

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 533 OF 2003

Gayabai Zagadu Patil (Dead)
through her legal heirs :

1A. Shivram Zagadu Patil,
Age 25 years, Occu. Agri.,

1B. Arjun Zagadu Patil,
Age 23 years, Occu. Agril,

Both residents of Pimpalgaon-
Hirashwar, Taluka Pachora,
Dist. Jalgaon.

1C. Kamalabai w/o. Sitaram Mahajan,
Age 22 years, Occu. Household,
R/o. Varuli, Tq. Pachora,
Dist. Jalgaon.

1D. Sunita Ravindra Patil,
Age 24 years, occu. Household work,
R/o. Gujar Mohalla, Erandol,
Dist. Jalgaon.

....Appellants.
(Ori. Plaintiffs)

Versus

1. Sayabai w/o. Sandu Mahajan (Dead)
through her legal heirs;

1A. Yuvraj Sandu Mahajan,
Age 55 years, R/o. Varuli,
Tq. Pachora, Dist. Jalgaon.

1B. Jivram Sandu Mahajan,
Age 50 years, Occu. Private Business,
R/o. Shirpur, Tq. Shirpur,
Dist. Dhule.

2. Narmadabai w/o. Raghunath,

Age Major, Occu. House-hold,
R/o. Jamner Pura, Jamner,
Dist. Jalgaon.
(Dismissed as per Court's Order
dated 19.11.2010).

3. Malanbai w/o. Shankar Patil,
Age 63 years, Occu. Agril.,
R/o. Khedgaon, Nandiche,
Tq. Pachora, Dist. Jalgaon.
4. Neelabai w/o. Sonaji Patil (Dead),
 - A. Arun Sonu Patil, Age 48 years,
Occu. Agril, R/o. Erandol,
Tq. Jamner, Dist. Jalgaon.
 - B. Nivrutti Sonu Patil, Age 38 years,
Occu. Agril, R/o. Hiverkheda,
Tq. Jamner, Dist. Jalgaon.
(Dismissed as per Court's
order dated 19.11.2010.)
 - C. Alkabai w/o. Pundlik Mahajan,
Age 28 years, Occu. Household Work,
R/o. Balapur, Tq. Erandol,
Dist. Jalgaon.
5. Babulal Damu Patil,
Age 50 years, Occu. Service,
R/o. Varuli, Tq. Pachora,
Dist. Jalgaon.
(R.No. 5 dead, appeal to proceed
further vide Court's order dated
11.10.2011)

....Respondents.

(Res. 1 & 5 - Ori. Deft.
& Res. 2 to 4- ori.
Plaintiffs)

Mr. P.F. Patni, Advocate for appellants.

Mr. V.R. Dhorde, Advocate for respondent No. 1.

Mr. V.B. Patil, Advocate for respondent No. 5.

WITH
SECOND APPEAL NO. 534 OF 2003

Gayabai Zagadu Patil (Dead)
through her legal heirs :

- 1A. Zagadu Totaram Patil,
Age 75 years, Occu. Agril.,
R/o. Pimpalgaon-Hirashwar,
Tq. Pachora, Dist. Jalgaon.
- 1B. Shivram Zagadu Patil,
Age 45 years, Occu. Agri.,
R/o. As above.
- 1C. Arjun Zagadu Patil,
Age 20 years, Occu. Agril,
R/o. As above.
- 1D. Kamalabai w/o. Sitaram Mahajan,
Age 22 years, Occu. Household,
R/o. Varuli, Tq. Pachora,
Dist. Jalgaon.
- 1E. Sunita Ravindra Patil,
Age 24 years, occu. Household work,
R/o. Gujar Mohalla, Erandol,
Dist. Jalgaon.

....Appellants.
(Ori. Appellants)

Versus

- 1. Yuvraj Sandu Mahajan,
Age 55 years, Occu. Agril,
R/o. Varuli Bk., Tq. Pachora,
Dist. Jalgaon.
- 2. Jivram Sandu Mahajan,
Age 50 years, Occu. Private Business,
R/o. Shirpur, Tq. Shirpur,
Dist. Dhule.
(Dismissed vide court's order
dated 1.11.2007)

3. Neelabai w/o. Sonaji Patil (Dead),
Through her L.Rs.
- 3-A. Arun Sonu Patil, Age 53 years,
Occu. Agril, R/o. Gujar Mohalla,
Tq. Erandol, Dist. Jalgaon.
(Dismissed vide court's order
dated 1.11.2007)
- 3-B. Nivrutti Sonu Patil, Age 51 years,
Occu. Agril, Occu. & R/o. As above.
(Dismissed vide Court's order
dated 1.11.2007.)
- 3-C. Alka w/o. Arun Patil,
Age 40 years, Occu. Household,
R/o. Gelepur, Tq. Erandol,
Dist. Jalgaon.
(Dismissed vide Court's order
dated 1.11.2007.)
4. Narmadabai w/o. Raghunath,
Age Major, Occu. House-hold,
R/o. Jamner Pura, Jamner,
Dist. Jalgaon.
(Dismissed vide Court's Order
dated 1.11.2007).
5. Malanbai w/o. Shankar Patil,
Age 63 years, Occu. Agril.,
R/o. Khedgaon, Nandiche,
Tq. Pachora, Dist. Jalgaon.
6. Sayabai w/o. Sandu Mahajan,
Age 50 years, Occu. H.H.,
R/o. Veruli, Tq. Pachora,
Dist. Jalgaon.
(Appeal is dismissed vide Court's
order dated 1.11.2007)
7. The State of Maharashtra

....Respondents.
(Res. 1 & 7 - Ori. Respdt.
& Res. 6 -Ori. Petitioner)

Mr. P.F. Patni, Advocate for appellants.

Mr. V.R. Dhorde, Advocate for respondents.

Mr. S.P. Sonpawale, AGP for respondent/State.

CORAM : T.V. NALAWADE, J.

DATED : 23rd June, 2016.

JUDGMENT :

1) Second Appeal No. 534/2003 is filed against the judgment and award of L.A.R. No. 19/1987. The said reference was filed under section 30 of the Land Acquisition Act and the reference was decided against the present appellants. It appears that initially the appeal was filed against the decision of Reference Court in this Court, but this Court, (other Hon'ble Judge) had advised to file First Appeal in District Court and so, the aforesaid First Appeal was filed in District Court. There is no need to discuss and decide this point as the decision of the main matter will decide everything. The dispute in Regular Civil Suit No. 163/1985 which was filed for relief of partition and possession is the main dispute. This dispute between the parties includes entitlement in respect of the compensation paid by the Government under Land Acquisition Act. Both the sides are heard.

2) The appellants, plaintiffs are real sisters inter-se.

Defendant No. 1 is also their sister and she is the eldest amongst the sisters. Defendant Nos. 2 and 3 are sons of defendant No. 1.

3) The suit was filed for partition of agricultural lands bearing Gat Nos. 134 and 139 and house properties Nos. 30 and 31 situated at village Veruli. It is the case of plaintiffs that the properties were owned by the father of plaintiffs and after the death of father, the properties were mutated in the name of his widow. It is contended that after the death of mother of plaintiffs, the property was mutated in the name of defendant No. 1, but due to this mutation, defendant No. 1 did not become owner. It is contended that from mother of plaintiffs namely Bhagabai, one will deed was got executed by defendant No. 1 in favour of defendant Nos. 2 and 3, but the contents mentioned in the will document were never complied with by defendant No. 2 and so, they cannot become owner of the suit properties under said will. Will was executed on 3.1.1964. Equal share was claimed by the plaintiffs in the suit properties as sisters of defendant No. 1.

4) Defendant No. 2 filed written statement and contested the matter. He contended that Bhagabai was absolute owner of the property and under will of 1964, she has

bequeathed entire property to defendants and so, there is no right to the plaintiffs or other daughter of Bhagabai to claim share in the suit properties. Defendant No. 4 also filed written statement and it appears that he is successor of one sister of the plaintiffs. He supported the plaintiffs.

5) Issues were framed by the Trial Court on the basis of aforesaid pleadings. The Trial Court decreed the suit by holding that defendant No. 2 had failed to prove that there was due execution of will in his favour. It was further observed that the suspicious circumstances surrounding the will were not dispelled by the defendants and due to that, it was not possible to infer that the properties were really bequeathed by Bhagabai to defendants. In all eight suspicious circumstances were mentioned in the reasoning and the main circumstances were :-

- (i) There was exclusion of Class I heirs.
- (ii) Evidence of some attesting witnesses who were probably alive was not given.
- (iii) No evidence was given to show that Bhagabai was in disposing state of mind and the contents of the will were explained to her.
- (iv) The will was not used for about 15 years.

6) The First Appellate Court has held that evidence for due execution for will was given by examining one attesting witness. Other circumstances are also considered like registration of the will etc. and the judgment and decree of the Trial Court is set aside by the First Appellate Court.

7) This Court admitted the Second Appeal No. 533/2003 on following substantial questions of law.

(i) Whether the will dated 3.1.1964 was duly proved as required by provisions of sections 68 and 69 of Indian Evidence Act ?, and

(ii) Whether Bhagabai was competent to bequeath the properties in favour of defendant Nos. 2 and 3 to the exclusion of others when the properties were ancestral properties ?

8) It is not disputed that Keshav, the original owner died in the year 1948. Bhagabai, the widow of Keshav was entitled to succeed to the properties of Keshav though she was limited owner as per the provisions of Hindu Law applicable to Mitakshara school. In view of the provisions of the Hindu Women's Right to Property Act, 1937 also she had become limited owner of the properties left behind by Keshav. The

properties were with her when Hindu Succession Act, 1956 came in to force. In view of the provisions of section 14 of this Act, she became absolute owner of these properties. There was no scope to give other finding on this point. The learned counsel for appellants also did not argue much on this point.

9) From the pleadings of plaint, which are quoted it can be said that plaintiffs are admitting that Bhagabai had executed will in favour of defendants. They were disputing the effect of will by contending that the conditions laid down in the will were not fulfilled by the defendants particularly by Yuvraj. This Court has carefully gone through the certified copy of the said will. Here only it needs to be observed that after following procedure, after taking the permission, secondary evidence was given in respect of will as the original will was lost and certified copy issued by the office of Sub Registrar, where will was registered, was produced and proved. In the will, it is mentioned that some amount like amount of Rs. 1,000/- was to be given to two daughters of Bhagabai. If it was not possible for Bhagabai to give such amount to two daughters, the amount was to be paid by Yuvraj and his brother as they were to get the properties of Bhagabai. They were also to pay the mortgage money if Bhagabai was not in position to pay debt in respect of one

property. There was no other condition in the will. By taking such defence, the plaintiffs have indirectly admitted that Bhagabai was in fit state of mind and she knew what she was doing.

10) One witness, son of attesting witness is examined by defendant No. 2 to prove that the will was attested. On the will, there are two signatures of attesting witnesses like Amrut and Balchand. Yuvraj has given evidence on oath that the scribe and attesting witnesses are dead. The will was executed on 3.1.1964. When such substantive evidence was given by Yuvraj, even suggestion was not given to him in the cross examination that any of this witness was alive. Thus, there was compliance of the provisions of the Evidence Act like sections 68 and 69 and evidence was given by Yuvraj to show that the will was duly attested. Further, the will was produced before the Sub Registrar by Bhagabai herself and that can be seen from the will, Exh. 98.

11) Bhagabai died in the year 1979, after about 15 years of the date of will. This circumstance is sufficient to create probability in favour of Yuvraj that she was mentally fit though he has admitted in cross examination that she was not moving during her last days.

12) It appears that immediately after the death of Bhagabai, the dispute started amongst daughters of Bhagabai and proceeding for mutation was started. Admittedly, in that proceeding, Yuvraj had immediately produce the will to oppose the mutation in favour of plaintiffs and their sisters. Thus, after the death of Bhagabai, immediately the will was used by Yuvraj.

13) It is true that Bhagabai did not give any property to some daughters, but that single circumstance itself is not sufficient to create suspicion about due execution of will. It is also true that Bhagabai was living with Yuvraj and her mother. But, she was living with them for all the years, of the life after the death of her husband, till her death. This circumstance can be used in favour of Yuvraj also as they were taking care of Bhagabai. To some daughters, she had intention to give Rs. 1,000/- and this amount was big in the year 1964. Those sisters could have used the will for recovery of amount from both Yuvraj and his brother if they wanted to use the will. Due to this condition, it cannot be said that the will cannot be used by Yuvraj when the property is bequeathed to Yuvraj and his brother by Bhagabai under the will.

14) The aforesaid circumstances are sufficient to show

that there was reason for Bhagabai to execute the will in favour of defendant Nos. 2 and 3. There is nothing to create doubt about her mental fitness. There is sufficient evidence to prove due execution of the will. The learned counsel for appellant has placed reliance on two reported cases like **AIR 1977 SUPREME COURT 63 [Beni Chand (Since Dead) now by L.Rs. Vs. Smt. Kamla Kunwar and Ors.]** and **AIR 1982 SUPREME COURT 133 [Smt. Indu Bala Bose & Ors. Vs. Manindra Chandra Bose and Ors.]**. In the first case, the Apex Court has laid down that in view of section 63 of Succession Act, the burden of proof of execution of will is on pre-pounder and satisfactory explanation needs to be given by the pre-pounder when circumstances surrounding execution are shrouded with suspicion. There is no dispute over this proposition. The meaning of 'attesting witness' for the purpose of section 68 of Evidence Act is also given in this case and there is no need to discuss this point as relevant evidence is quoted. Similar observations are made by the Apex Court in the second case. In view of the facts and circumstances of the present case, these cases are of no use to the appellants.

15) As the properties were given only to defendant Nos. 2 and 3 and land was acquired from the property given to

defendant Nos. 2 and 3, they are entitled to get the entire compensation. As the main matter is being decided in favour of defendant Nos. 2 and 3, nothing remains in other appeal, filed against the decision of Reference Court. So, the technicality that First Appeal was filed in District Court by the present appellants as per the directions given by this Court, cannot be used in their favour and the submission that present proceeding needs to be treated as First Appeal against the decision of Reference Court cannot be considered. In the result, all the points are answered against the appellants and both the appeals are dismissed.

[T.V. NALAWADE, J.]

ssc/