



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 31/2007

1. Prashant s/o Ramchandra Tembhurkar,
aged 24 years, Occ. Student.
2. Dilip s/o Ramchandra Tembhurkar,
aged about 21 years, Occ. Student
3. Sandip s/o Ramchandra Tembhurkar,
aged about 18 years Occ. : Student.
4. Ramchandra s/o Pandhari Tembhurkar,
aged 48 years, Occ. Agriculturist,

All r/o Hudkeshwar Khurd,
Post Pipla, Tah. Dist. Nagpur.

.....APPELLANTS

...V E R S U S...

1. ~~Smt. Kamutai wd/o Harishchandra
Tembhurkar (Deleted)~~
2. Deepak Harishchandra Tembhurkar
aged 23 years, Occ. Student.
3. Rakesh Harishchandra Tembhurkar
aged 22 years, Occ. Student.
4. Ku. Jyotsna d/o Harishchandra Tembhurkar
aged 19 years, Occ. Student.

Nos. 2 to 4 minors through their natural
Guardian respondent no.1.

5. Smt. Rukma wd/o Prabhakar Tembhurkar
aged 53 years, Occ. Household,
r/o Beldhara (Sukhali), Tq. Dist. Nagpur.

6. Sau. Indira Prabhakar Kanhere,
aged 55 years, Occ. Household,
r/o Hingna, Post Hingna, Dist. Nagpur. **...RESPONDENTS**

Mr. H. V. Thakur, Advocate for appellant.
Mr. S. V. Manohar, Senior Advocate assisted by Mr. U. K. Bisen,
Advocate for respondents.

CORAM:- ANIL L. PANSARE, J.

DATE OF RESERVING THE JUDGMENT : 20.02.2024

DATE OF PRONOUNCING THE JUDGMENT : 16.04.2024

JUDGMENT

Heard Mr. H. V. Thakur, learned counsel for the appellants and Mr. S. V. Manohar, learned Senior Advocate assisted by Mr. Bisen, learned counsel for the respondents.

2. The appeal has been admitted on the following substantial questions of law.

“1. *Whether in the absence to the challenge to the legality of the will, the Courts were justified in law in holding that the due execution of the registered will was not proved?*

2. *Whether the reasons recorded by the Courts for holding that the will was not duly executed are perverse and whether the findings recorded by the Courts are, therefore, liable to be set aside?*

3. *Whether the courts were justified in holding that the execution of the will by the deceased was doubtful because he normally did not affix his thumb mark on the documents and have done so while executing the will when the aforesaid fact was not pleaded by the plaintiff and the appellants/defendants had no opportunity to rebut the plea which was raised for the first time during the hearing and which was based on some stray admissions made by the defendants in the cross-examination?”*

The additional substantial question of law was formulated vide order dated 12.02.2024, which reads thus:

“Once having held as per order dated 17/8/2006 passed below application Exh.34 in R. C.A. No. 286/2002 that the present appellant nos. 1 to 3 were entitled to agitate their rights on attaining majority and having permitted them to file their separate written statement at the appellate stage so as to bring on record specific pleadings regarding execution of Will, whether the Appellate Court erred in law in not giving opportunity to the applicants/beneficiaries of the Will to lead evidence?”

3. Having heard both the sides at length and having gone through the material placed before me, I am of the considered view that the last substantial question of law will have to be answered first.

4. The appellant Nos.1 to 3, who were defendant Nos. 4 to 6 before the Trial Court, had filed an application (Exh.-34) before the First Appellate Court to grant them permission to file written statement on the ground that they attained majority and that they were not properly represented by their natural guardian, the original defendant No.1. Resultantly, the issue of validity of Will was not even framed by the Trial Court.

5. The First Appellate Court has allowed the application vide order dated 17.08.2006 in following terms:

- “1. Read application and say.*
- 2. Appellants were represented by the natural guardian father in the trial court. It is contended that guardian has not properly represented their cause before the trial court, and therefore, they want to file their written statement separately after attaining majority.*
- 3. Learned counsel for the respondents contended that the stage of filing written statement has gone and even otherwise the natural guardian has raised all necessary contentions in the written statement and the fact in issue has finally adjudicated by the trial court hence, there is no need to file additional written statement.*
- 4. I carefully gone through the pleadings of the parties and the observations made by the trial court. It is admitted fact on record that the natural guardian was well within knowledge of the disputed Will, but it is not followed why he has not specifically pleaded this fact in the written statement. The appellants want to bring this fact on record by their proposed written statement. I feel, no prejudice will be caused to the respondents if the application is allowed. Moreover, the minors who have attained majority have every right to agitate their right. Hence, the application is allowed.”*

6. As could be seen, the First Appellate Court held that natural guardian was aware of the disputed Will but for the reasons best known to him, did not plead said fact in the written statement. The appellants intend to bring on record the aforesaid fact by filing written statement and since they have attained majority, they have a right to agitate their claim.

7. This finding is in consonance with Order XXXII Rule 12 of the Civil Procedure Code, 1908, which provides as under:

“12. Course to be followed by minor plaintiff or applicant on attaining majority.—

(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus: “A.B., late a minor, by C.D., his next friend, but now having attained majority.”

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.”

8. Sub Rule (1) of rule 12 provides that a minor plaintiff to a suit, on attaining majority, shall elect whether he will proceed with the suit. Sub Rule (2) provides that where he elects to proceed with the suit, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

9. As such, Rule 12 of Order XXXII of the C.P.C. provides for the course to be followed by minor plaintiff on attaining majority. However, I do not find any reason as to why should same course be not followed by the minor defendant on attaining majority. The minor defendants, on becoming major, are entitled to follow the course provided under Order XXXII Rule 12 of the C.P.C. Similar such view has been taken by the Single Judge of the Rajasthan High Court in the case of *Malkiyat Singh and anr. Vs. Om Prakash and Ors., 1994 SCC OnLine Raj 91.* First Appellate Court, therefore, has rightly allowed the application and permitted the appellants to file written statement and to agitate their claim.

10. The question is whether the First Appellate Court has committed error in law by not giving opportunity to the appellants/beneficiaries of the Will to lead evidence. The answer would be certainly in the affirmative. The appellants had come up with a case that they were not properly represented by their guardian – original defendant No.1 and, therefore, issue as regards Will was not framed by the Trial Court. The First Appellate Court found merit in the said contention and, accordingly, permitted the appellants to file written statement. The First Appellate Court, however, did not realize that mere filing written statement will not

serve the purpose inasmuch without giving opportunity to lead evidence, the issue of validity of Will could not be answered.

11. As such, the First Appellate Court has formulated the point on validity of Will but the fact remains that the Natural Guardian i.e. defendant no.1 has not pleaded with precision about execution of Will under question. The First Appellate Court has answered the issue against the appellants but then this finding, without giving them opportunity to lead evidence particularly after allowing them to file written statement, would stand vitiated.

12. In the circumstances, unless the opportunity is given to the appellants to lead evidence in support of their claim as regards Will, the purpose of allowing them to file written statement will be not served. Once the appellants are permitted to file the written statement, they would be entitled, as of right, to lead evidence in support. Having not given said opportunity, the First Appellate Court has committed error of law. The fourth question of law is accordingly answered in the affirmative.

13. First three substantial questions of law relate to validity of the Will, which could only be answered once the appellants are allowed to lead evidence.

14. The sum and substance of the above discussion is that the error committed by the First Appellate Court will have to be set right by setting aside its judgment and further by remanding the matter back to the First Appellate Court to decide the issue afresh. Hence, following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The judgment and decree dated 27.09.2006 passed by Ad hoc District Judge-6, Nagpur in Regular Civil Appeal No. 286/2002, is quashed and set aside.
- (iii) The matter is remanded back to the First Appellate Court with a request to decide the same expeditiously.
- (iv) Appellant Nos.1 to 3 have filed written statement. The First Appellate Court shall proceed to formulate the additional issue/s, if any, in terms of the pleadings in the written statement and shall answer the same, in accordance with law. The First Appellate Court may proceed in terms of Order XLI Rule 25 of the Civil Procedure Code, 1908.
- (v) Parties shall appear before the First Appellate Court on 08.05.2024.

(Anil L. Pansare, J.)