Kashibai W/O Lachiram & Anr vs Parwatibai W/O Lachiram & Ors on 25 September, 1995

Equivalent citations: 1995 SCC (6) 213, JT 1995 (7) 48

Author: N.P Singh

Bench: N.P Singh

PETITIONER:
KASHIBAI W/O LACHIRAM & ANR.

Vs.

RESPONDENT:
PARWATIBAI W/O LACHIRAM & ORS.

DATE OF JUDGMENT25/09/1995

BENCH:
SINGH N.P. (J)
BENCH:
SINGH N.P. (J)
FAIZAN UDDIN (J)

CITATION:
1995 SCC (6) 213 JT 1995 (7) 48
1995 SCALE (5)615

ACT:

HEADNOTE:

JUDGMENT:

JUDGMENT Faizan Uddin, J.

1. Leave granted.

2. This appeal at the instance of the plaintiffs has been directed against the judgment and decree dated 5.2.1992 passed by the High Court of Bombay in Second Appeal No. 682/1981 reversing the judgment and decree of the two Courts below passed in favour of the plaintiffs-appellants herein. The appellants herein shall be described as plaintiffs and the respondents as defendants hereinafter

for the sake of convenience.

3. The following family tree will indicate the inter se relationship of the parties to the suit out of which the present appeal arises.

Lachi Ram (Dead)

---------- Kashi Bai (first wife) Parwati Bai (second wife) Plaintiff/appellant Defendant/respondent Sunita Bai (daughter Meena Bai (daughter from from Kashi Bai) Parvati Bai) Defendant/ Purshottam (son of Meena Bai) Defendant/respondent

4. As would be clear from the family tree the plaintiff No. 1 and defendant No. 1 are the two widows of deceased Lachiram while the plaintiff No. 2 is the daughter of Lachiram from his first wife. Kashi Bai and the defendant No. 2 Meena Bai is his daughter from his second wife, Parvati Bai. The defendant No. 3, Purshottam is the son of defendant No. 2. Meena and grand-son of late Lachiram. The plaintiffs brought this suit for separate possession by partition of a double storey house, open plot and some agricultural lands as described in the plaint, situated at village Eklara, Taluka Mukhed. The plaintiffs claimed half share in the suit properties being the legal heirs of deceased Lachiram. It was alleged by the plaintiffs that Lachiram during his life time had given survey Nos.171/1, 160 and 159/3 to the plaintiff No. 1 towards her maintenance in addition to a portion of suit house and placed the plaintiff No. 1 in possession thereof and she became full owner of the said land after the Hindu Succession Act, 1956 came into force. It was alleged by the plaintiffs that deceased Lachiram during his life time challenged the plaintiffs ownership in respect of survey Nos.171/1, 160 and 159/3 by filing civil suit No. 138/1969 which was dismissed on 28.12.1970. The said judgment was confirmed in first and second appeals and thus the plaintiffs became the absolute owner of the same.

5. Further case of the plaintiffs was that during the life time of Lachiram survey No. 111/2 and survey No. 129/7 were purchased by Lachiram in the name of defendant No. 1 and that survey No. 128/A was received by defendant No. 1 during the pendency of the suit as a result of a decision of pending suit between deceased Lachiram and one Naga and, therefore, the same were also liable to partition and the plaintiffs were entitled to half share by partition in the said lands also. It was averred by the plaintiffs that the defendants were requested for separate possession by partition to the extent of their half share in the suit property but the defendants were not agreeable for the same which led to the filing of the suit for partition.

6. The defendants contested the suit. In their written statement they denied the plaintiffs claim and took the stand that deceased Lachiram at the time of his death was the owner only of survey Nos. 110/1, 218 and 149/1 It was alleged that the defendant No. 1 had herself purchased survey Nos. 127, 129/1 and 120/2 from one Iranna on 21st March 1354 fasli (1945 A.D.) by a registered sale deed and she was the exclusive owner with possession thereof and the plaintiffs had no right over the same and those lands could not be the subject matter of the partition. The defendants though admitted the relationship but denied the claim of the plaintiffs for partition on the ground that the defandant No. 3, Purshottam son of Meena Bai was adopted by deceased Lachiram under the registered Deed

of Adoption dated 29.4.1970 and that Lachiram had also executed the Deed of Will on the same date i.e. dated 29.4.1970 in favour of Purshottam, defendant No. 3 becueathing the suit properties to the defendant No. 3 and as such the plaintiffs have no right over any of the suit properties. With regard to survey Nos. 172/1, 160 and 159/3 and the portion of the house the defendants took the plea that the same were given to the plaintiffs for their maintenance and, therefore, they were not entitled to claim any share in the suit properties. Regarding the decision in Civil Suit No. 138 of 1969 the defendants contended that the same was not binding on them as on the death of Lachiram, the defendant No. 3 Purshottam had become the owner of those properties.

7. After appreciation of evidence on record adduced by the parties the trial Court decreed the plaintiffs suit for separate possession by partition. The trial Court recorded the finding that the defendants had failed to establish the adoption of Purshottam by late Lachiram and the execution of will in his favour in respect of the suit properties and that Lachiram was the owner of all the properties in suit at the time of his death in which the plaintiffs are entitled to half share. The trial Court also recorded the finding that the plaintiffs were the absolute owner of lands bearing survey Nos. 172/1, 160 and 159/3 of village Eklara. These findings were further affirmed by the first Appellate Court after evaluating the evidence, the High Court took a contrary view and reversed the findings recorded by the two Courts. According to the High Court the defendants had proved the execution of Deed of Adoption and Deed of will in accordance with law by reason of which the plaintiffs were held not entitled to claim any share in the suit properties and, therefore, after setting aside the judgments and degree of the two Courts below dismissed the suit.

8. Learned counsel for the plaintiffs-appellants strenuously urged before us that the question of proof of the Deed of Adoption and the Deed of will is a pure finding of fact and, therefore, the High Court was not justified in interfering with the findings of fact arrived at by the two Courts below, in exercise of its power under Section 100 of the Code of Civil Procedure. It was submitted that the High Court was not justified in substituting its own views on re- appraisal of the evidence on record for that of the two lower Courts and that the conclusions arrived at by the High Court are based on conjectures and surmises. It was, therefore, submitted that the impugned judgment of the High Court should be set aside.

9. It is no doubt true that after analysing the parties evidence minutely the trial Court took a definite view that the defendants had failed to establish that the plaintiff No. 1, defendant No. 1 and deceased Lachiram had taken the defendant No. 3. Purshottam in adoption. The trial Court also recorded the finding that the plaintiff No. 1 was not a party to the Deed of Adoption as the plaintiff No. 1 in her evidence has specifically stated that she did not sign the Deed of Adoption nor she consented for such adoption of Purshottam and for that reason she did not participate in any adoption proceedings. On these findings the trial Court took the view that the alleged adoption being against the consent of Kashi Bai the plaintiff No. 1, it was not valid by virtue of the provisions of Section 7 of the Hindu Adoptions and Maintenance Act, 1956. Section 7 of the Act provides that any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. It provides that if he has a wife living, he shall not adopt except with the consent of his wife. In the present case as seen from the evidence discussed by the trial Court it is abundantly clear that plaintiff No. 1 Kashi Bai the first wife of deceased Lachiram had not only declined to participate in

the alleged adoption proceedings but also declined to give consent for the said adoption and, therefore, the plea of alleged adoption advanced by the defendants was clearly hit by the provisions of Section 7 and the adoption can not be said to be a valid adoption.

10. This brings us to the question of the will alleged to have been executed by deceased Lachiram in favour of his grand-son Purshottam, the defendant No. 3. Section 68 of Evidence Act relates to the proof of execution of document required by law to be attested. Admittedly, a Deed of will is one of such documents which necessarily require by law to be attested. Section 68 of the Evidence Act contemplates that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. A reading of Section 68 will show that "attestation" and "execution" are two different acts one following the other. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with regard to the execution of unprivileged wills. Clause (C) of Section 63 provides that the will shall be attested by two or more witnesses, each one of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark or the signature of such other person; and each of the witnesses should sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

11. Here we may also take note of the definition of the expression "attested" as contained in Section 3 of the Transfer of Property Act which reads as under:-

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Having regard to the afore-mentioned definition an attesting witness is a person who in the presence of an executant of a document puts his signature or mark after he has either seen the executant himself or someone on direction of the executant has put his signature or affixed his mark on the document so required to be attested or after he has received from the executant a personal acknowledgement of his signature or mark or the signature or mark of such other person. In the present case the trial Court after a close scrutiny and analysis of the evidence of the defendant No. 1, Smt. Parvati Bai, Vir Bhadra. Sheikh Nabi. Shivraj and Gyanoba Patil who are witnesses to the will recorded the finding that none of them deposed that Lachiram had signed the said will before them and they had attested it. None of them except Sheikh Nabi even deposed as to when the talk about the execution of will was held. The witness Sheikh Nabi, however, deposed that the talk about the

will also took place at the time of the talk about the adoption. But this witness too did not depose that deceased Lachiram had signed the alleged will in his presence. In the absence of such evidence it is difficult to accept that the execution of the alleged will was proved in accordance with law as required by Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act and Section 3 of the Transfer of Property Act. It may be true as observed by the High Court that law does not emphasis that the witness must use the language of the Section to prove the requisite merits thereof but it is also not permissible to assume something which is required by law to be specifically proved. The High Court simply assumed that Lachiram must have put his signature on the will Deed in the presence of the attesting witness Sheikh Nabi simply because the Deed of Adoption is admitted by the witness to have been executed on the same day. The High Court committed a serious error in making the observations that broad parameters of Nabi's evidence would show that Lachiram executed the will in his presence, that he signed the will being part of the execution of the testament and this evidence in its correct background would go to show that what was required under Section 63 has been carried out in the execution of the will. With respect to the High Court we may say that these findings of the High Court are clearly based on assumption and surmises and, totally against the weight of the evidence on record. The trial Court on a close and thorough analysis of the entire evidence came to a proper conclusion that the will has not been proved in accordance with law which finding has been further affirmed by the lower appellate Court after an independent reappraisal of entire evidence with which we find ourselves in agreement as there was hardly any scope or a valid reason for the High Court to interfere with.

12. Further, it may not be out of place to mention that Sub-section (1) of Section 100 of the Code of Civil Procedure explicitly provides that 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. Sub-section (4) of Section 100 provides that when the High Court is satisfied that a substantial question of law is involved in any case it shall formulate that question. But surprisingly enough the High Court seems to have ignored these provisions and proposed to reappreciate the evidence and interfere with the findings of fact without even formulating any question of law. It has been the consistent view of this Court that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, based on appreciation of the relevant evidence. There is a catena of decisions in support of this view. Having regard to all the facts and circumstances of the present case discussed above, we are satisfied that there was no justification for the High Court to interfere with the well reasoned findings of the two Courts below. Consequently, this appeal must succeed.

13. In the result the appeal is allowed, the judgment and decree passed by the High Court are set aside and that of the trial Court is restored. We make no order as to costs of this appeal. The respondents shall, however, bear the plaintiffs cost incurred in trial Court and the first appellate Court.