

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

***SECOND APPEAL NO. 826 OF 2015
ALONG WITH
CIVIL APPLICATION NO. 1746 OF 2015***

Nanda Vilas Gaikwad,
Plot No.302, Third floor,
Aditya Sankul Apt., D.P. Road,
Badlapur, Tal. Kalyan, Dist. Thane.

... Appellant/Applicant

v/s

1. Bhikachand Yeshwant Ahire
2. Madhukar Yeshwant Ahire
3. Eknath Yeshwant Ahire
4. Mahanand Yeshwant Ahire
All residing at B-47, Room No.277,
Bhatia Hospital, Ulhasnagar – 5, Dist.Thane.

5. Saguna Govind Kedare,
Plot No.202, Ganesh Apartment,
At-Post Ulhasnagar, Dist. Thane.

... Respondents
(Resp.Nos.1 to 4 are original
applicants.)

Mr.Harshad Palwe for the appellant and applicant.

Mr.Vinod Tayade for Resp. Nos.1 to 4.

*CORAM: N.M. JAMDAR, J.
DATED : 26 APRIL 2016*

ORAL ORDER:

The Appellant challenges the concurrent judgments and orders passed by the Civil Judge, Niphad, and the District Judge, Niphad,

granting probate of Will executed by the father of the parties, and dismissing the appeal filed by the Appellant.

2 The Appellant is the sister of Respondent Nos.1 to 4 who are brothers and Respondent No.5 is the sister. Their father Yashwant Ahire executed a Will on 31 March 1984. Thereafter he expired on 1 January 1987. In the Will, Yashwant Ahire did not leave any property to the Appellant and Respondent No.5, daughters and bequeathed the property to his wife and upon her death, to Respondent Nos.1 to 4, the sons. The name of the mother was entered into the property extract pursuant to the Will. After the mother expired in 1988, Respondent Nos.1 to 4 entered their names into the revenue extract. This was objected by the Appellant. In the revenue proceedings, parties were informed that they will have to get their rights adjudicated in Civil Court. Respondent Nos.1 to 4 filed Probate Application No.1 of 2010 in the Court of Civil Judge, Senior Division, Niphad. Parties adduced their oral evidence and Respondent Nos.1 to 4 examined the witnesses. Learned Civil Judge, by the judgment and order dated 2 May 2013 allowed the application and granted probate as sought for. The appeal filed by the Appellant to the District Court bearing Regular Civil Appeal No.81 of 2013 filed by the Appellant to the District Court, Niphad, was dismissed on 20 June 2015.

3 I have heard learned counsel for the parties.

4 Learned counsel for the Appellant submitted that Respondent Nos.1 to 4 were seeking probate and they were preponderance of the Will and burden was entirely upon them to show that the Will was genuine.

He submitted various circumstances, such as, the Will was not produced nor probate was sought for around 26 years, the medical condition of the testator and the complete disinheritance of the daughters, makes the Will suspicious. He submitted that, the attesting witness to the Will has admitted that he did not confirm the identity of the testator and various such admissions clearly show the requirement of proving the Will was not made. He submitted that the mere admission of the Appellant regarding the Will, Will not make the Will a valid one as Respondent Nos.1 to 4 Will have to show that all ingredients have been fulfilled. He relied upon the decision of the Apex Court in the case of *S.R. Srinivasan & ors. v/s S. Padmavathamma*¹ in furtherance of this submission. As regard the suspicious circumstances and test laid down by the Apex Court, he relied upon the decision *Bharpur Singh & ors. v/s Shamsher Singh*² and *Gurdail Kaur & ors. v/s Kartar Kaur & ors.*³ Learned counsel submitted that, it is only when the Respondents sought probate that the question of Appellant objecting arose. He submitted that, both the Courts have committed an error in placing the burden on the Appellant to prove the Will. Learned counsel for the Respondents, on the other hand, supported the decisions and submitted that the Appellant has clearly admitted even the genuineness of the Will by accepting part of bequeath of mother, therefore, cannot take a contrary stand. He submitted that, in view of this position, both the Courts have rightly accepted the Will as genuine. He submitted that adequate material was placed on record as regard the evidence of the attesting witness and the reason why the daughters were not given any property, is stated in the Will itself.

1 (2010) 5 SCC 274.

2 (2009) 3 SCC 687.

3 AIR 1998 SC 2861.

5 Firstly, the line of argument of the Appellant before the first appellate Court needs to be noticed. It is clear from the decision of the learned District Judge that the appellant's submission was that no property can be bequeathed after the death of Sunderabai because she had become absolute owner by proper virtue of the Will in her favour. This specific argument advanced before the appellate Court clearly proceeds on the premises that the Will, as far as it bequeaths property to Sunderabai, is valid. The main contention raised was, after the death of Sunderabai, the property cannot go to Respondent Nos.1 to 4. This argument has been rightly negated by the learned District Judge relying on Section 14(2) of Hindu Successions Act, 1956. The Appellant also did not take any steps to challenge the Will when their mother's name was entered in the revenue record pursuant to the Will. The Appellant being a daughter, cannot be said that she was not aware of the Will. In fact, in the evidence she has admitted that the entry in the revenue record of her mother was pursuant to the Will. The Will creates a life interest in favour of the mother and thereafter the property in respect of Respondent Nos.1 to 4. It is only when the revenue records were sought to be changed in respect of Respondent Nos.1 to 4 that she raised an objection and thereafter the parties approached the Civil Court in respect of the probate proceedings. The argument, therefore, that the Will was not disclosed nor probate was sought for, for the last 26 years, cannot be accepted in these circumstances.

6 As far as the reliance on the decision of the Apex Court in the case of *S.R. Srinivasa & ors.* to contend that irrespective of the admission, the burden is upon the Respondents to prove the Will is concerned, the

decision Will have to be understood in the facts of the case. In this case before the Apex Court, the Plaintiff stated to have admitted execution of the Will in a subsequent suit. He had specifically not admitted the genuineness of the Will and had stated that he came to know about the Will from the written statement. It was held that there can be no presumption therefore as regards to genuineness of the Will on the basis of the alleged admission. In that case none of the attesting witnesses were examined. The scribe who was examined, stated that he had no knowledge of the contents of the Will. Even though this being the factual position, the High Court had held that the proof of the Will is not necessary once the same was admitted by the Plaintiff therein in the pleadings in the other suit. The Apex Court found that since there was no admission at all, dispensing with other requirement solely on the basis of a non-existent admission, was not correct. In the present case, there is no inferential admission. The Appellant has accepted the Will as valid when it concerned the bequeathing the property to the mother but has questioned the subsequent right to Respondent Nos.1 to 4. Therefore, relying on the decision of the Apex Court in *S.R. Srinivasa & ors.*, the finding of both the Courts based on clear stand of the Appellant, cannot be disturbed.

7 As far as the evidence of the attesting witness is concerned, the Will was executed in the year 1984. Witnesses were examined in the year 2010. Since the Appellant did not raise any objection to the Will till the year 1998, there was no occasion for seeking any probate. If the evidence of the attesting witness is seen, a basic requirement has been deposed by the attesting witness. The cross-examination of this witness is as if he is an

eye-witness to a criminal proceeding. The admissions given Will have to be considered keeping in mind the time period when the deposition been given. The Will is registered. The attesting witness has deposed that the Will was signed by deceased Yashwant Ahire. This basic requirement was fulfilled.

8 As regard the medical condition of the deceased is concerned, the Respondent Nos.1 to 4, in their evidence have stated that Yashwant Ahire was of sound health. The Appellant, in the evidence asserted that her father had suffered from paralysis and he was seriously unwell and was bedridden. Respondent Nos.1 to 4 have discharged their burden by deposing that their father was of sound health. It is not expected that Respondent Nos.1 to 4 Will produce the medical evidence of his good health. The Appellant has not produced any evidence at all that the deceased father was unwell at the time of execution of the Will. The reason why the daughters was not given share in his self-acquired property, is stated in the Will. The deceased has stated that the daughters were given their shares during their marriage and therefore remaining portion was being bequeathed to the wife and the other sons. Therefore, these circumstances cannot be called as suspicious circumstances. Reliance of the learned counsel for the Appellant in the case of *Bharpur Singh & ors.* and *Gurdial Kaur & ors.* therefore does not arise for consideration. Both the Courts have assessed the evidence on record to come to the conclusion that the Appellant having admitted the validity of the Will cannot raise a restricted challenge to the part which is in favour of Respondent Nos.1 to 4. There is no perversity or illegality in adopting this approach.

10 No substantial question of law arises for consideration.

11 The second appeal is dismissed.

12 In view of disposal of the appeal, the civil application does not survive and is dismissed.

(N. M. JAMDAR, J.)