

HIGH COURT OF MADHYA PRADESH AT JABALPUR

Before : Justice Vivek Agarwal

SANJAY INGLE and another - Petitioners

versus

PANCHFULA BAI - Respondents.

Misc. Petition No. 5039 of 2022

Evidence Act, Section 101 - Will - Defendants are staking their claim on the basis of a registered Will left by deceased has to prove their Will first and then only plaintiffs can be asked to discharge their burden - Suit seeking relief of declaration of title to property- Defendants claimed title on the basis of registered Will - Per Hindu law of succession, issues asserted by the plaintiffs will come into play and inter se rights will be decided only when it is established that deceased died intestate - If he had left a Will, then their rights and liabilities are subject to the proof of that Will - Order directing defendants to lead their evidence first, upheld.

Even in *Anil Rishi v. Gurbaksh Singh*, (2006) 5 SCC 558, it is held that ordinarily burden of proving a fact rests on party which substantially asserts the affirmative of the issue. When this aspect is considered, then defendants asserting their rights on the basis of the Will have been rightly asked to lead their evidence first, impugned order does not call for any interference.

Shri Avinash Zargar, for the petitioner.

ORDER

Vivek Agarwal , J. - (07.11.2022) - This miscellaneous petition is filed by the defendants/petitioners being aggrieved of order dated 29/07/2022 (Annexure-P/1) passed by learned 2nd Civil Judge (Junior Division), Khandwa in RCSA 19A/2019 whereby learned Civil Judge has directed the defendants to lead their evidence first.

2. Shri Avinash Zargar, learned counsel for the appellants, submits that plaintiffs filed a suit seeking relief of declaration of title with regard to the suit property. Further claiming that defendants have no right, title and interest in respect of the suit property because defendant-Yashoda Bai is concubine of

late Laxman and defendant-Sanjay Ingle is illegitimate child Laxman whereas plaintiff - Panchfula Bai is first wife of deceased-Laxman and plaintiff No.2 is her son.

3. It is submitted that defendants claim, title in respect of the suit property on the basis of registered Will dated 02/06/2012. Defendants further pleaded that Laxman had divorced his first wife, therefore, she has no stake in the suit property.

4. Reliance is placed on the judgment of Hon'ble Supreme Court in the case of *Anil Rishi v. Gurbaksh Singh*, (2006) 5 SCC 558 wherein it is held that under the provisions contained in Sections 101, 102 and 106, reversal of burden of proof is permissible when hardship in proving the affirmative of the issue and possession of original materials. It is held that original burden of proving a fact rests on party which substantially asserts the affirmative of the issue. Placing reliance on the said judgment, it is submitted that plaintiffs should have been directed to lead evidence instead of shifting burden on the defendants/petitioners.

5. After hearing learned counsel for the parties and going through the record, it is evident that Section 101 of the Evidence Act provides that "whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist." When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

6. In the present case, defendants are relying on the registered Will of deceased-Laxman to claim title over the suit property whereas plaintiffs are claiming that defendants are respectively illegitimate child and concubine of Laxman, therefore, they have no right to the property. As per Hindu law of succession, issues asserted by the plaintiffs will come into play and inter se rights will be decided only when it is established that deceased-Laxman died intestate. If he had left a Will, then their rights and liabilities are subject to the proof of that Will.

7. Chapter-XIX in Article 366 of Hindu Law by Sir Dinshaw Fardunji Mulla, 23rd Edition by Lexis Nexis provides that burden of proof in regard to a Will is governed by two rules namely "Onus probandi lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of free and capable testator."

8. Second Rule is that "if a party writes or prepares a Will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever there nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the successor knew and approved the contents of the Will and it is only where this is done that onus is thrown on those who oppose the Will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the Will. [*Sukhdei v. Kedarnath* (1901) 23 ALL 405].

9. Thus, when these rules of proving a Will are taken into consideration, then the order passed by learned Civil Judge when tested on the touchstone of the aforesaid rules cannot be said to be illegal or arbitrary because the defendants are staking their claim on the basis of a registered Will left by deceased-Laxman has to prove their Will first and then only plaintiffs can be asked to discharge their burden.

10. Thus, when judgment of Hon'ble Supreme Court in *Anil Rishi* (*supra*) is examined, even in that judgment, it is held that ordinarily burden of proving a fact rests on party which substantially asserts the affirmative of the issue. When this aspect is considered, then

defendants asserting their rights on the basis of the Will have been rightly asked to lead their evidence first, impugned order does not call for any interference.

11. Accordingly, this petition fails and is hereby dismissed.

Ss -