



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

SECOND APPEAL NO. 246 OF 2007

Ajabrao s/o Ramchandra Dongre,
aged about 40 years, Occ. Cultivator,
R/o Borgaon Warale, Tq. Balapur,
District – Akola.

...APPELLANT

Versus

- 1] Parvatibai wd/o Tulsiram Dongre
(since deceased) through LRs
- 1-a] Smt. Manoramabai w/o Devidas Wankhade
(since deceased) through LRs
- 1-a-I] Siddharth s/o Devidas Wankhade,
aged about 35 years, Occ. Cultivator.
- 1-a-II] Bharat s/o Devidas Wankhade,
aged about 26 years, Occ. Cultivator.
- 1-a-III] Keshav s/o Devidas Wankhade,
aged about 21 years, Occ. Cultivator.
- Respondent nos. 1-a-I to 1-a-III are R/o
Dapura, Tq. and District – Akola.
- 1-b] Smt. Banabai Hirole,
R/o Manjri, Tq. Balapur, District – Akola.
- 1-c] Smt. Sumitra Ingle,
aged about 38 years, Occ. Household Work,
R/o Nimkarda, Tq. Balapur, District – Akola.
- 2] Ramchandra s/o Shivram Dongre,
aged about 66 years, Occ. Cultivator.
- 3] Vikas s/o Ramchandra Dongre,

aged about 34 years, Occ. Cultivator.

Respondent nos. 2 and 3 are R/o
Borgaon Wairale, Tq. Balapur,
District – Akola.

4] The State of Maharashtra,
through the Collector, Akola,
Tq. and District – Akola.

...RESPONDENTS

Shri C.A. Joshi, Counsel for the appellant.

Shri S.V. Sohoni, Counsel for respondent nos. 1-a-I, 1-a-II, 1-a-III, 1-b and 1-c.

CORAM : ANIL L. PANSARE, J.

ARGUMENTS WERE HEARD ON : APRIL 22, 2024

JUDGMENT IS PRONOUNCED ON : APRIL 24, 2024

JUDGMENT :

Heard Shri C.A. Joshi, learned Counsel for the appellant and Shri S.V. Sohoni, learned Counsel for respondent nos. 1-a-I, 1-a-II, 1-a-III, 1-b and 1-c.

2] The appeal has been admitted on the following substantial question of law :

“Whether will executed by the husband of defendant no.1 dated 18.5.1994 confers any right of ownership and possession over the plaintiff subject to liability of maintenance of defendant no.1.”

3] The appellant is the original plaintiff and the

respondents are the original defendants. The appellant filed a suit, being Regular Civil Suit No. 24/1999, alleging that the deceased Tulshiram s/o Kolsaji Dongare, who was his uncle, has, on 18/5/1994, executed a Will bequeathing the suit property bearing field survey no. 180, admeasuring 1.66 H.R., situated at Mouza – Borgaon Vairale, District – Akola, in favour of the appellant. The appellant claimed to be in possession of the suit land. He alleged that respondent no.1 made an attempt to obstruct his possession on 12/1/1999 and accordingly, he filed a suit for permanent injunction.

4] Respondent no.1, by filing written statement, contested the suit and disputed execution of Will.

5] Both the Courts below have rendered a concurrent finding that the appellant failed to prove the Will.

6] The judgment of the First Appellate Court indicates that the Will (Exh. 44) was discarded by the trial Court for the following reasons :

“i] Discloser about will by the appellant after the period of 4 years from the death of deceased Tulshiramji.

ii] Insufficient evidence to show that appellant maintain deceased Tulshiramji and respondent no.1 in their old age.

iii] The reason of love and affection for deceased Tulshiramji towards appellant.

iv] Active participation of appellant while preparation of alleged will Exh. 44 and his presence while scribing it.

v] PW. no. 2 and 4 attesting witnesses over the will deed Exh. 44 are the chance witnesses.

vi] Variances regarding attestation over the will Exh. 44 find place in the evidence of PW. no. 2 and PW. no. 4.

vii] No evidence at all, to determine that Exh. 44 is the last will executed by deceased Tulshiramji.

viii] Necessity of bequeathing the property for deceased Tulshiramji particularly when the respondent no.1 daughters so in law are available to succeed the interest.

ix] The father and brother of the appellant simultaneously claiming the right over the suit field by virtue of contract/will of deceased Tulshiramji.”

7] The Courts below found the testimony of the appellant to be untrustworthy for various reasons. In his chief examination, the appellant has categorically stated that the suit

property is the only property in his hand in the village, however, it was found that he owns other properties as well in the said village. The appellant pleaded that he took care of the deceased Tulshiram and performed his last rites, however, he failed to produce any evidence in support. The appellant failed to establish his relationship with the deceased Tulshiram. He claimed Tulshiram to be his uncle, but could not prove the same.

8] The Courts below also noted that in the Will, which was allegedly executed just six months prior to the death of the deceased Tulshiram, has not assigned any reason for excluding his legal heirs. The Courts below have also noted that the attesting witnesses were the chance witnesses and the evidence of two attesting witnesses has discrepancy on the point of execution of Will.

9] The first attesting witness is Kisan. He firstly deposed that he does not know as to what happened between plaintiff and Tulshiram, the testator. He deposed that when he

visited Balapur Court, he noticed Tulshiram was present in the Court and some writing was going on. He states that he does not know as to what was being written. He then states that Tulshiram put his signature on the document in his presence and the document was a Will. The witness has also put his signature. In cross-examination, he states that the document with signature of Tulshiram was ready, thereafter Tulshiram asked him to put his signature, which he did.

10] The next attesting witness is Gautam. He states that at the time of scribing of document, i.e., Will, Tulshiram, his wife, Kisan, plaintiff Ajabrao and he himself were present. Tulshiram made his signature on the document. Thereafter, his wife put thumb impression. Kisan has then put his signature on Will and thereafter the witness signed the Will. This witness has identified his signature and signature of others.

11] The trial Court has noted that Kisan does not disclose presence of Gautam and plaintiff Ajabrao at the time of scribing the document. He does not depose that Gautam had

put his signature in his presence. On the contrary, Kisan admitted, in cross-examination, that document with signature of Tulshiram was ready and he has just signed it.

12] The trial Court has also taken note of the fact that Kisan had visited Balapur for execution of sale deed in respect of property purchased by him and witness Gautam had visited Balapur for purchasing bricks. They were, while returning back, were passing from the Court and accordingly made witness to the Will. In that sense, the Court has described these witnesses as chance witnesses. The trial Court has disbelieved their version being not consistent. In fact, Kisan admitted that the document was ready with the signature of Tulshiram. This appreciation of evidence has been upheld by the First Appellate Court and accordingly Will has been held to be not proved.

13] The learned Counsel appearing for the appellant submits that the Courts below have committed an error while appreciating the evidence of attesting witnesses. Thus, he suggests that the Will has been proved through the attesting

witnesses.

14] The question that requires answer is whether, in the facts and circumstances of the case, this Court should re-appreciate the entire evidence ?

15] The law is well settled on this point. Both the Courts below have rendered a concurrent finding and, therefore, it is impermissible to interfere with the said finding unless the appellant could show that the finding is based on no evidence or is perverse. Such is not the case here. The finding given by both the Courts below is based on evidence. Further, it is well settled that even erroneous finding cannot be interfered with, particularly when such concurrent finding is based on plausible appreciation of evidence. The concurrent finding, in the present case, is based on appreciation of evidence.

16] One cannot lose sight of the fact that the trial Court has an advantage of noticing the demeanor of the witnesses and, hence, are better equipped to appreciate the evidence. The finding of fact given by the trial Court, therefore, ought to be

respected.

17] In the circumstances, there appears no reason why should the concurrent finding be interfered with. In other words, the appellant has failed to make out a case.

18] The appeal is accordingly dismissed.

JUDGE

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