

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 700 OF 2001

Tukaram Gangaram Awhad	... Appellant
Vs.	
The Municipal Corporation of Greater Mumbai & Ors.	... Respondent

Mrs. V.V. Thorat, Advocate for the appellant.
Dr. Prakash K. Deshmukh, Advocate for respondent nos. 2 and 3.
Mrs. M.S. Bhoir, Advocate for respondent no. 1.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **4th March, 2016.**

ORAL JUDGMENT:

This Appeal is directed against the judgment and order dated 9th June, 2001 in L.C. Suit No. 1343 of 1994 and counter claim no. 2 of 2000. By the said impugned judgment and order, the learned trial Judge dismissed the suit of the plaintiff and allowed the counter claim of defendant nos. 3 and 4, i.e., respondent nos. 2 and 3 and it is decreed in terms of prayer clause a, b and c of the counter claim with costs. The appellant/original plaintiff who has filed the suit for declaration and injunction in respect of room no. 24, 2nd floor, Barne compound, Sane Guruji Marg, Tardeo, Mumbai. It is a suit property. The parties are addressed by their original status for the sake of convenience.

2. It is the case of the appellant/original plaintiff that BMC is the owner

of the suit room. Nathu Raghunath, uncle of the appellant and father of respondent nos. 2 and 3 was the tenant of the suit room prior to 1970. The plaintiff is the resident of village Nathu Shingote, Taluka, Sinnar, District Nashik came to Mumbai in the year 1971-72 and started residing with his uncle. His uncle had two daughters, i.e., defendant nos. 2 and 3/respondents. However, the uncle did not have son and at the relevant time, he was working as a porter at Bombay Central. The uncle stopped working thereafter and requested the authority to transfer his buckle no. of porter in the name of the plaintiff. Accordingly, the authority issued certificate of transfer of porter number in favour of the plaintiff. Thus, the plaintiff was the one who was looking after his uncle, paternal aunt and cousins/defendant nos. 2 and 3. The plaintiff started residing there with his family, i.e., wife and daughters. The electricity meter was also transferred in the name of Tukaram during the life time of Nathu and Nathu executed the will on 12th January, 1991 in favour of Tukaram, as he is treating him like his son. So the tenancy right of the suit room was bequeathed by Nathu by will in favour of Tukaram. Nathu died after one year, i.e., on 4th March, 1992. Thereafter the sisters/defendants and mother gave letter addressed to BMC giving NOC on 9th July, 1992 in favour of Tukaram in respect of suit room. It is the case of the plaintiff that immediately thereafter on 7th August, 1992 respondents/sisters sent

letter to BMC for transfer of tenancy in their name. Therefore, the plaintiff gave notice to BMC under section 527 of the BMC Act and thereafter filed L.C. Suit No. 1343 of 1994 for declaration that he be declared as tenant of the suit room and that BMC/defendant no. 1 be directed to transfer the said room in favour of the plaintiff and so also other defendants are to be restrained from disturbing the possession of the plaintiff in the suit room. After filing of the suit, notices were issued to the defendants. BMC and defendant nos. 2 and 3 appeared in the suit. Contesting defendants filed their written statement on 14th November, 1994 and denied all the averments made and contentions raised in the plaint. They challenged the will dated 12th January, 1991 and also denied the fact that at any time the defendants have executed NOC in favour of the plaintiff and submitted that the said will is forged document so also the NOC given by the defendant was obtained by misrepresentation by the plaintiff. The plaintiff had promised the sisters and mother that their right to stay in the suit room will remain alive till their life time, however, for transferring the said room in the name of plaintiff, he agreed to pay Rs.50,000/- each to two sisters and mother. The plaintiff did not keep the promise and thereafter they gave notice to the Corporation for transferring the said room in the name of their mother. The issues were settled by the trial Court. The plaintiff entered the box and lead oral as well as documentary evidence. He

produced the will (Exhibit D), electricity bills of the suit room which stands in the name of the plaintiff, ration card disclosing the name of the plaintiff and his family members and address of the suit room. He also produced NOC given by the sisters in his favour on 9th July, 1992. He also examined one witness PW-2 Bhaskar Ghuge who deposed that certificate of porter was issued in favour of the plaintiff and also another witness PW-3 Govind Shangle to prove the will. Defendant no. 1/Shakubai entered the box and gave evidence in favour of Shakubai. The defendant entered the box and gave evidence. After considering the evidence, the suit was dismissed.

3. The point of determination is -

- (i) Whether the appellant can prove that the bequeath of tenancy right of the room is true and genuine?
- (ii) Whether the judgment passed by the trial Court is legal and correct or not?

4. The learned counsel Mrs. Thorat submitted that the learned trial Judge has failed to appreciate the evidence tendered by the appellant and the facts and circumstances which are produced before the Court. She relied on the evidence of the appellant, who has stated that he started residing with his uncle. His uncle has no son. His uncle offered him a

buckle of porter as he treated the appellant like his own son. The appellant has taken care of his uncle throughout his life. She further submitted that the uncle before his death has executed a will-cum-affidavit and transferred the tenancy of the room in the favour of appellant. She submitted that the respondents are daughters of Late Nathu/original tenant. They were married twice or thrice and they left their husband and started residing with their father. She further submitted that Bagubai, wife of Nathu, did not take care of Nathu and appellant, being nephew, was the only person to look after his uncle in his old age. The learned counsel submitted that the learned Judge should have appreciated the will executed by Nathu. The witness who was present at the time of execution of the will is also examined. The will was executed in the presence of Judicial Magistrate , therefore, more authentic. She submitted that the tenancy rights is heritable and it is a property of the tenant and therefore that tenancy can be disposed of by bequeath and therefore by will, Nathu bequeathed the tenancy rights in favour of the plaintiff. In support of her submissions, she relied on following decisions:

- (i) Gian Devi Anand vs. Jeevan Kumar & Ors., reported in 1985 AIR (SC) 796.
- (ii) Vasant Pratap Pandit: Banoo Pirojsha Jungawalla vs. Anant Trimbak Sabnis: Ardeshir K. Irani, reported in 1994 (3) SCC 481.

5. In reply, the learned counsel for the Corporation has submitted that the suit room is owned by the Corporation. Nathu was the original tenant of the Corporation. The tenancy receipts were issued in his name. After his death, the present appellant and respondent nos. 2 and 3 along with their mother Bagubai claim tenancy of the said room. She relied on the order passed by the Deputy Municipal Commissioner, who had conducted enquiry pursuant to the directions of the Court given pending Regular Civil Suit. She submitted that Deputy Municipal Commissioner has referred a circular issued by the Corporation in respect of case of transfer of tenancy. She pointed that it can be transferred to the legal heirs of the tenant based on their classification mentioned in the Circular. Bhagubai, being a widow, and respondent nos. 2 and 3, being daughters, the tenancy was rightly transferred to Bhagubai and respondent nos. 2 and 3. However, the appellant was allowed to reside in the room till the disposal of the suit.

6. The learned counsel Mr. Deshmukh appointed from the legal aid panel for respondent nos. 2 and 3 has submitted that the alleged will is the only document on the basis of which the appellant claims his right. However, the said will is not probated. Hence, the appellant cannot claim any right on the basis of unprobated will. In support of his submissions, he relied on the decision laid down in the case of **Gaiv Dinshaw Irani & Ors.**

vs. Tehmtan Irani & Ors., reported in (2014) 8 SCC 294. He submitted that the judgment passed by the learned trial Court is correct is to be upheld.

7. In **Gian Devi Anand** (*supra*), the Hon'ble Supreme Court held that a contractual tenant has an estate or property in the subject matter of the tenancy and heritability is an incident of the tenancy. It cannot be assumed.

8. Nathu was a contractual tenant having contract with BMC. So, his tenancy right was heritable. A main question before this Court is that that the will which is placed before the court as an evidence of legal transfer of the room can be accepted or not. As per the Indian Succession Act, if a male hindu dies intestate, then the estate is devolved. As per Schedule I under the Indian Succession Act of 1925, property goes to his widow and his children. The property can be distributed on the basis of degree of relationship with the deceased and in the absence of first degree relatives, the property will go to other relatives which may include brother, sister, nephew, niece etc. A person has every right to dispose of his property by bequeath by executing a will. In the present case, the case of the plaintiff stands completely on the will dated 12th January, 1991. In the absence of

will, the tenancy would have straightway transferred to Nathu's daughters/respondents. In order to prove this will, the plaintiff has stepped himself in the box. The plaintiff deposed that in the year 1992 he accompanied his uncle and his uncle prepared document in his favour about transfer of tenancy. He went along with his uncle to Dhobhitalao Court and his uncle put thumb impression and presented the document marked Exhibit B, i.e., will. In order to prove this document, he examined one witness, namely, Govind Sangle who was one of the signatories as witness on the will. He is also son-in-law of the plaintiff/Tukaram. He deposed that witness DW-3 Govind Sangle deposed that along with Nathu, plaintiff went to Dhobitalao Court and before the Judge a document was signed by Nathu about transfer of the premises. Sangle told that he signed the document as a witness. He identified the second signature of Arjun. The thumb impression is of Nathu. He also said that the said document was read over to him by the Judge and one advocate was present at that time. In the cross-examination of Sangle, he has stated that in May 1991 he got married to daughter of the plaintiff. He also deposed that plaintiff and Nathu came to his shop on 12th January, 1991 and along with them he came to the Court. He gave very important admission that “ I had not met Nathu prior to 12th January, 1991”. Thus, it shows that Sangle was not aware that the person who accompanied with his father-in-law was Nathu

or not.

9. Another witness Bhaskar Karbhari Ghuge was examined, who deposed that he was Secretary of Bombay Central Station Licence Portners Co-op. Society and plaintiff is a member. Thus, he was examined on the point of genuineness of certificate of porter issued in favour of the plaintiff. The fact of transfer of certificate of porter is not disputed by the respondent.

10. Section 68 of the Evidence Act is a relevant section which states about the proof of execution of documents which is required by law to be attested. A will is required to be attested and therefore, if such attested document is produced before the Court, it cannot be used as evidence until atleast one attesting witness has been called and deposed about its execution. Thus, as the case of the plaintiff is entirely based on this will, he is required to prove the execution of the will and therefore, he examined Sangle as a witness of the said document and thus has proved the execution of the will. However, the said execution is challenged by the respondents, i.e., daughters of Nathu. They stated that this will is bogus and their father have never executed any such will, as their father was not staying in Mumbai at the relevant time, i.e., in January 1991, but he was

staying at native place. Thus, not only the contents but the execution of the will is a contentious issue. The will is not probated. Sangle, being a son-in-law of the plaintiff, undoubtedly is an interested witness. Under section 68 of the Evidence Act, only execution is proved. The genuineness of the document or the contents of the document are always open for scrutiny to arrive at conclusion that the will is genuine. Whether really a person who executed the will was Nathu or not is disputed and though he was Nathu, the contents in the will is a matter of challenge. The Court must look into the contents of the will once it is admitted in the evidence. A document which is admitted in the evidence, not necessarily it is believed or accepted by the Court without scrutiny. The Court will admit the document but has to assess the truthfulness of the document on the basis of prevailing circumstances, evidence adduced by the parties and the facts of the case. This will is sworn in the form of affidavit. It is captioned as affidavit-cum-will. Nathu died on 4th March, 1994, i.e., after a year of executing the will. Sangle is an interested witness and he has given admission that he has never seen Nathu earlier, therefore, his evidence though cannot be given any credit, assuming the thumb impression put on the will is of Nathu, whether the will is genuine or not is a question before the Court. In this will, at the time of so called execution of the will, Nathu was having his wife and two daughters, i.e., respondents, however, he has

mentioned that “I have no issue from the marriage, hence I am giving my self-acquired property including the above mentioned room no. 24, Bane Compound, second floor, Arthur Road to my nephew Tukaram Tawde, aged 40 years and nobody else. He stayed with him for last 30 years along with his family members. He further sealed the said bequeath by saying that my other relatives or heirs have no claim on above property including the room. He further mentioned that he has no objection if the said property is transferred after his death in the name of his nephew, as he has no son from the wedlock. Other relatives have no objection or right in the said property”. It is surprising that in this will Nathu neither mentioned the name of his wife or of his two daughters. In fact he made a false statement that he did not have any issue from the marriage though subsequently he has mentioned that he has no son but he did not mention the name of his wife or two daughters. It is difficult to accept that a person who is staying with the wife and two daughters will give away not only his room but his all self-acquired property to his nephew. No evidence is brought on record that Nathu was having quarrel with his wife either or she had left him and did not look after him. In the will also there is no mention that he had any animus against his wife and therefore, he did not want to give anything to his wife. The learned counsel Mrs. Thorat submitted that his two daughters, who are respondent nos. 2 and 3, got married twice or thrice,

however, they left their husbands and started residing with their father. On the contrary, this shows that Nathu was kind enough to accommodate his daughters, who are deserted or who themselves had left the house of their respective husbands. It is not the situation that father disowned his daughters because he was angry with him as they left their husbands and returned to him. Thus, it is a case where father has allowed them to stay with him. It shows that he has concern for his two daughters. This will is in English. Nathu has put his thumb impression. The respondents are successful in creating doubt in the mind by putting different circumstances, then the burden is on the appellant who relied on will. This will is not probated. The burden is entirely on the plaintiff to prove that the will is genuine. In totality of the facts and circumstances, it is difficult to believe that the testator really wanted to dispose of self acquired property and room by this will in favour of his nephew is unbelieved. Mrs. Thorat has submitted that these two respondents filed joint affidavit on 9th July, 1992 that they are legal heirs of Nathu. Tukaram is their cousin residing with them in the premises since last 30 years and Tukaram has applied to the Corporation for transfer of tenancy in his name, however, they claimed that they are legal heirs of deceased Nathu and declared that they have no objection for tenancy in the name of Tukaram. Thus, affidavit shows the thumb impression of three women, i.e., Baghubai, Sakhubai and

Anandibai. Thereafter, immediately after 5 to 6 days, these ladies moved an application to the Corporation claiming that they want the room to be transferred in their name and they withdraw their no objection and object to transfer the tenancy in the name of Tukaram. She submitted that once they filed the joint affidavit, they should not have withdrawn their consent to this transfer. The joint affidavit is another circumstance which created not only doubt but really falsifies a claim of the appellant that the will executed by Nathu is genuine. In this affidavit there is no mention of will. If at all the will was relied as transfer of tenancy rights, it would have been disclosed in the affidavit. This affidavit was executed on 9th July, 1992. In reply of this execution of affidavit and withdrawal of no-objection in the evidence of Sakubai, she has deposed that in the year 1992 they executed affidavit because a promise was given by Tukaram. They are not educated and they had no information about the transfer in favour of the plaintiff. In the year 1992, after the demise of Nathu, the respondents were told by the appellant/Tukaram that all three of them would be paid Rs.50,000/- each for transfer of the premises and thumb impression was given, however, neither they received Rs.50,000/- and nor it was deposited in their accounts. As soon as the respondents came to know about it, they filed an application for transfer in their name in the office of Corporation, which is marked as Exhibit 23. The affidavit which were obtained by the

respondents were under the promise of payment of Rs.50,000/- each.

11. I have considered the submissions of Mrs. Thorat that Exhibit 20 the affidavit cannot be read in evidence, that no original is produced and no permission is taken to lead secondary evidence. This document is produced by Sakhubai, i.e., it has come from the proper custody. A photocopy was produced, so is a secondary evidence. A permission might not have been asked for leading secondary evidence, however, her oral evidence explaining that why all the three women gave thumb impression on the affidavit of transfer is sufficient to accept the reason for giving thumb impression. Thus, this cumulative circumstances disclose that the contents of the will are doubtful and appellant has failed to prove that it is genuine. Once the document is considered as not genuine and is doubtful, then entire case of the plaintiff based on the sole document collapses. The learned counsel for the Corporation relied on the letter of Deputy Municipal Commissioner which was passed on 7th March 1998 pursuant to the order passed by the trial Court on 16th October, 1997 in B.C.C. No. 1343 of 1994 while hearing Chamber Summons and Deputy Municipal Commissioner has considered the rules of corporation as to whom the tenancy can be transferred after the death of the tenant. In this case, after the death of Nathu, entitlement of wife was first and therefore, the tenancy

was transferred in the name of Baghubai. Under such circumstances, I maintain the order of the trial Court. Appeal is dismissed.

12. The learned counsel for the appellant prays to stay the operation of this order as the appellant wants to challenge this order before the Supreme Court. In view of this, the operation of this order is stayed for 8 weeks from 30th March, 2016 to enable the appellant to file Appeal.

(MRIDULA BHATKAR, J.)