

MHKO110009362012



Reg. Civil Suit No. 354/2012.

(CNR No.MHKO110009362012)

Order below Exh.53

(Sayajirao Ghorpade Vs. Balasaheb Ghorpade)

01. The present application is made on behalf of the plaintiff vide order XIV, rule 5 of Code of Civil Procedure. (in short C.P.C.)

02. It is the contention of the plaintiff that, he instituted the suit for the relief of declaration and perpetual injunction. Issues were framed vide Exh.20. Plaintiff further submitted that, he seeking the relief of declaration that, the will dated 10/09/2007 is bogus and sham. Defendants filed their written statement vide Exh.19 and submitted that, the registered will no.5185/2007, dated 10/09/2007 is legal one. In such situation to prove the will in question as legal, the bourdon of proof is on defendants. But, while framing the issue vide Exh.20, the court keep the bourdon on the shoulder of the plaintiff to prove that, whether the will dated 10/09/2007 is illegal and liable to be set aside.

03. It is further submission of the plaintiff that, the issued framed vide Exh.20 is as follow, “Does the plaintiff prove that, the will deed executed in favor of defendant no.1 dated 10/09/2007 is illegal and liable to be set aside.” Plaintiff further submitted that, by considering rival parties and Indian Evidence Act, the bourdon of proof must be on the shoulder of defendants to prove that, the will dated 10/09/2007 is legal one, for that purpose plaintiff prayed to recast the above said issue as follow, “ Does the defendant no.1 prove that, will deed executed in favor of defendant no.1, dated 10/09/2007 is legal and correct one”.

Hence he made the instant application.

04. Defendant no.1, filed his say vide **Exh.54**. He objected the instant application on various grounds. Defendant further submitted that, issues are properly framed by considering the pleading of both the parties. Only to avoid the evidence plaintiff made the instant application. The application is not as per the parameters of C.P.C. He further submitted that, court properly framed issue in question by considering the prayer clause of the suit. Plaintiff should have prove his case on his own legs. So, plaintiff cannot shift his bourdon of proof on the shoulder of defendant, by altering the issue in question. Defendant further submitted that, he specifically averted in his pleading that the registered will dated 10/09/2007 is legal and correct one. So, now to prove the legality of the will bourdon shall not be shifted on his shoulder. Defendant finally submitted that, the issue in question is properly framed, hence the application be rejected.

05. Read application and say there on. Heard arguments of both sides.

06. The present suit is instituted for seeking the relief of declaration and perpetual injunction. Plaintiff praying to the court to declare the registered will bearing no.5185, dated 10/09/2007 is illegal and to cancel the same. On the other hand, defendant no.1 specifically pleaded in para 05, of his written statement that, the will executed by deceased Santaji is legal and valid one.

07. It is necessary to consider here that, the party propounding a will or otherwise making a clam under a will is no doubt seeking to

prove a document and, in deciding how it is to be proved, we must inevitably referred to statutory provisions which govern the proof of documents. Section 68, of Indian Evidence Act and section 63(c) of Indian evidence Act are relevant for this purpose.

08. On bare perusal section 68 of the Indian Evidence Act, it is seen that, if a document is require by law to be attested, then it shall not be used as evidence until one attesting witness at least has been called for that purpose, for proving its execution. On the other hand on bare perusal section 63(c), of the Indian Evidence Act, it is seen that, for a valid and legal will the same shall be attested by two or more witnesses and each of whom has seen the testator sine or affix his mark to the will or has seen some other person signed the will in the presence and by the direction of the testator.

09. By considering the above legal provision of Indian Evidence Act, it is crystal clear that, if a person claiming the benefit of the will, he indirectly claiming that, the will in question is legal and valid one. On the other hand, it is also seen hat, a will has to be attested at-list by one witness. To prove the legality of the will the attesting witness must depose that, the testator has affixed his sign or mark on the will in his presence. If that is so, the attesting witness of the will are in the contact of the testator or the person who claiming the benefit of will. In such situation also, the person who challenging the will on the ground that, the same is illegal or void, then he shall not be supposed to bring the testator before the court, who is unknown to him.

10. It is also necessary to consider here that, if any person raised the doubt about the circumstance under which will in question

was executed, then in such cases the court would naturally expect that, all legitimate suspension should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstance has to be removed by the propounder of the will. So, in such circumstance to remove all the suspicious circumstance relating to the will in question the burden of proof will be on the propounder of the will, and on perusing the supra cited section of Indian Evidence Act, it is crystal clear that, if any person claiming any benefit of a will, he is claiming the will as a legal and valid one. In such situation he has to prove the will, before the accepting the same in to evidence.

11. In the present case in my hand also, the defendant no.1 specifically pleaded in para 05, of his written statement that, the registered will bearing no. bearing no.5185, dated 10/09/2007, is legal and valid one. In such situation the burden of proof to prove the legality of the will, will be on the defendant no.1 and not on the plaintiff. It is also the settled principle of law that, there should not be negative burden of proof. So, if the issue in question not altered then, there will be negative burden of proof on the shoulder of plaintiff, which is not acceptable in civil jurisprudence. Hence, considering the above discussion I am of the candid opinion that, to finally decide the issue in question on merit it needs to alter as prayed by the plaintiff. Hence, I proceed to pass the following order : -

ORDER

- 1) The application Exh.53, is hereby allowed.

- 2) The issue no.3 framed vide Exh.20 which runs as follows,

Does the plaintiff prove that, the will deed executed in favour of defendant no.1 dt. 10/09/2007 is illegal and liable to be set aside ?

The above said issue is re-framed as,

Does the defendant no.1 prove that, will deed executed in favour of defendant no.1 dated 10/09/2007 is legal and correct one ?

- 3) Necessary effect be given to vide Exh.20.
- 4) The application Exh. 53, is disposed off accordingly.

Date : 10/08/2023.

(L. M. Pathan)
Civil Judge Junior Division,
Peth-Vadgaon