

CASE NO.:
Appeal (civil) 5813 of 2006

PETITIONER:
Shanti Devi
t

\005Appellan

RESPONDENT:
Daropti Devi & Ors.

\005Respondents

DATE OF JUDGMENT: 14/12/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

[Arising out of SLP (Civil) No. 4127 of 2004]

S.B. SINHA , J :

Leave granted.

An order of remand passed by a Division Bench of the Delhi High Court dated 07.11.2003 passed in R.F.A. No. 435 of 1992 is in appeal before us.

The parties are sisters being the daughters of Shri Tara Chand Madan and Smt. Budho Bai (since deceased). Tara Chand Madan died on 21.03.1954. Smt. Budho Bai executed a deed of sale in respect of the property bearing No.16/26, Old Rajinder Nagar, New Delhi, by a registered deed dated 14.06.1965. She allegedly disowned Respondent No.1 as her daughter. A Will was executed by her on 22.02.1977, beneficiary whereof was said to be the appellant. Smt. Budho Bai died on 20.04.1980.

Appellant filed an application for mutation of her name. Respondent filed a suit for perpetual injunction, which was marked as Civil Suit No. 308 of 1980, claiming, inter alia, for the following reliefs :

"(a) A decree for perpetual injunction restraining the Defendant No. 3 from dealing the said property in any manner whatsoever and from getting the said property No. 16/26, situated at Old Rajinder Nagar, New Delhi, together with the lease hold rights of the land thereunder admeasuring 85 sq. yds. Or thereabouts substituted/transferred exclusively in her name to the exclusion of the Plaintiffs from Defendants Nos. 1 & 2 on the basis of the alleged WILL dated 22.02.1977 and also restraining the Defendants 1 and 2 from enforcing or acting in any manner whatsoever on the basis of the said alleged WILL dated 22.02.1977 and thereby transferring and/or substituting the said property in favour of the Defendant No. 3 to the exclusion of the Plaintiffs be passed in favour of the Plaintiffs and against the Defendants.

(b) The costs of the suit be also awarded against the

Defendants."

According to the appellant, the said suit was not maintainable. It was dismissed as such by an order dated 18.12.1981, holding :

"The allegations of the plaintiffs being out of possession have not been denied and controverted with specifically and categorically in the corresponding paragraph of the replication to the written statement of defendant no. 3 and the suit is not maintainable unless the plaintiffs seek the remedy of possession in respect of their shares in the property in dispute. I do not agree with the counsel of the plaintiff that provisions of Section 31 are permissive."

The respondent filed another suit, which was marked as Suit No. 276 of 1992, for declaration and consequential relief. The said suit was also dismissed being not maintainable being hit under Order II Rule 2 of the Code of Civil Procedure. The learned judge, however, also dealt with the other issues involved in the suit.

In the Appeal filed by the respondents, the High Court observed that as the learned Trial Judge wrongly framed the issue and opined that the onus of proof was on the plaintiffs and not on the defendant, the matter should be remitted to the Trial Judge, stating :

"18. In the case in hand, we are of the view that the learned trial court did not frame Issue No. 4 in its true perspective. The onus to prove Issue No. 4 ought to have been put on the respondent who pleaded about the existence of the Will instead of being put on the appellants and that too in negative. We fail to comprehend as to how the appellants shall give proof of the non-existence of the Will. Respondent ought to have brought evidence on Issue No. 4 and of course it was open to the appellants to cross-examine the witnesses of the respondent on this issue to prove that the Will on which the respondent was placing reliance was in fact fictitious and not executed by Smt. Budho Bai. The appellants by no stretch of imagination could lead evidence on this issue. Therefore, it seems to us that this issue was not correctly adjudicated primarily because of the reason that onus to prove this issue was erroneously put on the appellants instead of being put on the respondent who was under legal obligation to prove this issue strictly in terms of Section 63 of the Indian Succession Act, the document in question being Will and its prove being governed by Indian Succession Act, 1925.

19. As discussed above the appellant on whom the onus was to prove Issue No. 4 did not adduce any evidence excepting the bald statement of PW 1 whereas, the respondent did not lead any evidence as they thought that onus to prove this issue was on the appellants and perhaps for these reasons, this issue could not be determined in its true spirit.

20. Since Issue No. 4 is an important and material issue for determination of the rights of the parties, therefore, we deem it fit and proper and fit that this issue be determined afresh after the same is framed

by the trial court in the affirmative as referred above putting the onus to prove this issue on the respondent. The trial court shall also look into the aspect as to the effect of the will, it being not probated as provided under Section 218 of the Indian Succession Act."

Mr. Ranjit Kumar, the learned Senior Counsel appearing on behalf of the appellant, would submit that having regard to the fact that the four issues were framed by the learned Trial Judge, the High Court could not have indirectly set aside the findings on all the issues, although it purported to have remitted the matter only on the premise that the learned Trial Judge was not correct in holding that the burden of proof on Issue No. 4 was on the plaintiff.

It was submitted that having regard to the provisions of Order II Rule 2 of the Code of Civil Procedure, the suit itself was not maintainable.

In view of the order proposed to be passed by us, it may not be necessary to arrive at a definite conclusion one way or the other on the said question. The issues framed by the learned Trial Judge are as under :

- "(1) Whether the suit is not maintainable in the present form ? OPD
- (2) Whether the suit is barred as alleged in para 12 of the written statement ? OPD
- (3) Whether the suit property valued for the purpose of court fee and jurisdiction ? OPP
- (4) Whether the Will dated 22.2.1977 is invalid as alleged in the plaint ? OPP
- (5) Whether the plaintiff is entitled for relief ? OPP.
- (6) Relief"

The High Court, in our opinion, rightly opined that the merit of the matter revolved round the legality of the Will. It would also depend upon the nature of the property held by the father of the original parties.

A bare perusal of the plaint filed by Respondent No.1 herein would show that the validity and/or legality of the Will has been challenged on a number of grounds; one of them being suspicious circumstances surrounding the execution of the Will purported to have been executed by Smt. Budho Bai. There cannot be any dispute with regard to the proposition of law that the onus of proof to establish that the Will was validly executed by the testator was on the person who was a beneficiary thereunder. Existence of suspicious circumstances may not lead to an inference that the Will was invalid in law, but would certainly be a relevant factor to arrive at a finding that the Will was not executed by the testator in a sound and disposing state of mind.

But the same by itself could not be a ground for remitting the entire suit to the learned Trial Judge upon setting aside the decree of the learned Trial Court. The power of remand vests in the Appellate Court either in terms of Order XLI Rules 23 & 23A or XLI Rule 25 of the Code of Civil Procedure. Issue No. 4 was held to have been wrongly framed. Onus of proof was also wrongly placed and only in that view of the matter the High Court thought it fit to remit it to the learned Trial Judge permitting the parties to adduce fresh evidence. It, therefore, required the learned Trial Judge to determine a question of fact, which according to it was essential,

upon reframing the issue.

Only, thus, additional evidences were required to be adduced upon reframing the issue and having regard to the fact that onus of proof was wrongly placed on the plaintiff.

In the aforementioned situation, in our opinion, it would have been proper for the High Court not to remit the matter in its entirety, which could have been done by the court in exercise of its jurisdiction under Order XLI Rule 23 or Order XLI Rule 23A of the Code of Civil Procedure. The impugned judgment must in the aforementioned situation be held to have been passed in terms of Order XLI Rule 25 of the Code of Civil Procedure.

For the reasons aforementioned, the impugned judgment should be directed to be modified. We, therefore, in modification of the impugned judgment, direct that the learned Trial Judge may allow the parties to adduce evidence, whereupon it shall return the evidence to the Appellate Court together with its findings thereupon and reasons therefor within four months from the date of communication of this order, whereupon the High Court may proceed to determine the appeal on its own merit. The appeal is allowed to the aforementioned extent. However, there shall be no order as to costs.