

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

***SECOND APPEAL NO. 62 OF 2013
ALONG WITH
CIVIL APPLICATION NOS. 1632 & 1635 OF 2013
AND
SECOND APPEAL NO. 65 OF 2013
ALONG WITH
CIVIL APPLICATION NOS. 1633 & 1634 of 2013***

Sahadu Zambar Muluk

R/o Chas-Kaman, Tal. Khed, Dist.Pune. ... Appellant in both
appeals and Applicant
in all civil applications.

v/s

Sitabai Namdev Pokharkar,

R/o Walad, Tal. Khed, Dist. Pune;

& ors.

... Respondents in appeals
and civil applications.

Mr.P.R.Arjunwadkar for the appellant in both appeals and applicant
in all applications.

Mr.Drupad Patil for Resp. No.2 in both appeals.

Coram: N.M. Jamdar, J.

Dated: 13 July, 2016

ORAL ORDER:

Both these appeals have been argued together as they arise from

the same proceedings and are being disposed of by this common order.

2. The Appellants, three in number, are the original Plaintiffs. They had filed a suit bearing No.247 of 2000 in the Court of Civil Judge, Junior Division, Khed-Rajgurunagar. The Appellants, in the suit prayed that partition of the suit properties and a declaration that the Plaintiff No.1 is entitled to the 1/3 share to the suit property Schedule A and Schedule C and entire suit property Schedule B, as a owner as per the Will executed by deceased Bala on 6 February 1989. Deceased Bala is the father of Respondent Nos.1 and 2. Learned Civil Judge framed issues as to whether the suit properties were joint family properties and whether the Appellants prove that the deceased Bala had executed a Will in favour of Appellant No.1 in respect of suit properties mentioned in Schedule B on 6 February 1989 and, whether the Appellants acquired right for partition of the joint family properties and right in respect of the property in Schedule-B as per the Will. Learned Civil Judge held that the property is the joint family property. It is also held that the Will was executed by deceased Bala in favour of Appellant No.1, however, proceeded to hold that since properties Schedule-B was the joint family property, Respondent Nos.1 and 2 had share in the properties by birth and therefore deceased Bala could only dispose of his share i.e. 1/3 share that held by him under partition. Accordingly, by the judgment and decree dated 15 December 2008, the learned Civil Judge decreed the suit for

partition and directed that the properties be divided as per the shares specified in the decree and the claim of the Appellants based on Will was only to be out of 1/3 share that came to deceased Bala in respect of the property Schedule-B. Aggrieved by grant of 1/3 of 1/3 out of Schedule B to the Appellants, Respondent Nos.1 and 2 filed a Civil Appeal bearing No.143 of 2009 and the Appellants filed Civil Appeal No.162 of 2009, aggrieved by rejection of their claim to the entire share of deceased Bala as per the Will. Learned District Judge, by the impugned judgment and order, concluded that the Will executed by deceased Bala was not genuine and, therefore, there was no question of any right in favour of the Appellants pursuant to the alleged Will executed on 6 February 1989. Accordingly, the appeal filed by Respondent Nos.1 and 2 was allowed and the appeal filed by the Appellants was dismissed by the learned District Judge by the impugned order dated 5 May 2012.

3. I have heard learned counsel for the parties.

4. The entire dispute centers around the will dated 6 February 1989. It is the case of the Appellants that, pursuant to this Will, deceased Bala gave his entire share in the property Schedule-B to them, while it is the case of Respondent Nos.1 and 2 that the Will is bogus.

5. It is well settled law that the burden of proving the Will is on

the propounder. The learned counsel for the Appellants submitted that the will has been duly proved. He submitted that the Will is a registered will. Two witnesses, Nathu Hari Muluk and Vasant Shantaram Muluk, though were no more, one more person who had signed the will as a witness i.e. Kushaba, was examined and learned District Judge, on minor discrepancies in the evidence of Kushaba, has come to the conclusion that the Will was not genuine. He submitted that the will was executed in the year 1989 and the witness has deposed after 16 years and contradictions would naturally occur in such circumstances. He also submitted that the reason was given in the Will as to why the property was being bequeathed to Appellant No.1 and not to the daughters, cannot be said to be not genuine. Learned counsel also submitted that the finding that the Will was never asserted, is not correct as the Appellants had filed a revenue appeal, which fact is admitted by Respondent Nos.1 and 2 themselves. Learned counsel further submitted that the insistence by the learned District Judge on a medical certificate was not correct as in the year 1989 there was no such practice. The learned counsel for the Respondents pointed out various discrepancies and supported the impugned judgment and order.

6 The learned District Judge has considered the evidence on record and has taken into consideration certain factors to arrive at a conclusion that the Will put-forth by the Appellants was not a genuine. This conclusion is based on an appreciation of evidence

before him. Firstly, it has to be noted that, merely because the Will is registered, does not mean that enquiry shut up to find out its genuineness or otherwise and it is also not correct that no duty is cast on preponder of the registered Will.

7 As far as the share to the daughters is concerned, the learned District Judge has noted that there is no evidence that relationship of deceased Bala with Respondent Nos.1 and 2 were strained at any time. The only reason given in the Will is that they are married and financially well off, therefore, property need not be given to them. Even assuming this reason is sufficient enough, there is absolutely no reference in the Will to the wife, who was alive at the time of executing the will. Why had deceased Bala disinherited his wife from the entire property, is something which is not explained at all by the Appellants. There is also no evidence that there was any strained relationship with deceased Bala and his wife and therefore such piece of conduct is totally unnatural and rightly taken as one of the suspicious circumstance by the learned District Judge.

8 Two of the attesting witnesses were not alive and the only witness i.e. Kushaba, who was only a witness to identify the signature. This witness is not a attesting witness. Though he has deposed after a substantial period of time, his evidence is full of contradictions of basic nature. He stated that, deceased Bala was 80 to 82 years old, when the Will refers that he was 65 years old. It is not possible to

make a mistake in age. He has also stated that, he has signed three papers and there is also discrepancy whether the Will was signed. These discrepancies cannot be stated to be of minor nature to be overlooked. The learned District Judge also noted that all the witnesses were relatives of the Appellants/Plaintiffs and not relatives of deceased Bala. Therefore the cumulative position emerges that, daughters and wife of deceased Bala were completely excluded from any share whatsoever in the property. No attesting witnesses were alive to be examined. The one identifying the signature gave various contradictions in his evidence.

9 As regard not disclosing the Will is concerned, it is the case of the Appellants that they had filed an appeal against the revenue entry in view of Respondent Nos.1 and 2 after the death of deceased Bala. But in this appeal, immediately a stand is taken by Respondent No.1 that the Will is not genuine. The Will is of the year 1989 and the suit is filed in the year 2000 i.e. 11 years after the said document.

10 These facts are akin to the facts which were before the Apex Court in the case of *Kalyan Singh v/s Smt.Chhoti & ors.*,¹. In this case, the deceased testator therein had constituted the Plaintiff as a sole legatee has disinherited testator's wife. The Will was not produced for many years before the Court or revenue authority though there were occasions to produce. In the present case, even

1 A.I.R. 1990 SC 396

though the appeal has been filed before the revenue authority, the first criteria of completely excluding the testator's wife as a unnatural circumstance, has gone completely unanswered in the present case. Therefore, the conclusion drawn by the District Judge that the Will was suspicious, is a possible conclusion to be drawn on the basis of material that was placed before the learned District Judge. No substantial question of law arises which is necessary for interference under Section 100 of Code of Civil Procedure.

11 Since the validity of the Will is the ground in both the appeals, which has been answered as above, both the appeals are accordingly dismissed.

12 All the civil applications are disposed of.

(N. M. Jamdar, J.)