

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.84 of 2015

(Indrayani wd/o Narayan Kharche (Dead), through LRs. Sau. Tai w/o Sopan Ingle and others v. Nirmala w/o Sudhakar Karande and another)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri N.G. Solov, Advocate for Appellants.

Shri N.A. Gaikwad, Advocate, holding for Shri A.A. Naik,
Advocate for Respondents.

Coram : R.K. Deshpande, J.

Dated : 5th July, 2016

The Trial Court passed a decree on 6-12-2006 for partition and separate possession in Regular Civil Suit No.7 of 2005. The lower Appellate Court has modified the said decree in Regular Civil Appeal No.49 of 2012 decided on 13-10-2015. Since the original defendant No.1 died, taking into consideration the said fact, the shares have been modified and there is no challenge to such modification. Hence, the original defendant Nos.4 and 5 are before this Court in this second appeal.

The claim of the appellants is based upon the Will dated 17-7-2003, said to have been executed by one Narayan, who expired on 27-7-2003. Both the Courts have held that the suspicious circumstances have not been removed. Though the attesting witness has been examined, the Court has held that the said witness has failed to establish that the testator has signed the Will in his presence and the witnesses have attested the Will in

presence of the testator. The Court has taken into consideration the evidence that the scribe of the Will, though examined, his evidence shows that the testator had signed the Will, whereas the Will at Exhibit 61 shows that it bears the thumb impression of the testator. However, other suspicious circumstances have been taken into consideration and the findings are recorded ultimately in para 32 of the judgment of the lower Appellate Court as under :

“32. ... Therefore, it is to be seen whether Narayan Hari Kharche was in a sound disposing state of mind. In this context the learned advocate for the plaintiff has pointed out from the record that photograph of Narayan Hari Kharche is affixed to the papers of will submitted before the Sub Registrar. On bare perusal of the photograph of deceased Narayan Hari Kharche would show that the photograph is taken of an unconscious person lying on a bed with close eyes and open mouth. Said photograph itself suggests that the testator was in such a deteriorated physical condition that he was even not able to understand what he was doing. The aforesaid circumstances indicating that testator was not in a sound disposing state of mind. Needless to say mere registration of Will cannot be said it is valid will. Thus, the propounder of Will i.e., defendants have failed to remove suspicious circumstances as discussed above and also failed to prove due attestation and execution of will. The learned trial court has rightly held that defendants has failed to prove that deceased Narayan Hari Kharche have bequeathed property 1-A and 1-C to defendant Nos.4 and 5 by the Will dated 17-7-2003.”

Shri Solov, the learned counsel for the appellants, has urged that there was no prayer in the suit to challenge the Will

dated 17-7-2003, and in the absence of any challenge to it, the suit for partition could not have been decreed. The contention cannot be accepted. It was a defence raised by the defendant Nos.3 and 4 on the basis of the Will dated 17-7-2003, and if that is not proved, the decree for partition has to follow, and that is what the Courts below have done.

Thus, no substantial question of law arises for consideration of this Court.

The second appeal is dismissed.

It is made clear that the proceedings for partition shall go on. However, the possession of the appellants shall not be disturbed, as it is reported that the sowing operations are completed in the agricultural field, and an undertaking is given before this Court that as soon as the crops are taken out, the possession shall be handed over to the parties concerned in terms of the decree passed by the Trial Court, as has been confirmed in appeal. So far as the house property is concerned, these directions in respect of shares shall not be applied to it.

Judge.

Lanjewar