

Sequeira

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

SECOND APPEAL NO. 311 OF 1995

Shri Narayan Ganpat Bhosale
Age 58 years, Occ. Business
Residing at 1326/A, C ward,
Kolhapur.

.. Appellant
(Ori. Plaintiff)

Vs

Smt.Nalini Narayan Chavan
Age 60 years, Occ. Household
Residing at 2761, C ward,
Shukrawar Peth, Kolhapur.

.. Respondent
(Ori. Deft. No.1)

Mr.S.M.Railkar, for the Appellant.

Mr.P.M.Palshikar, for the Respondent.

Coram : N.M.Jamdar, J.
Date : 24 April 2017.

Oral Judgment :

The Second Appeal is filed by the original Plaintiff who has been unsuccessful both in the trial Court as well as in the First Appellate Court.

2. The parties are related. The Respondent is the sister of the Appellant. The Appellant filed a Special Civil Suit No.74 of 1993 in

the Court of Civil Judge Senior Division, Kolhapur seeking a declaration that the Appellant has become the sole owner of the suit property by virtue of a Will executed by the father of the Appellant and the Respondent on 12 December 1972. The Suit property is a house bearing City Survey No.1326/A, situated at C-Ward Laxmipuri Kolhapur. According to the Appellant, Ganpat the father of the parties, before he expired on 23 December 1973 had executed a Will on 12 December 1972 wherein he gave all his rights in the suit property to the Appellant alone. According to the Appellant inspite of this position, the Respondent was interfering with his ownership rights. The Appellant also stated in the plaint that when the Appellant made an application for recording his name in the City survey record, initially the Respondent gave her no objection, yet filed an Appeal. This Appeal was allowed by the Collector and thereafter further Revision was filed before the Commissioner by the Appellant which was dismissed for default. Taking advantage of this position, the Respondent disputed the ownership claim of the Appellant. Hence a declaration was necessary.

3. The Respondent filed Written statement and contested the claim of the Appellant. Respondent contended that the claim of the Appellant based on so-called Will, was fraudulent. The revenue authorities have not accepted the case of the Appellant based on the Will which proceedings were not taken further. On the date when the Will was stated to be executed, father was more than 80 years of

age and had suffered from paralysis. The Respondent filed a counter claim claiming one half share in the suit property, which according to the Respondent was a self-acquired property of the father. Both the parties led their oral and documentary evidence.

4. The learned Civil Judge, Kolhapur framed issues as regards the Will and the claim of the Respondent for one half share in the suit property. The learned Civil Judge held that the Will was not duly proved since the Appellant did not examine the attesting witnesses as required under section 68 of the Evidence Act, 1872. The learned Civil Judge also held that there were various suspicious circumstances surrounding the Will, which were not satisfactorily explained. The learned Civil Judge accordingly, dismissed the suit by judgment and order dated 29 March 1993 and allowed the counter claim of the Respondent.

5. Regular Civil Appeal No.217 of 1993 was filed by the Appellant in the District Court Kolhapur. An issue was raised regarding the valuation of the Suit and the jurisdiction of the learned Civil Judge. The learned District Judge found that the Suit was properly valued and the learned Civil Judge had jurisdiction to decide the Suit. The learned District Judge confirmed the finding of the learned Civil Judge that the Appellant did not take efforts as required in law to examine the attesting witness for section 69 of the Evidence Act, to be invoked. The learned District Judge also found that the

suspicious circumstances surrounding the Will were not satisfactorily explained. Accordingly, the learned District Judge dismissed the appeal by judgment and order dated 3 February 1995. Thus both Courts have concurrently negated the case of the Appellant based on the Will and directed one half share to both the Appellant-brother and the Respondent-sister in the property of their father.

6. The Second Appeal was admitted on 20 June 1995 on grounds (a) to (e) of the memo as the substantial questions of law. Grounds (a) to (e) relate to the Will dated 12 December 1972 and the proof thereof and the requirements of attestation.

7. As far as the aspect of valuation of the suit and the jurisdiction of the trial Court is concerned, there is no question of law framed as regards the same. Apart from this position, the learned District Judge has discussed this aspect in detail and has found that the *ad valorem* court fee as per Bombay Court fees Act, Schedule-I has been properly fixed by the learned Trial Judge and that the Appellant had paid excess court fee and the learned Civil Judge had jurisdiction to try the Suit. I do not find that there is any error in the conclusion of the learned District Judge in that regard.

8. The main question that arises is as regards the Will dated 12 December 1972, stated to be executed by father of the parties. The two aspects that arise therefrom. Firstly, as to whether Will was duly

proved as required by law and secondly, whether the Will was free from suspicious circumstances.

9. Taking the aspect of proof of the Will first. The section 68 and 69 of the Indian Evidence Act, have a bearing on the controversy. Section 68 of the Indian Evidence Act reads thus -

'68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]'

The Apex Court in the decision of *Janki Narayan Bhoir Vs. Narayan Namdeo Kadam* – ¹ has laid down that section 68, which also deals with the proof of a Will, is mandatory. Section 69 of the Evidence Act reads thus :

'69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

1- AIR 2003 Supreme Court 761

This proviso lays down that if no attesting witness can be found then what steps are to be taken in such a contingency.

10. As per the case of the Appellant there were two attesting witnesses to the Will in question. Shri N.A Dhere and Mr. Sarnobat. It was sought to be urged by the Appellant in both the Courts, that Mr.Dhere could not be served as he had left the premises and his whereabouts were not known. It was also sought to be contended that therefore, Shri Dhere could not be examined and therefore, section 69 of the Evidence Act is attracted. The learned District Judge relied upon the decision of the Calcutta High Court in the case of *Amal Sankar Vs Dacca Co-op. Housing society* – ² wherein the Court held that mere taking out of the summons which is returned unserved, is not sufficient for applicability of section 69 as further methodology has been laid down in the Code of Civil Procedure for such eventuality. It is only after the entire methodology under the Code to serve a witness is exhausted that a foundation is laid for application of section 69 of the Evidence Act. It is not the case of the Appellant that Shri Dhere was not alive. Merely because the summons returned with a remark that Mr.Dhere had left the premises and his whereabouts were not known was not sufficient to exempt the Appellant from the obligation to take further steps as per Order 16 Rule 10 of the Code of Civil Procedure.

2 - AIR 1945 Calcutta page 350

11. The other witnesses were Mr.Sarnobat and the Magistrate before whom the Will was stated to be explained. These two witnesses have also been not examined. It was merely stated that these two witnesses were not competent to be examined, without any particulars thereof. The Evidence Act lays a stress on examination of attesting witness to prove the Will and such obligation cannot likely be brushed aside. Therefore, merely stating that the witness is not available, without making any effort to demonstrate that how he is not competent the Will cannot be stated to be proved. The Appellant therefore cannot be permitted to rely on section 69 of the Evidence Act. There is therefore, no error in the view taken by the learned District Judge on this aspect of the matter.

12. The second ground is regarding suspicious nature of the Will. The Apex Court in the case of *Smt.Jaswant Kaur vs.Smt.Amrit Kaur and others* – ³ and *H.Venkatachala Iyengar Vs B.N.Thimmajamma & ors.* - ⁴ has emphasized that the burden is heavy on the propounder of the Will, to demonstrate that the Will is duly proved and that it is free from suspicious circumstances. Unless conscience of the Court is satisfied that the Will is free from suspicious circumstances, the Court will not give effect thereto. Where there exists suspicious circumstances, the burden on the propounding of the Will becomes heavier. In this regard the evidence of the parties will have to be seen.

3 - AIR 1977 Supreme Court 74

4 - 2007 ALL SCR (O.C.C.) 13

13. The Respondent had categorically asserted in her evidence that the father expired in the year 1973. In the year 1971, he suffered first paralytic attack and thereafter he suffered two paralytic attacks and he was unable to speak. In the cross-examination the Appellant accepted the position that his father suffered attack of paralysis, in the year 1971. Thereafter he was kept in the hospital where he suffered further attacks. Father was in the hospital after the first attack, he had lost sensation of one side and at that time his age was 80. The learned District Judge took note of this physical condition of the father. The Courts also found that the Appellant took lead in the execution of this Will. Nothing was left under the Will to the mother of the parties.

14. The Appellant in his cross-examination was unable to give details of the money that was given to the Respondent in her marriage. Both the Courts have taken notice of the evidence of the doctor who was examined by the Appellant. The doctor accepted that it was not stated that the Will was read out to the father of the Appellant and thereafter he put his thumb impression. Considering the age of the father, who is admittedly beyond the age 80, and that he had suffered multiple attacks of paralysis, the doubt raised by both the Courts in respect of the genuineness of the Will cannot be stated to be unjustified. It is the cumulative effect of all the facts that the Court must consider while deciding whether the Will is free from suspicious circumstances. There was no reason for the father not to

leave anything for the Respondent or to his wife from the suit property.

15. Therefore, the situation that arises is not only there is no cogent explanation forthcoming for examining the attesting witness which itself is a fatal blow, further there is no satisfactory explanation regarding the suspicious circumstances.

16. There is no perversity in the conclusion drawn by both the Courts that the Will stated to be executed by the father of the parties, was not proved and both the Appellant and Respondent have one half share in the suit property. The question of law framed will have to be answered against the Appellant. Accordingly, the Second Appeal stands dismissed. No order as to cost.

(N.M.Jamdar, J.)