

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

SECOND APPEAL NO. 38 OF 2014

Smt.Sandhya Anil Shedage & anr. ... Appellants
V/s.
Smt.Preeti Pradeep Shedage. ... Respondent.

Mr.D.J.Deshmukh, for Appellants / Applicants.
Ms.Gauri Godse, for the Respondent.

***Coram : N.M. Jamdar, J.
Thursday, 14 July 2016.***

P.C. :-

The Appellants challenge the concurrent Judgments and Orders passed by the Civil Judge, Senior Division, Kalyan and District Judge, Kalyan, dismissing the Suit and Appeal filed by the Appellants.

2. The Appellants filed Miscellaneous Application No.95 of 2004 seeking grant of probate on the basis of Will executed by deceased Pradeep Viswasrao Shedage. The Application was converted in Regular Civil Suit No.39 of 2005. The Appellant No.1 is sister-in law of deceased Pradeep and Appellant No.2 is his sister. The Respondent is the wife of deceased Pradeep.

3. When the Suit was taken up for trial, parties led their oral and documentary evidence. The Appellants examined the witnesses said to be the attesting witnesses and the witnesses who had stated to be present at the time of presentation of the Will. The Appellants also examined the doctor where deceased was hospitalised at the time of his death. According to the Appellants, deceased Pradeep executed a registered Will on 1 November 1994 in favour of the Appellants. The main dispute is in respect of license of country Liquor Bar C.L.III 23 at Ulhasnagar-4. The learned Civil Judge, after examination of the evidence came to the conclusion that the evidence of the attesting witnesses was not reliable and merely because Will was executed with Sub-Registrar, the other circumstances, which according to the learned Judge were suspicious circumstances, could not be brushed aside. The learned Civil Judge found that the Appellants on whom the burden lay to prove the Will did not discharge the same. The learned Civil Judge also took note of the medical condition of the deceased at the time when the Will was alleged to be executed. The Appeal was filed by the Appellants in District Court, Kalyan, was dismissed by the learned Judge, by Judgment and Order dated 27 September 2013.

4. Heard the learned counsel for the parties.

5. The learned counsel for the Appellants contended that issues

were not properly framed by the learned Civil Judge and therefore, prejudice was caused to Appellants as the burden based under Section 68 of the Evidence Act could not be properly discharged. He submitted that the Will was registered, attesting witnesses were examined and a doctor from the hospital was also examined. He submitted that therefore once the Will was registered and attesting witnesses were examined, no suspicious circumstances could exist and both the Courts have not appreciated the evidence in proper perspective and have reached perverse findings. The learned counsel for the Respondent on the other hand, submitted that the attesting witnesses are not witnesses for registration of the Will and one of the witnesses for registration of the Will is the son of the Appellant No.1. It was also submitted that merely because Will is registered does not mean that the further inquiry is shut out. It was also contended that the doctor who had stated to have given medical certificate was not examined. It was urged that there was no reason stated in the Will why the Respondent, the wife was completely excluded and the matrimonial proceedings were ended in the year 1991 not even pursued further.

6. Before considering the rival contentions, the scope of Section 100 of the Code of Civil Procedure Will have to be kept in mind. Both the Courts have concurrently held that the circumstances as existing on record cumulatively indicate that the Will was not

genuine. As far as first contention that the issues were not framed, it is correct that the learned Civil Judge has not framed a issue regarding burden of proof. However, the burden is always on the prepounder of the Will. Both parties were fully aware of this legal position and led evidence accordingly. This ground is not taken in first Appeal. It cannot be said that there was any prejudice caused to the Appellants.

7. The doctor who was stated to have examined the deceased and gave the medical certificate, for reasons best known to the Appellants, was not examined. If the Appellants could summon and examine a doctor from the same hospital there was no reason why the Appellant did not lead evidence of the material witness. The presumption will have to be drawn that the Appellants did not want to bring on record the correct medical condition of the deceased which would have been elicited through cross-examination. Even the evidence of the doctor who has examined does not take the case of the Appellants further. The doctor has stated that the deceased was HIV positive. He was suffering for eleven months prior to his death. He was suffering from pneumonia, diabetes and his physical condition was very poor. His condition was critical on 5 November 2014. When he was brought in he was also suffering from tuberculosis and abdominal pain, vomiting and high fever. The Will stated to have been executed just four days prior to his death. The

condition in which the deceased was, as stated by the doctor, makes extremely doubtful whether the deceased was in fit state of mind to execute a Will. This position considered by both the Courts creates an extremely suspicious circumstance surrounding the execution of the Will. Furthermore, the Respondent who is the legally wedded wife was completely excluded from the Will, with no reference at all to her. Though there was a matrimonial proceeding in the past, they were not presented and came to an end thirteen years before the death of the testator and thereafter there was no evidence that their relations were strained. If there is no Will, the property would come to the Respondent. With these two circumstances, both the Courts naturally put the burden on the Appellants to dispel doubts surrounding the Will.

8. The attesting witnesses were not present at the time of registration of the Will. At the time of registration of the Will son of the Appellant No.1 was present. Both the Courts have noted that the witnesses have not been able to state the correct factual position. Both the Courts examined the cross-examination of the attesting witnesses. There are serious discrepancies. One of the witnesses stated that the copy was typed one when the other witness stated that the copy was handwritten. The learned District Judge rightly held that it is not a technical mistake as even the layman would know the difference between typed and handwritten script. The learned counsel for the Appellants sought to rely upon the decision of the

learned Single Judge of this court in the case of *Bhagwat Sheshrao Choudhary Vs. Chakradhar Tukaram Thakare* -[2006(6) Mh.L.J. 204, to contend that mere discrepancy of using word 'typing' in place of 'writing' could not be sufficient to discard the Will. The facts in the matter before the learned Single Judge were not of discrepancy between the depositions of two attesting witnesses regarding handwriting and typing. What the learned Judge found that the appellate Court had erroneously used the word 'handwritten' in place of 'typing' and therefore, suspicious circumstances pointed at the appellate Court were not in existence. Even otherwise, the suspicious circumstances will have to be considered in the facts of each case that for each individual instance a proposition of law cannot be advanced in isolation. The suspicious circumstances will have to be considered in their totality.

9. In the present case Pradeep was seriously ill preceding eleven months before his death. He was critical around the time of his death. The Will is stated to be executed five days before his death. The Will excludes his wife, to whom the property, which is a liquor license would have come by succession. The son of Appellant No.1 has taken active role in registration of the Will stated to be made by deceased Pradeep when he was in critical condition. The attesting witnesses were not able to agree whether the Will was typed or handwritten. These circumstances were rightly appreciated by both the Courts to dismiss the Suit and the Appeal filed by the

Appellants. No substantial question of law arises. Second Appeal is accordingly dismissed.

(N.M. Jamdar, J.)