

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

**SECOND APPEAL NO. 868 OF 2015
WITH
CIVIL APPLICATION NO. 1908 OF 2015**

Mallapa Shivappa Mali @ Kore
& Anr.

..... Appellants

Versus

Mahadeo Gurappa Mali @ Kore
& Anr.

..... Respondents

Mr. A. B. Tajane, for Appellants/Applicants.
Mr. Harshad Palwek, for Respondent No. 1.
Mr. Padmanabh D. Pise, for Respondent No. 2.

***CORAM : N. M. Jamdar J.
Wednesday 20 July, 2016***

ORAL ORDER

. The appellants challenge the Judgment and Order dated 16 July, 2015 passed by the District Judge-3, Solapur allowing the Civil Appeal No. 145 of 2010 and dismissing the Suit No. 623 of 2006 filed by the appellants.

2. The appellants filed a Civil Suit No. 623 of 2006 praying that the Will stated to be executed by the deceased Shivappa on

13 May, 2002 was void ab initio and not binding on the appellants and for partition and separate possession. The learned Civil Judge partly decreed the suit and held that the appellants are entitled to 1/3 share in the suit land. A First Appeal was filed by the respondents/defendants. The learned District Judge came to the conclusion that the Will was duly proved and accordingly allowed the appeal by the impugned Judgment.

3. The learned Counsel for the appellants submitted that the property being a joint family property even assuming the Will was executed, it could have been only in respect to the share of deceased Shivappa. He submitted that the Will is not duly proved as the attesting witness who was examined admitted that deceased Shivappa was not in fit state of mind to execute a valid will. He submitted that there were various suspicious circumstances shown as the Will was executed only in favour of one son and there was coercion and fraud played for the execution of the Will, so also there were criminal proceedings. He further submitted that the learned District Judge did not consider that the appellants had sought examination of the Registrar. However, the application was dismissed and that even though attesting witness was available, he was not examined. The learned Counsel for the respondent supported the impugned order.

4. As regard the joint family property, the learned Trial Judge has come to the conclusion that the will was not properly executed, as the plaintiffs and defendants are brothers had the share in the suit property. As regard the property being ancestral property, the learned Civil Judge has held that the partition was effected earlier and the parties have received their share. The appellant had accepted in the cross-examination that he had sold the share received by him.

5. As regard the execution of the will is concerned, one of the attesting witness was examined and except the admission, which is sought to be relied upon, nothing else has been brought out in his cross-examination. As regard the admission relied upon by the learned Counsel for the Appellants, the learned District Judge has considered the manner in which the witness conducted himself and the backdrop in which the statement is came to be made. The learned District Judge has also taken note of the admission of the appellants themselves. The appellants in their cross-examination admitted that the deceased Shivappa till his death was working in the fields and was active. The attesting witness in his examination-in-chief deposed that the deceased Shivappa was fully aware when he executed the Will and at the time of execution of the Will his mental and physical condition was proper and he was aware of what he was doing. The examination-

in-chief was recorded on 9 September, 2009. Thereafter this witness, who was examined by the respondents, remained absent on various occasions and in ultimately the respondents prayed for bailable warrant against the said witness. The bailable warrant against the witness was allowed. The witness executed bail bond and thereafter he was cross-examined. The manner in which this witness behaved, the learned District Judge concluded that after proving the will in examination-in-chief, he was won over by one of the appellants. Therefore, the learned District Judge considered the value of the statement of the attesting witness *vis a vis* the admission of the appellants as regards the health of the deceased Shivappa and came to the conclusion that deceased Shivappa was in fit state of mind at the relevant time. Therefore, the contention raised by the learned Counsel for the appellants cannot be accepted.

6. The learned District Judge has gone through each piece of evidence and found no suspicious circumstance regarding the execution of the Will. Merely on the basis of some police complaint regarding the death of the deceased Shivappa, straightway inference cannot be drawn that the Will was executed under duress. It is not possible to re-appreciate the evidence which is the domain of the learned District Judge as a last finding Court. The view taken by the learned District Judge cannot be stated to be erroneous in law.

7. As regard the contention that the application filed by the respondents for calling the Registrar as witness for proving the will, as rightly contended by the learned Counsel for the respondent it was only by way of precaution.

8. No substantial question of law arises in Second Appeal. Second Appeal accordingly dismissed. The learned Counsel for the appellants seek continuation of ad-interim relief in the Civil Application. The learned Counsel for the respondent submitted that the respondents have no intention to create any third party rights at present and at least for a period of 8 weeks. In view of the statement which is accepted, there is no need to pass any further order.

(N. M. Jamdar, J.)