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

**SECOND APPEAL NO.549 OF 2017
WITH
CIVIL APPLICATION NO.1031 OF 2017**

Pranay Shriram Hirurkar
Aged :32 yrs., Occup :Business
R/o Lahariya Nagar, Kaulkhed,
Akola, Tah. & Dist. Akola

... Appellant/Applicant

Versus

1. Vijay Vishnupant Vinchurkar
Aged :45 yrs. Occp : Service,
R/o C/o Sanjay B. Barve
20, Suryakamal Housing Society,
Near Maharashtra High School,
Upnagar, Nashik.

2. Bombay House Co-operative Housing
Society, Upnagar, Nashik.
Through its Secretary/ Chairman

... Respondent
(Orig. Defendant No.1 and 2)

Mr. S.B. Shetye i/b. Mr. Dilip Annasaheb Shinde for the
Applicant/Appellant.

Mr. Girish R. Agrawal for the Respondent No.1.

**CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 11th FEBRUARY 2020.**

ORAL JUDGMENT :-

1 Heard respective parties. The appellant herein impugns the judgment and order passed by the Principal District Judge, Nashik dated 13th September 2016 passed in Civil Appeal No.601 of 2012 thereby setting aside the judgment and decree of the first Court in R.C.S. No.273 of 2012.

2 The facts of the case are as follows :-

Jyoti Vijay Vinchurkar expired on 30th May 2005 in the house of her sister at Akola. It is an admitted position that Jyoti was carrying pregnancy of about 6 months at the time of her death. She had been to her sister's house to attend marriage. She did not return from the marriage. There were certain complications in her pregnancy and she expired on 30th May 2005.

3 That on 23rd April 2007, the son of sister of deceased Jyoti filed a suit for recovery of possession and injunction of the suit property which was Galla (Shop) situated at Mauje Takali within the limits of Nashik Municipal Corporation. The shop was situated in Bombay House Co-operative Housing Society at Upnagar, Nashik. It was the contention of the plaintiff that on 20th May 2005, deceased Jyoti had got the Will executed thereby endowing the shop upon the plaintiff. The Will was placed on record by the plaintiff. The Will was neither a registered document nor a notarized document. Needless to say that the suit shop was mutated in the record of the Bombay House Co-operative Housing Society. Advocate Mr. Hirurkar was close family friend of the plaintiff's family. In the present case, he happens to be the scribe of the document as well as the witness and executor of the said document. The Will is marked at Exh.55.

4 Upon perusal of the said Will, it is more than clear that according to testator, the suit shop was purchased on 4th June 2006 by a registered sale deed. She had given the entire description of the suit property in the Will. It was further contended that she was informed by the Doctor about poor prognosis therefore, she had an anxiety about devolution of her property after her demise and had executed the said Will. According to the testator, father of the plaintiff had settled her marriage with Mr. Vinchurkar and had always been helpful to her. He had started Kumar Typing Institute in her name for her welfare and he was the person who had paid the amount for purchasing the said property. That her son-in-law (sic) had purchased the property in her favour and therefore, she desires that the said property should devolve upon his son i.e. the plaintiff.

5 It is an admitted position that the plaintiff happens to be the son of the sister of the deceased and by virtue of the same, his father would not be the son-in-law of the deceased Jyoti.

6 Perused the copy of the sale deed. It is pertinent to note that the sale deed is executed on 4th May 2004. It was purchased from one Ramesh Samel. The sale deed also indicates that the owner of the said property was a member of the said Bombay House Co-operative Housing

Society and that by virtue of the said sale deed, he would transfer all the shares in the name of the purchaser of the said property after clearing all the charges. The expenditure for execution of the sale deed was borne by purchaser. It is further pertinent to note that the typing institute was in existence in the said shop even at the time of execution of the sale deed. The vendor of the said property had transferred the said shop in the name of the testator along with the furniture and other equipment which were required for a typing institute. An amount of Rs.1,75,000/- was paid by cheque and Rs.50,000/- was paid in cash at the time of agreement of sale.

7 It is pertinent to note that the plaintiff had examined the scribe/ witness of the said document which was none other than his close relative. The plaintiff had not examined the vendor of the said property Mr.Samel. The defendant no.2 was the Bombay House Co-operative Housing Society which was a formal party. Father of the plaintiff i.e. Shriram Hirurkar was Witness No.3. It is pertinent to note that PW3 was presiding as a Judge of the Industrial Court on the date of execution of the sale deed. He indirectly happens to be the beneficiary of the suit property. The suit was decreed in favour of the plaintiff on the basis of the Will which was at Exh.55.

8 The defendant being aggrieved by the said decree had filed the Civil Appeal. In First Appeal, the learned Judge had framed issue in respect of the genuineness of the said document more particularly as to whether the testator was in a fit and sound mental and physical stage at the time of executing the Will and whether the plaintiff was entitled for mesne profit or for the order directing inquiry from the mesne profit.

9 The learned counsel for the appellant vehemently submits that the issue that is framed could not be answered by the plaintiff/defendant since no such contentions were raised by the defendant in the said civil suit. There was no suspicion expressed by the defendant in respect of the genuineness of the Will or as to whether the testator was in a fit mental state to execute the said Will.

10 The substantial questions of law which fall for determination are as follows :-

“(1) Whether the Will produced by the plaintiff is a reliable document and does it inspire the confidence of the Court?

(2) Whether the Will deed was a legal document and whether its validity was proved on the touchstone of section 68 of Evidence Act?”

11 Section 68 of the Evidence Act reads as follows :-

“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.]”

It can be inferred that attesting witnesses have not proved the contents of the document. The execution of the Will itself is suspicious as it is not in consonance with the supervening circumstances.

12 In the facts of the case, it can be seen that in fact, it is incumbent upon the first appellate Court to appreciate the evidence on record in its proper perspective as it would be the first fact finding Court and it is necessary to appreciate the entire evidence placed on record by the plaintiff as well as the defendant and therefore, there was no error committed by the learned appellate Court in appreciating the evidence in the absence of any specific averment in the written statement. The appellate Court has held that Will was executed just 10 days before the demise of deceased Jyoti. It is also taken into consideration that PW3 – Shriram happens to be a Judge whereas PW4 who is the scribe of the Will is an Advocate. It was considered by the learned appellate Court that the

plaintiff has failed to show as to whether Jyoti was really under the apprehension of death at the time of executing the said Will. All the witnesses examined by the plaintiff are interested witnesses and the health condition of Jyoti was within the special knowledge of the witnesses and therefore, it cannot be said that it was necessary to examine any Medical Officer. It is pertinent to note that the learned appellate Court had rightly appreciated that the signature on the Will was disputed by the defendant. However, admitted signature of the testator were not placed before the Court. There was no occasion for the trial Court to exercise powers under section 73 of the Indian Evidence Act. In fact, on the date of filing of the suit the defendant had got the shop mutated in his own name and the possession was sought only two years after the demise of the testator.

13 The contents of the Will need to be considered. Perused the contents of Exh.55. Contents of Exh. 55 were not in consonance with the facts of the case. It was mentioned that the Typing Institute was given to the testator after her marriage. It is pertinent to note that the marriage was solemnised on 20th May 2003 and the said suit/shop was purchased in May 2004 i.e. within one year after her marriage. The learned appellate Court has rightly observed that being a Judge it was incumbent upon PW3 to obtain permission of the High Court while purchasing the suit property.

14 In any case, the suit property was not purchased in his own name and he did not wish to disclose the same at that relevant time and the issue had come up only after the demise of his sister-in-law.

15 Moreover, the date of purchase is at variance. The sale deed is of the year 2004, whereas, according to the testator, it is stated in the Will that it was purchased in 2006, it would be a date after her demise as she had expired on 30th May 2005. It is necessary to see the contents of the Will more particularly, when the witnesses are interested witnesses. The document is neither notarized nor registered.

16 The date assigned in the Will is far from reality. The genuineness of the Will is doubtful. The manner of execution of the Will is shrouded with mystery and in these circumstances, the said deed cannot be legally endorsed.

17 In view of the above discussion, the substantial question of law raised by the appellant requires no consideration. Second appeal being sans merit stands dismissed. In view of dismissal of the second appeal, the civil application stands disposed of.

(SMT. SADHANA S. JADHAV, J.)