REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.3410 of 2007

DHANNULAL AND OTHERS .....Appellant(s)

versus

GANESHRAM AND ANOTHER
.....Respondent(s)

WITH

Civil Appeal No.3411 of 2007

GANESHRAM .....Appellant(s)

versus

DHANNULAL AND OTHERS
.....Respondent(s)

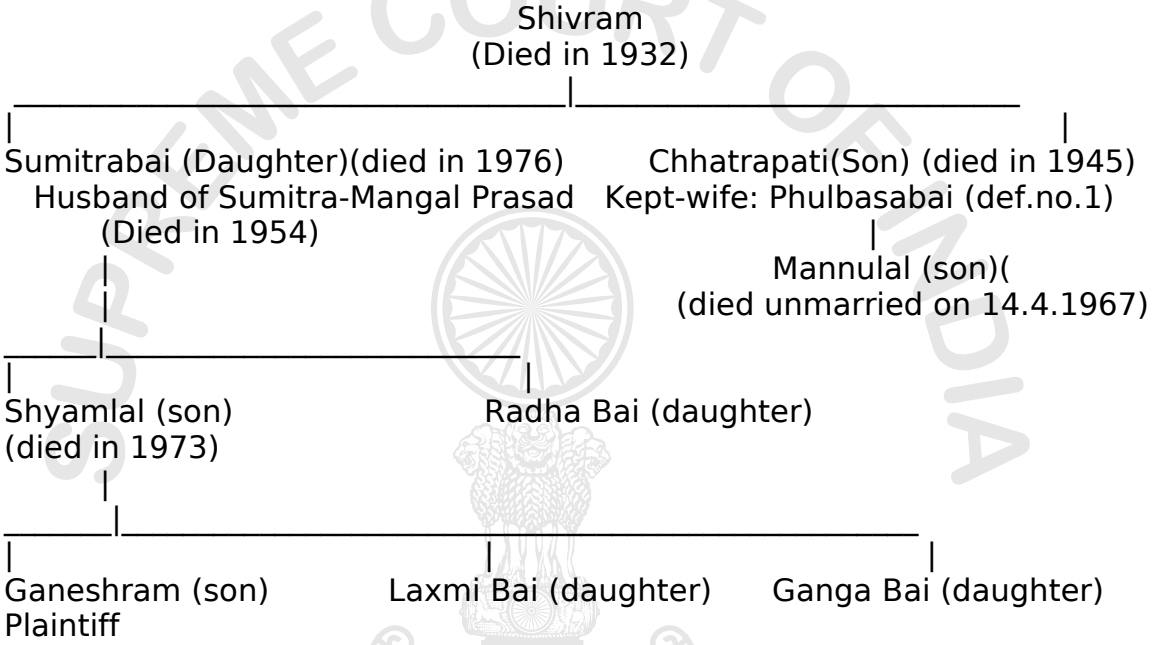
JUDGMENT

M. Y. EQBAL, J.

Aggrieved by the judgment and order passed by the High Court, partly dismissing First Appeal No.92 of 2001, both the plaintiff and the defendant have filed the aforementioned two appeals. While confirming judgment and decree, the High Court reversed the finding recorded by the trial court on the issue of will executed by the testatrix.

2. The plaintiff-Ganeshram, appellant in Civil Appeal No.3411 of 2007, filed suit for declaration, possession and damages in relation to the two suit houses described in Schedule A & B of the plaint, pleading inter alia that the registered sale deed of 1987, executed by Phoolbasa Bai (original defendant no.1, who died during the pendency of the suit) in favour of defendant no.5 Mukesh Kumar Chourasia, which relates to some portion of suit house, be declared illegal, void and not binding on him.

3. To understand factual matrix and issue involved in the case, we would like to reproduce here the pedigree table as submitted before us:



4. The suit property was originally owned by Shivram who had a daughter Sumitrabai and a son Chhatrapati. The plaintiff, the grandson of Sumitrabai, filed a suit for declaration of ownership, possession and damages in relation to the suit property against defendant nos.1 to 5. The plaintiff challenged the validity of the Will dated

18.08.1977 purported to have been executed by Phoolbasa Bai in favour of the sons of her brother Gayaprasad, defendant nos.1-4. The plaintiff also challenged the validity of the sale deed purported to have been executed by Phoolbasa Bai in 1987 in favour of defendant no. 5 in relation to a portion of the suit property.

5. The plaintiff alleged that Sumitrabai (plaintiff's grandmother) had become the owner of the suit property by adverse possession having stayed therein, after the death of her husband Mangal, with her father Shivram till his death in 1932 and till her own death in 1976. Phoolbasa Bai was alleged to have been the mistress and not the legally wedded wife of Chhatrapati and their son was alleged to have died unmarried and issueless in 1967. The sale deed and the Will purported to have been executed by Phoolbasa Bai were alleged to be illegal.

6. The suit was contested firstly by filing joint written statement by the original defendants namely Phoolbasa Bai and Gaya Prasad stating that after the death of Shiv Ram the entire property was succeeded by Chhatrapati (his only son) as Sumitrabai was a married daughter. It was further pleaded that Phoolbasa Bai, being the lawful wedded wife of Chhatrapati, became the owner of the suit property after Chhatrapati's death in 1945. During the pendency of the suit, when Phoolbasa died, she was substituted by defendant nos.1 to 4, who also filed separate written statement in addition to earlier written statement filed by the original defendants. Defendant no.5 also filed separate written statement claiming to be the owner of the portion of property by virtue of a sale deed executed in his favour in 1987.

7. The trial court dismissed the civil suit holding that the Will executed by Phoolbasa in the year 1977 in favour of

defendants nos.1 to 4 is legal and the sale effected by her during the pendency of the civil suit in favour of defendant no.5 is also legal and valid. The trial judge recorded the finding that Sumitra Bai had not perfected her title by adverse possession and the plaintiff could not establish that Phoolbasa Bai was a concubine of late Chhatrapati. The trial court also recorded a finding that the plaintiff failed to establish that the Will was a fraudulent and fabricated document.

8. Aggrieved by the judgment and decree of the trial court, plaintiff moved the High Court preferring First Appeal, which was partly dismissed by the learned Single Judge of the High Court. Although learned Single Judge set aside the finding of the trial court on the issue of validity of the Will on the ground that the Will was not proved as per law, but upheld the sale deed executed by Phoolbasa Bai in favour of

defendant no.5. The concluding paragraphs of the impugned order are, therefore, quoted hereinbelow:

> "In the facts and circumstances, the sale in favour of defendant no.5 was a valid sale and the same cannot be held to be illegal, void and not binding against the plaintiff. The arguments advanced in this regard cannot be accepted.
>
> Now the question arises, what should be the legal position after the death of Smt. Phoolbasa and her son namely Mannulal when it has been held that the alleged will executed in favour of defendants nos.1 to 4 was not proved. Certainly these properties were succeeded by her from her husband or from her father-in-law, therefore, according to Section 15(2)(b) of the Hindu Succesion Act, this shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) upon the heirs of her husband. In this case, if we look to the pedigree set forth in the plaint, the succeeding heir of her husband, namely Chhatrapati, would be sister's daughter which finds place as serial no.4 in Entry IV of Class II of Schedule. When Radha Bai, the sister's daughter is said to be alive on the date of succession according to the plaint allegations itself, then the plaintiff, in the reversionary right will not get the ownership of the property.
>
> In the result, the appeal is dismissed. The judgment and decree passed by the trial court are hereby confirmed with the aforesaid modifications in the finding regard the 'Will'."

9. Hence, present cross appeals filed by both side against each other including purchaser-defendant no.5. Defendants nos.1 to 4 have preferred Civil Appeal No.3410 of 2007 and the plaintiff has preferred Civil Appeal No.3411 of 2007.

10. Mr. Naveen Prakash, learned counsel appearing for the plaintiff-appellant in C.A. No.3411 of 2007 assailed the finding on the relationship of Chhatrapati and Phoolbasa Bai as husband and legally married wife. Learned counsel submitted that no witness from the side of defendant has been examined to prove the marriage of Phoolbasa Bai with Chhatrapati. Learned counsel further submitted that no finding has been recorded by the Trial Court or the Appellate Court as to when Chhatrapati died. However, in course of argument, learned counsel does not deny that Phoolbasa Bai was living with the joint family when Chhatrapati was alive for the last 20 years, but there is no evidence of valid marriage.

11. We are unable to accept the submissions made by Mr. Naveen Prakash, learned counsel appearing for the plaintiff-appellant. Indisputably, the first wife of Chhatrapati died in the very early age and immediately thereafter the original defendant No.1 Phoolbasa Bai started living with Chhatrapati as his second wife. Out of the wedlock of Phoolbasa Bai and Chhatrapati, one son was born, whose name was Mannu Lal. The said son of Chhatrapati and Phoolbasa Bai died unmarried. It is also not in dispute that the original owner Shiv Ram had only one son namely, Chhatrapati and one daughter Sumitrabai. Phoolbasa Bai died during the pendency of the suit in the year 1992. The relationship of Chhatrapati and Phoolbasa Bai has not been denied. It has also not been denied that they had been living together as husband and wife in a joint family.

12. In the fact of the case there is strong presumption in favour of the validity of a marriage and the legitimacy of its child for the reason that the relationship of Chhatrapati and Phoolbasa Bai are recognized by all persons concerned.

13. In the case of ***A. Dinohamy vs. W.L. Balahamy***, AIR 1927 PC 185, it was held that where a man and woman are proved to have lived together as husband and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. The Court observed as follows-

> "The parties lived together for twenty years in the same house, and eight children were born to them. The husband during his life recognized, by affectionate provisions, his wife, and children, The evidence' of the Registrar of the District shows that for a long course of years the parties were recognized as married citizens, and even the family functions and ceremonies, such as, in particular, the reception of the relations and other guests in the family house by Don Andris and Balahamy as host and hostess--all such functions were conducted on the footing alone that they were

> man and wife. No evidence whatsoever is afforded of repudiation of this relation by husband or wife or anybody."

14. In the case of ***Gokal Chand vs. Parvin Kumari,*** AIR 1952 SC 231, this Court observed that continuous co-habitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.

15. It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin. In the instant case, instead of adducing unimpeachable evidence by the plaintiff,

a plea was taken that the defendant has failed to prove the fact that Phoolbasa Bai was the legally married wife of Chhatrapati. The High Court, therefore, came to a correct conclusion by recording a finding that Phoolbasa Bai was the legally married wife of Chhatrapati.

16. For the aforesaid reason, we do not find any merit in C.A. No.3411 of 2007.

17. So far the validity of will is concerned, the High Court after considering a catena of decisions came to the following conclusion:-

> "26. If we apply the above law in the present matter it would appear that the attesting witnesses were not examined because they were not alive and will has been proved by only examining the scribe as P.W.3. Though it has been stated by the Scribe that he has drafted and typed the will on the instructions of the testatrix, but this fact appears to be false on the face of the document itself; There are many suspicious circumstances appearing on the face of document which go to suggest that in fact, nothing was drafted or typed by the scribe on the instructions of the testatrix,

but a typed matter was placed before him for getting it registered showing as the will of the testatrix. First of all, it would appear that though the will has ended in the very second sheet but there is no space left for signature of the scribe and the scribe has inserted his signature in between the last two lines by using an ink pen. Secondly it appears that the complete date like 18.8.1977 was not typed in the second page and only -8-1977 was typed and figures like 18 have been inserted by an ink pen showing as the document was executed on 18.8.1977. EX.D-72 Muktarnama was also written and signed on the said date and the suspicious circumstance appears that when this document (Muktarnama) was being executed, the thumb impression over the alleged will was also taken by the beneficiaries and the document writer was shown to be the Scribe of the document whereas, in fact, the document was not scribed by him. Another important circumstance is that the original defendant namely Smt. Phoolbasa had died on 20.9.1992 after filing of her written statement on 14.7.1987. The date of execution of the will is 18.8.1977 but there is no whisper of her will in her written statement which she had filed on the said date. Though it was not a requirement of law, but under a normal human nature if she has pleaded the detailed administration of property, vide para 9 of her written statement, right from its acquisition by Shiv Ram to the date of filing of the suit, (please see para 9 of the written statement). She should have mentioned something about the will, if this alleged will was in her knowledge and she in fact had executed the same in favour of defendant no. 1 to 4. These circumstances which are highly suspicious, have not been removed or cleared by the beneficiaries of the will and only by examining the scribe, who is not an attesting witness and whose statement is not very satisfactory in appreciation on all above points, particularly in the situation when the testatrix was residing in the dominion of the beneficiaries and their father and was keeping a fiduciary relations

> with them, it cannot be held that a due execution of will has been proved by the defendants in accordance with the provisions of section 68 or other provisions of the Evidence Act. The finding recorded by the court below that due execution of the will is proved, is not in accordance with law and the same is set aside. The will is held to be not proved in this case."

18. It is evident from the findings recorded by the High Court in the paragraph referred to hereinabove that the Will suffers from serious suspicious circumstances. The execution of a document does not mean mechanical act of signing the document or getting it signed, but an intelligent appreciation of the contents of the document and signing it in token of acceptance of those contents.

19. Proof of a Will stands in a higher degree in comparison to other documents. There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the Will were read over to the executant and he, after admitting the same to be correct, puts his signature in presence of the witnesses. It is only after the executant puts

his signature, the attesting witnesses shall put their signatures in the presence of the executant.

20. In the instant case, the suspicious circumstance appears to be that when the Will was being executed, the thumb impression over the alleged Will was also taken by the beneficiaries and the document-writer was shown to be scribe of the document, whereas the document was not scribed by him. However, late Phoolbasa Bai although filed written statement before her death, but she did not whisper anything about the Will in the written statement. Admittedly, the Will was allegedly executed in 1977 whereas the written statement was filed some time in 1987. Taking into consideration all these facts, we do not filed any error in the conclusion arrived at by the High Court. The said finding, therefore, needs no interference by this Court.

21. For the reasons aforesaid, we do not find any merit in these appeals which are accordingly dismissed.

.....J.
(M.Y. Eqbal)

.....J.
(Amitava Roy)

New Delhi,
April 08, 2015.