

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.251 OF 2018

Nitin M. Bakare & Ors.	 Appellants
V/s.	
Kamalakar R. Bakare & Ors.	 Respondents

Mr. Girish J. Paryani for the Appellants.

None for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 12TH JULY 2018.

P.C. :

1. Heard Mr. Paryani, learned counsel for the Appellants.
2. This Second Appeal takes an exception to the 'Judgment and Decree' dated 18th October 2016 passed by the Court of District Judge-18, Pune, in Civil Appeal No.565 of 2010, which was preferred against the 'Judgment and Decree' dated 14th May 2010 passed by the Court of 2nd Joint Civil Judge, Senior Division, Pune, in Regular Civil Suit No.761 of 1979.
3. The said Suit was filed by the Appellants herein for a declaration that the 'Will Deed' dated 1st March 1974 is illegal and for

injunction restraining Respondent No.1 herein – Original Defendant No.1 from claiming any rights or interest in the suit property on the basis of the said 'Will Deed'. Appellants are the sons from the first wife; whereas, Respondent No.1 is the son from the second wife. As per the case of the Appellants, in the 'Will Deed' executed by their father, bequeathing his property in favour of Respondent No.1, there are several suspicious features. Those features were, however, not considered properly by both the Courts below and hence, as regards the appreciation of evidence in respect of these suspicious features, interference of this Court in the present Second Appeal is required.

4. At the outset itself, it has to be stated that, if the suspicious features pointed out by the Appellants in the pleadings are considered and evidence thereof is also appreciated by both the Courts below, this Court in the Second Appeal cannot convert itself into “third Court of fact finding” and re-enter into appreciation of evidence, unless some perversity is pointed out in the Judgments of both the Courts below. However, it is pertinent to note that, whatever seven to eight suspicious circumstances, which were pointed out by the Appellants before the Trial Court and the Appellant Court in the 'Will Deed' dated 1st March 1974, they are properly considered by both the Courts below in the light of the evidence of the attesting witness, who is not only examined in these proceedings, but also in the earlier proceeding itself and both the

Courts below found that the evidence of this attesting witness, namely, Shivgir Gosavi has remained unshattered on record. His evidence clearly goes to prove as to how deceased Ratikant Bakare has expressed his desire to execute the 'Will Deed' the day before and had also deposed about the mental and physical state of deceased Ratikant Bakare being in sound condition. His evidence rules out the contention of the Appellants that, deceased Ratikant Bakare was, in any way, mentally or physically in feeble condition on account of his age. The evidence of the attesting witness also goes to show that, even the last line in the 'Will Deed', which is appearing in handwriting, is also written as per the direction of deceased Ratikant Bakare.

5. The Appellate Court has also considered that, there were rounds of litigation between the Appellants and Defendant No.9 on one side and father of deceased Ratikant Bakare on the other side and on account of this litigation going on for years together, in which deceased Ratikant Bakare was required to attend even the Police Station in connection with the chapter cases filed by the Appellants, there was nothing unnatural, if deceased Ratikant Bakare has, by executing the 'Will Deed', bequeathed the suit property in favour of Respondent No.1.

6. Both the Courts below have also considered that, during the time when this 'Will Deed' was executed, deceased Ratikant Bakare was

contesting the Suit and attending the Court in various litigations; for example, Regular Civil Suit No.987 of 1974 was filed by deceased Ratikant Bakare against the present Appellants, and hence it was difficult to accept that his mental condition was not sound or there was any undue influence exercised by Respondent No.1 in execution of the said 'Will Deed'.

7. As regards the signature and handwriting, it was also found by both the Courts below on cross-examination of Defendant No.9 that, due to old-age, his handwriting has become shaky. Therefore, both the Courts below have rightly arrived at the conclusion that, none of the suspicious features pointed out by the Appellants holds ground, so as to invalidate the 'Will Deed'.

8. In this Second Appeal, the last submission advanced by learned counsel for the Appellants is that, in the statement of the deceased Ratikant Bakare, recorded before the Police, he has stated that, he has not executed any 'Will Deed'. If it was so, that contention is not raised before the Trial Court or the Appellate Court. Now whatever is not stated or not placed before both the Courts below cannot be considered in the Second Appeal. Moreover, that statement recorded is before the Police under Section 161 of Cr.P.C. and it is required to be properly proved. In the Second Appeal, this Court cannot consider the evidence, which is not proved on record.

9. Therefore, there is absolutely no merit in this Second Appeal and hence, it stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]