on record that the property is mentioned as Gut No. 217, which was never owned by Bhanudas. In this regard, it is material to note that there is no dispute about the fact that Bhanudas was holding only one property and except for this, he was not owner of any property in order to bequeath the same. Document of will shows that the property bequeath was not only mentioned by its gut number, but it is described by boundaries. Thus, the property which was bequeathed by Bhanudas in favour of plaintiff is easily identifiable from the description thereof in the will. Defendants also do not claim that

Bhanudas owned any other property in order to create doubt as to which property was bequeathed to the plaintiff. In the facts and circumstances of the case description of the property as recorded in the document will prevail over the number of property mentioned therein.

8. Once the plaintiff proves that the suit property was bequeathed to him and that Bhanudas was capable of disposing of his property as per his wish, the title of the suit land is duly transferred in favour of plaintiff. There could be no impediment to such transfer, irrespective of any other condition applicable to suit land. The revenue record though indicates that the defendants are in possession and cultivating the suit land, but defendants have failed to show source of acquisition of title in respect of the same. It is not in dispute that suit land was exclusively owned by Bhanudas and it was within his right to dispose the said land. Thus, after proof of will of Bhanudas, defendant no. 1 cannot claim ownership of the same on the strength of adoption. Once the plaintiff proves that she is owner and having

title of the suit land, the defendants have no right to retain possession thereof and hence, it is rightly directed by the First Appellate Court to the defendants to handover the possession of the suit land to plaintiff.

9. Learned trial Court has refused to accept testimony of plaintiff on the ground that she examined her husband, who was her constituted attorney, without taking into consideration relationship between them. Being husband of plaintiff he was aware of the facts of the case and there is nothing on record to show that he had no personal knowledge of facts deposed, thus, without appreciating the cross-examination of this witness, his evidence is discarded. Similarly, evidence of Sakram, who was attesting witness to the will, has not been relied upon on the ground that the exact property bequeathed is not mentioned in the will ignoring description of the property by its boundaries therein, which was sufficient to identify the suit land. Learned trial Court has also failed to consider that no suspicious circumstances are brought on record in order to create doubt about the execution of the

will by Bhanudas, after the execution thereof was duly proved through the attesting witness Sakram (Exh. 38).

10. These erroneous findings are rightly reversed by First Appellate Court. Perusal of judgment in R.C.A. No. 32/2018, shows that there is proper appreciation of evidence on record, as required to be done under Section 96 read with Order XLI CPC. Having regard to the facts of the case and evidence on record, no fault can be found with the judgment of reversing the judgment passed by the learned trial Court.

11. The Defendant/Appellant herein have failed to show any perversity in the findings recorded by the first appellate Court. This Court finds that no substantial question of law is involved herein and hence, Appeal deserves to be dismissed. Accordingly, the same stands dismissed. Pending applications, if any, are also disposed of.

(R.M. JOSHI, J.)

Malani