



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

SECOND APPEAL NO. 192 OF 2007

1. Smt. Durgabai wd/o Pappan Choudhary,
aged about 45 years, Occ. Household.
2. Manisha d/o Pappan Choudhary,
aged about 15 years, Occ. Student.
3. Vaishali d/o Pappan Choudhary,
aged about 12 years, Occ. Student.
4. Annu d/o Pappan Choudhary,
aged about 9 years, Occ. Student.
5. Sneha d/o Pappan Choudhary,
aged about 8 years, Occ. Student.

All are R/o Bornala, Katol Road, Nagpur.

6. Ashok Gendlal Choudhary,
aged about adult, Occ. Business.
7. Krushna s/o Pannalal Choudhary,
aged about adult, Occ. Business.

Appellant nos. 6 and 7 are R/o Borgaon,
Kanol Road, Nagpur.

...APPELLANTS

Versus

Smt. Leelabai Sarju Kanojiya,
aged about adult, Occ. Household,
R/o Ravi Nagar, C/o Kisan Kanojiya,
Civil Lines, Nagpur.

...RESPONDENT

Shri A.V. Bhide, Counsel for the appellants.
Shri V.A. Dhabe, Counsel for the respondent.

CORAM : ANIL L. PANSARE, J.

ARGUMENTS WERE HEARD ON : MARCH 5, 2024

JUDGMENT IS PRONOUNCED ON : MARCH 8, 2024

JUDGMENT :

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

“Whether the reversing judgment passed by the first appellate Court suffers from vice of perverse appreciation of evidence on record ?”

2] The respondent/plaintiff had filed a suit against the appellants/defendants to declare herself as the owner of the suit property and to cancel the Will dated 23/9/1988 executed by her father, namely, Buddhulal, in favour of his nephews.

3] The subject matter of the suit is an agricultural land bearing Khasra Nos. 60/2 and 60/1, admeasuring 3.18 acre and 2.25 acre respectively, situated at Mouza – Borgaon, and also a Corporation House bearing No. 5036, situated in Khasra No. 61/1 at Mouza – Borgaon, Taluka and District – Nagpur.

4] According to the respondent, her grandfather – Ganesh Makade (Choudhary) expired in the year 1964 intestate leaving behind the suit property. He had three sons, namely, Buddhulal, Gendlal and Pannalal. The respondent's grandmother expired in the year 1960. The three sons inherited the property left behind by Ganesh. The respondent's father – Buddhulal expired on 4/1/1993, whereas her mother expired on 22/4/1991.

5] It appears that Buddhulal, in his lifetime, has executed a Will in favour of his nephews, i.e., sons of Gendlal and Pannalal. The trial Court, vide judgment and decree dated 6/10/2001, dismissed the suit holding that the Will is genuine. The First Appellate Court, however, vide judgment and decree dated 30/9/2006 passed in Regular Civil Appeal No. 529/2001, reversed the judgment and decree of the trial Court and declared the Will dated 23/9/1988, executed by Buddhulal, as not binding on the respondent.

6] The challenge to the finding of the First Appellate

Court is based on perverse appreciation of evidence. The learned Counsel for the appellants has taken me through the evidence. The respondent has examined herself and no other witness. She has deposed that she is the only legal heir of deceased Buddhulal. He was having an agricultural field and a house property. Defendant no.2, who is appellant no.6 herein, came to her and asked for her signature. She informed him that she is having share in the property. Appellant no.6 told her about execution of Will by her father, which she denied.

7] This is how the respondent led evidence. As could be seen, there is absolutely nothing in her evidence to suspect any doubt on execution of Will. The learned Counsel for the appellants submits that the burden is on the propounder of Will and not on the appellants.

8] The learned Counsel for the appellants has invited my attention to the evidence led by the appellants. Appellant no.6 – Ashok examined himself as the first witness. He deposed that Buddhulal expired in the year 1993. He was 80 years old.

For last 1 ½ years of his life, he was not keeping good health and was lastly bed ridden. He and other family members used to take care of him. He further deposed that the respondent is his cousin. She was married and was staying with her husband at her matrimonial house. She never cared for her father. Buddhulal handed over the Will to the witness six months prior to his death. The Will was registered on 23/9/1988. He then deposed that the respondent had never objected possession of appellants over the suit property. In cross-examination, he deposed that since the relations with the respondent were so cordial, he and other relatives decided to give some premium amount, i.e., Rs.1,50,000/- to the respondent. Except for the above, there is absolutely nothing in the cross-examination to doubt the mental disposition of Buddhulal to execute the Will, which he had executed five years prior to his death.

9] Second witness is Haridas. He is an attesting witness to the Will. He was working in revenue section of the Collector office. The office is situated adjacent to the Sub-Registrar's office. In the month of September – 1988,

Buddhulal was standing outside the Registrar's office. The witness came out for attending natural call. He saw Buddhulal, who informed him that he was in search of witness for attesting his Will. The witness accompanied him to the Sub-Registrar's office. He met one Advocate and one witness. The Advocate read out the contents of the Will and, thereafter, he put his signature on the Will in the capacity of witness. Prior to him, Buddhulal put his signature on the Will in his presence. He has proved the Will (Exh.48).

10] In cross-examination, he deposed that the Will came to be executed at about 3:00 pm. He further deposed that firstly, Buddhulal put his signature. He fairly deposed that he doesn't know the other attesting witness but stated that he was present along with the Advocate. Nothing more is elicited from his mouth.

11] Thus, the appellants have proved the contents of Will through the attesting witness. There is absolutely nothing in the cross-examination to doubt his version, nor is there

anything to raise doubt about execution of Will, which was registered five years prior to Buddhulal's death.

12] The next important witness is the Scribe of the Will. He has been examined as third witness. He was an Advocate, by profession. He deposed that his office is situated at Gandhi Gate, Mahal. Buddhulal had been to his office. He expressed his desire to execute a Will. The witness obtained his signature on Vakalatnama and also obtained instructions from the testator as to the manner in which he desired to bequeath the property. The Will is drafted as per the instructions of the testator. A draft was prepared and the contents were read over to Buddhulal. He confirmed the contents. Thereafter, the witness, along with his Junior Advocate Shri Jaiswal and Buddhulal, approached the Sub-Registrar's office. Buddhulal called one attesting witness. The Advocate put his signature on the original Will as Scribe. The testator and the witnesses have also signed the Will before the Sub-Registrar. He has identified the signature and contents of the Will. He then deposed that Buddhulal was in sound disposing state of mind. His mental

and physical condition was good.

13] In cross-examination, he deposed that he is unable to recollect whether Buddhulal had been to his office prior to execution of Will. He is further unable to recollect as to at what time, he had visited the office. He deposed that the Will was executed thirteen years ago and, therefore, he is unable to tell exact time, date and day when he visited the office. Thereafter, suggestions were put, which have been denied by the witness.

14] Thus, the Scribe has given all necessary details. He has, in addition, opined that Buddhulal was in sound disposing state of mind. He was mentally and physically fit. In his cross-examination, there is absolutely nothing to doubt, either execution of Will or the mental state of Buddhulal.

15] The learned Counsel for the respondent argued that the witness has not given details as to why Buddhulal approached him and no other Advocate. He has further not given details as regards date, time, etc. To my mind, these details are not expected from the Advocate, who has drafted

the Will thirteen years ago. Secondly, why did Buddhulal approach the Advocate is something which is within the exclusive knowledge of Buddhulal and not the Advocate concerned.

16] Thus, what transpires is that Buddhulal has executed the Will prior to five years of his death. The Will is registered. The Will has been proved by the attesting witness so also the Scribe of the Will. There is nothing in testimony of the respondent to doubt genuineness of the Will.

17] The trial Court noted all the above vital aspects and rendered a finding that the Will is a genuine document.

18] The First Appellate Court has indulged itself into unnecessary details, which do not find place in the pleadings of the plaint or the evidence of the respondent. The Court has noted that the suit property was mutated in the name of the respondent. Subsequently, part of the suit property was acquired by the Government under the Urban Land (Ceiling and Regulation) Act, 1976 (for short "Act of 1976") and

compensation was paid to the appellants. Since, compensation was not received by the respondent, she expressed her grievance by issuing notice dated 24/8/1998 (Exh.44) that she was not paid a single pie.

19] Taking pause here, when enquired with the learned Counsel for the respondent as to where has she pleaded a case that the land was acquired under the Act of 1976 and that compensation was paid to the appellants, he could not give any satisfactory answer. In fact, plaint is silent on this point. The Court has then noted that the appellants have mischievously sold the house property in the year 1995. Even this part/fact has been not pleaded by the respondent in her plaint, nor has she uttered a word in her evidence, either on acquisition of land or receiving compensation by the appellants or selling property in the year 1995.

20] The First Appellate Court has then dealt with the revenue proceedings. The respondent, in the year 1998, approached the revenue authorities to get her name mutated.

At that time, the appellants denied her right on the basis of Will. Accordingly, the objection, raised by the respondent, was rejected by the Tahsildar on 8/12/1998 and the property was mutated in the name of the appellants on the basis of Will. The Court opined that the appellants have suppressed the Will for six years. The Court has also taken note of the fact that the appellants had decided to give Rs.1,50,000/- to the respondent knowing fully well that she had no right, title or interest in the suit property. The Court posed a question as to why should the appellants give Rs.1,50,000/- when the respondent had no right, title or interest in the suit property. This finding is contrary to the evidence led by DW/1 – Ashok, who has categorically deposed that because of the cordial relations and as a premium, they proposed to give Rs.1,50,000/- to the respondent. The First Appellate Court has given weightage to the facts which had hardly any bearing on genuineness of the Will.

21] What is most important is that the First Appellate Court has lost sight of the fact that the Will was proved in

accordance with law. The Will was a registered document, which carries a presumption in terms of Section 17 read with Section 49 of the Registration Act, 1908. The attesting witness and the Scribe of the Will have fully supported the appellants' case. Once the Will has been duly proved, there was absolutely no necessity for the First Appellate Court to indulge into other details, like revenue proceedings, belated action by the appellants to approach the revenue authorities for mutation, etc., which has no consequences on genuineness of the Will. The First Appellate Court has further given weightage to Buddhulal ignoring his own daughter while bequeathing the property. This finding is contrary to the recitals made in the Will. The testator has said that his daughter is married and was happy. He has further mentioned in the Will that whatever was to be given to his daughter has been given. Thus, the reasons for exclusion of daughter is clearly spelt out in the Will.

22] The First Appellate Court lost sight of the fact that Will is an exception to general rule of inheritance. There is nothing in the law that the testator has to assign reason for

ignoring his legal heir/s. Further, the evidence indicates that the respondent was married long back and was happy. The evidence further shows that Buddhulal was residing with his nephews.

23] In the circumstances, merely because the exclusion of daughter is not expressed to the satisfaction of the appellant, the execution of Will shall not become doubtful. Further, the Will is executed only when general rule of inheritance is to be not followed. If general rule of inheritance is to be followed, there is no necessity to execute a Will. In that sense, the moment a person decides to execute a Will, it would follow that he/she desired to exclude his heir/s from inheritance to his/her property or at least to modify the share in inheritance.

24] Further, the First Appellate Court has jumped to the conclusion that the testator was not in a disposing state of mind because he was eighty years old. This finding is again contrary to the evidence. The Scribe has deposed that Buddhulal was in a sound state of mind. The beneficiary of the

Will deposed that Buddhulal was not keeping well for last 1 ½ years of his death. The Will, admittedly, was executed five years prior to his death. It is nobody's case that at the time when he executed the Will, he was suffering from any illness/disease. Thus, the First Appellate Court has drawn the inference on surmises and conjunctures. The finding of the First Appellate Court, therefore, suffers from vice of perverse appreciation.

25] The learned Counsel for the respondent contends that the property was jointly owned by Buddhulal and his brothers, Gendlal and Pannalal and, therefore, Buddhulal could not have bequeathed undivided share. He submits that the property was an ancestral property and, therefore, Buddhulal had no right to bequeath the same through Will.

26] The contentions have been rightly countered by the learned Counsel for the appellants. He submits that the property was owned by Buddhulal's father. It is nobody's case that Buddhulal's father inherited the property from his father.

The respondent, in her plaint, has pleaded that her grandfather, i.e., Buddhulal's father, had an agricultural land and a house property, i.e., the suit property. Thus, upon own showing of the respondent, Buddhulal's father owned the suit property. After his death, the suit property was inherited by three sons in terms of Section 8 of the Hindu Succession Act, 1956.

27] The learned Counsel has referred to two judgments of the Hon'ble Supreme Court; *Commissioner of Wealth-tax, Kanpur, etc. Vs. Chander Sen etc.* [AIR 1986 SC 1753] and *Ashnoor Singh Vs. Harpal Kaur and others* [AIR 2019 SC 3098]. In the case of *Ashnoor Singh (supra)*, the Supreme Court has held that after the Hindu Succession Act came into force, the position has undergone a change. Post 1956, if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self-acquired property and does not remain coparcenary property. In the case of *Commissioner of Wealth-tax, Kanpur (supra)*, the Supreme Court has, in the backdrop of Section 8 of the Hindu

Succession Act, held that the grandson in the lifetime of the father has no right, title or share in the property inherited by his father from grandfather.

28] Applying the aforesaid principles of law, Buddhulal would inherit the property owned by his father and shall hold the same as a self-acquired property. He has right to bequeath the same, even if his share is undivided. Thus, there is no substance in the contentions of the respondent that Buddhulal had no right to execute the Will.

29] The sum and substance of the above discussion is that the reversing judgment passed by the First Appellate Court suffers from vice of perverse appreciation of evidence. The substantial question of law is answered accordingly. Consequently, the judgment of the First Appellate Court would become unsustainable. Hence, the following order :

ORDER

i] The appeal is allowed.

ii] The judgment and decree dated 30/9/2006 passed by the Adhoc District Judge – 6, Nagpur in Regular Civil Appeal No. 529/2001 is quashed and set aside. The trial Court's judgment and decree is restored.

30] The appeal is disposed of in above terms with no order as to costs.

JUDGE

Sumit