

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

SECOND APPEAL No. 284 OF 1995

- | | | | |
|----|-------------------------------|-----|-------------------|
| 1. | Smt. Parabati Vithal Mozar |) | |
| 2. | Sonubai Vitthal Mozr |) | |
| | (since deceased through |) | |
| | original Defendant Nos. 1 & 2 | ... | Appellants |

V/s.

- | | | | |
|-----|-------------------------------------|-----|--------------------|
| 1. | Dasharath Shankar Chorat |) | |
| 2. | Mahadev Shankar Chorat |) | |
| 2A. | Smt. Krishnabai Mahadev Chorat |) | |
| | (deceased, by heirs) |) | |
| 2B. | Mangal Chandrakant Ombale, |) | |
| | Age 35 years, |) | |
| 2C. | Sandeep Mahadev Chorat, |) | |
| | Age 28 years |) | |
| 2D. | Sanjay Mahadev Chorat, |) | |
| | 38 years |) | |
| 3. | Laxman Govind Mozar[dead,(deleted)] | | |
| 4. | Ganpat Maruti Mozar, |) | |
| 5. | Tukaram Maruti Mozar, |) | |
| 6. | Narayan Sakharam Mozar, |) | |
| 7. | Bhiku Sakharam Mozar, |) | |
| 8. | Raghunath Sakharam Mozar |) | |
| 9. | Kondiba Bahiru Mozar | ... | Respondents |

Mr. S. G. Deshmukh a/w Priya A. Patil i/b Gautam Kanchanpurkar,
for the Appellants.

Mr. R. A. Thorat, Sr. Counsel a/w Nazia S. A. Shaikh a/w Aditi
Naikare i/b P. J. Thorat, for the Respondents.

CORAM : C.V. BHADANG, J.

JUDGMENT RESERVED ON : MARCH 11, 2020

JUDGMENT PRONOUNCED ON : MAY 26, 2020

JUDGMENT :

1. On 30th June 1995 this Second Appeal was admitted on the following substantial questions of law which are ground Nos.18, 20, 25 and 26, in the appeal momo:-

- (i) The Lower Courts ought to have held, that in the absence of partition between Kalu and Balu, Gangubai had no authority to execute the will (Exhibit 81)dated 29th August 1968, in favour of the plaintiffs and their deceased brother Keshav.
- (ii) The Lower Courts ought to have held that the disposition of her properties by Gangubai under the alleged will (Exhibit 81) dated 29th August 1968 was unnatural and the same was surrounded by suspicious circumstances.
- (iii) The Lower Courts ought to have drawn adverse inference against the plaintiffs, for not examining Krishna Tukaram Patil, one of the attesting witnesses on the will (Exhibit 81) dated 29-08-1968.
- (iv) The Lower Courts erred in not allowing the defendants to examine Krishna Tukaram Patil, one of the attesting witnesses of the will (Exhibit 81) dated 2-08-1968, as their witness.

2. The facts giving rise to the appeal are as under:-

. That the appellants are the original defendant Nos.1 and 2 while the respondent Nos.1 and 2 are the original plaintiffs. The respondent Nos.3 to 9 are the original defendant Nos. 3 to 9. It may be mentioned that defendant Nos. 3 to 9 were joined to avoid any technical difficulty. For the sake of convenience parties are referred to their original capacity as plaintiffs and defendants.

3. The plaintiffs filed Civil Suit No.280 of 1980 before the learned Civil Judge Senior Division, Wai against the defendants for declaration and permanent injunction in respect of the properties which are subject matter of dispute and which are more specifically described in the plaint.

4. The case made out by the plaintiffs, is that suit properties were originally owned by one Genu Mozar. Genu had two sons Kalu and Balu. The appellants (defendant Nos.1 and 2) are the descendants of Balu. Kalu died issueless leaving behind widow Gangubai. Gangubai had a sister Thakubai. Plaintiffs are grand sons of Thakubai. The case made out in the plaint is that Kalu and Balu were living separately during their lifetime and their agricultural properties were separate. After the death of Kalu, Gangubai was separately in the possession of the property which was left by Kalu. Insofar as land Survey No.11 is concerned she was an agricultural

tenant and she purchased the said land under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948.

5. It is the material case that Gangubai executed a will on 29th August 1968 bequeathing her properties to the plaintiffs. Gangubai died on 08th February 1970 and the plaintiffs have become owner of the properties left by her on the strength of the will dated 29th August 1968. It was contended that the appellants (defendant Nos.1 and 2) have no concern with the said properties. The defendants made an attempt to remove the name of the plaintiffs from the revenue record, claiming that they are the owners of the suit properties being the heirs of Ganu. An attempt was also made to claim the land acquisition compensation in respect of some of the lands, which were acquired by the Government. It was also contended that there was an apprehension that the defendant Nos.1 and 2 will disturb the possession of the plaintiffs over the suit property. It is in these circumstances, that the plaintiffs sought declaration that they have become owners of the suit property on the basis of the said will and for permanent injunction etc.

6. The defendant No.2 filed his written statement (Exhibit-22) which was adopted by the defendant No.1 and they resisted the suit. The genealogy of the family of Genu was denied. It was denied that Balu and Kalu were living separate. It was contended that Kalu

being the elder brother his name was recorded in the record of rights, after the death of Genu. After the death Kalu, the name of Gangubai came to be recorded in place of Kalu. It was specifically denied that there was any partition as alleged between Kalu and Balu and for the matter of that Kalu and sons of Balu or Gangubai and Vithal son of Balu. It is the specific case made out that the defendant Nos. 1 and 2 and Gangubai were living jointly till her death and the properties were in possession of these defendants. It was also contended that Gangubai has not made any will and the so called will is forged. It was also denied that the will bears, the thumb impression of Gangubai.

7. On the basis of the rival pleadings the learned Trial Court framed the following issues.

Issues

- 1 Does the plaintiffs prove that the deceased Gangubai had executed will dated 29.8.1968 in their favour about the suit property as alleged ?
- 2 Do the plaintiffs prove that the said will is the last will of said deceased Gangubai ?
- 3 Do the plaintiffs prove that the said alleged will is legal, valid ?
- 4 Do the plaintiffs prove their possession of the suit property on the date of suit ?
- 5 Do the plaintiffs prove the alleged obstructions ?

- 6 Are plaintiffs entitled for injunction and declarations as sought for ?
- 7 Are plaintiffs alternatively entitled to the possession of suit property ?
- 8 Are defendants entitled to the compensatory costs as prayed for ?
- 9 What order and decree ?

8. The parties went to trial and produced oral and documentary evidence. The plaintiff Dashrath examined himself (PW-1) along with the attesting witnesses Mr. Haribahu Mozar (PW-2) and one Rajaram Mozar (PW-3). The defendants examined Parabati Mozar (DW-1) and Namdev Mozar (DW-2).

9. It may be mentioned that the second attesting witness was not examined by the plaintiffs. The contesting defendants sought his examination as a witness on their behalf, which was refused by the Trial Court.

10. The learned Trial Court answered issue Nos. 1 to 8 in the affirmative and by a judgment and decree dated 04th December 1989 decreed the suit as prayed.

11. That was challenged by the appellants before the learned Additional District Judge at Satara in Regular Civil Appeal No.608 of 1989. The first Appellate Court framed the following points for determination :-

Points

- (i) Do respondents-plaintiffs prove that they become Owners of the suit lands by virtue of the Will dated 29-08-1968 (Exh.81) executed by deceased Gangubai wd/o. Kalu ?
- (ii) Do they further prove that they are in possession of the suit lands on the date of the suit ?
- (iii) Do respondent-plaintiffs prove that the appellants have obstructed their possession over the suit lands ?
- (iv) Whether the decree passed is sustainable in this case ?
- (v) What order ?

12. The first Appellate Court answered the Point Nos.1 to 4 in the affirmative and dismissed the appeal vide judgment and decree dated 25th January 1995 which is subject matter of challenge in this appeal.

13. I have heard Mr. Deshmukh the learned counsel for the appellant and Mr. Thorat the learned senior counsel for respondent Nos.1 and 2. With the assistance of the learned counsel for the parties, I have gone through the record.

14. It is submitted by Mr. Deshmukh learned counsel for the appellants that there is no proof of partition of the properties between Kalu and Balu or that they were staying separate. It is submitted that in the absence of such partition, Gangubai had no authority to execute the will or bequeath the properties in favour of the plaintiffs. It is submitted that the defendant Nos. 1 and 2 and Gangubai were staying together till the death of Gangubai. It is submitted that the

trial court failed to frame a specific issue regarding partition between Kalu and Balu, which goes to the root of the matter. It is submitted that there are suspicious circumstances surrounding the alleged execution of the will and the courts below, were in error in accepting the will as proved. In this regard it is submitted that the will is an unregistered will. It is submitted that Gangubai had no reason to go to Natiwade to execute the will. It is submitted that Gangubai had no reason to execute the will in favour of strangers. The learned counsel has pointed out that the will has not been disclosed by the plaintiffs for a period of ten years after its alleged execution, which itself raises doubts about the execution of the will. It is submitted that the plaintiffs only examined one attesting witness of the will. The learned counsel was at pains to point out that the other attesting witness, namely Krishna Patil was not examined by the respondents/ plaintiffs. It is submitted that the appellants/defendants, sought permission to examine Mr. Krishna Patil as their witness, which was not allowed by the trial court, which has caused prejudice to the appellants. It is therefore, submitted the appeal be allowed and the suit be dismissed.

15. Mr. Thorat, the learned senior counsel for the respondents has supported the impugned judgment. It is submitted that there are various circumstances considered by the courts below,

in accepting the will as proved, It is submitted that there is intrinsic material on record to suggest that there was partition of the properties between Kalu and Balu, after the death of Genu and the will is genuine and is properly executed, which has been considered by the courts below. It is thus submitted that the non framing of a specific issue as to partition between Kalu and Balu is thus inconsequential. It is submitted that the defendants have not disputed the execution of the will as such and the only defence made out is about the absence of partition between Kalu and Balu and the absence of authority with Gangubai to execute the will. It is submitted that examination of one of the attesting witnesses is sufficient for the proof of the will. It is submitted that there are no suspicious circumstances surrounding the execution of the will as claimed on behalf of the appellants. it is submitted that there are concurrent findings of facts properly recorded by the courts below which do not need interference. On behalf of the respondents reliance is placed on the decision of the Supreme Court in ***Kunju Kesavan Vs M M Philip & Ors.***¹ (and ***Syeda Akhtar Vs Abdul Ahad***² .

16. I have considered the rival circumstances and the submissions made.

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17. The claim of the respondents/plaintiffs is based on the will (Exhibit 81) executed by Gangubai. Thus the principle issue is about the execution and the proof of the said will. The will is dt. 29.8.1968. Gangubai died on 8.2.1970. Admittedly the will is an unregistered will. As per the Registration act a will is not a compulsorily registrable document. Thus merely, because the will is an unregistered will is not decisive. It is now well settled that the court has to consider all the attending circumstances, in which the will is said to be executed and then to decide whether the will can be said to be proved. The challenge to the will on behalf of the appellants is principally on two grounds. First is with reference to the absence of partition between Kalu and Balu in order to claim that Gangubai in the absence of such partition had no authority to execute the will and bequeath the properties. in favour of strangers. It is contended that Gangubai was staying till her death with the appellants / defendants Nos. 1 and 2. Secondly, it is contended that there are suspicious circumstances surrounding the execution of the will.

18. The substantial question of law at Sr. No. (i) relates to the claim about absence of partition between Kalu and Balu. In this regard, admittedly, the suit properties were owned by Genu Mozar, who is the common ancestor. Genu had two sons – Kalu and Balu, Kalu being the elder brother. Gangubai is the widow of Kalu. Kalu

died issueless somewhere in the year 1948. The will (Exhibit 81) is executed by Gangubai in favour of the respondent Nos. 1 and 2 / plaintiffs, and their deceased brother Keshav. It has come on record that the respondents are the grand-sons of Thakubai, who is the sister of Gangubai. With this, it is now necessary to see whether the finding of fact recorded by the courts below can be said to be perverse so as to amount to a substantial question of law, if not, it being a finding of fact, properly recorded, deserves to be confirmed.

19. The first appellate court in particular has considered this aspect in details from para 10 onward of the impugned judgment. The first appellate court has considered various circumstances, which would indicate the fact that indeed there was a separation and partition of the properties between Kalu and Balu. The first appellate court has found, and to my mind rightly so, that the suit properties were not jointly possessed or cultivated by the legal heirs of Genu. The first appellate court has found overwhelming evidence to hold that the suit lands and the other properties inherited by Kalu and Balu, after the death of their father Genu, were partitioned during the lifetime of Kalu and Balu, and the properties were independently cultivated and enjoyed. In this regard, it is necessary to note that 7-12 extracts which were produced on record showed that deceased Gangubai alone was shown to be in cultivation of the suit lands. It was the case made out on behalf of the appellants that Kalu being the

elder brother, after death of Genu, the properties were shown in the revenue record in the name of the elder brother i.e Kalu, and after his death in the name of Gangubai, widow of Kalu. It appears that before the first appellate court it was contended that the name of Gangubai was recorded, being Karta of the joint family, which has rightly not been accepted by the first appellate court. There is nothing in the 7-12 extracts to show that name of Gangubai was recorded in the capacity as Karta of the joint family properly. Secondly, the first appellate court has rightly found that even after the death of Kalu, suit lands were not entered in the name of Gangubai and Balu as the legal heirs.

20. It is further significant to note that the properties at Sr. Nos. 11, 12 and 13 are shown to be purchased in the name of Gangubai under S. 32-G of the Bombay Tenancy and the Agricultural Lands Act. This would further be indicative of the fact that Gangubai was alone the tenant, and the joint family as such, not the tenant.

21. The third circumstance is about compensation paid to deceased Gangubai when a portion of the suit land was acquired by the Government, to which no claim was made by the appellants or the other legal heirs of Balu. That apart, there is evidence on record that during his lifetime, Kalu gifted some properties to Shankar i.e. father of the respondent Nos. 1 and 2 under the gift-deed dated 10.4.1947 (Exhibit 91) and the said gift-deed was acted upon as the

name of the respondent Mahadeo i.e. son of Shankar is entered in the revenue record in the year 1968-69. There is also evidence that Balu during his lifetime independently disposed of / created a charge on some of the ancestral properties. In this regard, the first appellate court has noted mortgage-deed dated 15th March, 1915 (Exhibit 119), in favour of Vitthal Devji.

22. The oral evidence of Haribhau and Rajaram, who are the adjacent land holders, have stated that during the lifetime of Gangubai, Gangubai was in cultivating possession of the suit lands and after her death, it was the respondents, who cultivated the suit lands. Lastly, the first appellate court has considered several receipts (Exhibit 58) which show that payment of land revenue was made by Gangubai alone and the Mutation Entry (Ferfar) No. 213 (Exhibit 60) shows that after death of Kalu, Gangubai alone was shown to be the heir of Kalu. Considering the overall circumstances, there is clear evidence indicative of the separate possession of the properties of Kalu and Balu after the death of Genu. The contention on behalf of the appellants that there was no separate issue / point framed by the courts below, which vitiates impugned judgment, cannot be accepted. This is because the rival contentions of the parties on the point have been specifically considered by the courts below, and more particularly, by the first appellate court, which is the final fact finding court. For this reason, in my considered view, non-framing of a

specific issue on the point would not be decisive, as no prejudice can be said to be caused by such non framing of the issue.

23. This takes me to the second issue about the alleged suspicious circumstances, surrounding the execution of the will. According to the appellants, following are the suspicious circumstances surrounding the execution of the will, which make the will unacceptable:

- (i) The appellants were close relative of Gangubai than the respondents and all the properties were given to the persons, not closely related and the close relations have been totally excluded;
- (ii) The will was not disclosed until death of Gangubai;
- (iii) Though several persons went to Wai from Nhalewadi (where deceased Gangubai was residing) by engaging a bullock-cart, will is neither executed on a stamp paper, nor it is registered;
- (iv) the legatees and their relations have taken a prominent part and interest in getting the will executed in their favour.

24. As noticed earlier, the court while deciding on the issue of genuineness of a will, has to consider all the attending circumstances and to puts itself in the arm chair of the testator / testatrix, and then decide the issue. Insofar as the first ground is concerned, it cannot be accepted that merely because close relatives have been excluded, the will becomes suspicious. In fact testatrix

Gangubai died issueless and thus had no Class-I heirs. The appellants on one hand are claiming through Balu, who was the brother of the husband of the testatrix, while the respondents are grand-sons of the real sister of the testatrix. It is necessary to note that testator or testatrix, who dies issueless, if intends to give the properties to other Class-I or Class-II heirs, there is no need to execute any will, as they will otherwise inherit the property by intestate succession. It is only when the testator intends to bequeath the property to somebody else, who may even be a complete stranger, only then there is a necessity to execute a will.

25. The first appellate court has considered the ground about will being executed in suspicious circumstances, from para 22 onward. Although initially it was contended that the will does not bear the thumb impression of Gangubai, the first appellate court has noticed that essentially the case was made out, during the course of hearing, was that the will was executed in circumstances, which are suspicious in nature. The first appellate court has noticed that Gangubai was living with the respondents / plaintiffs at the time of her death and her last rites were performed by Dashrath. It is necessary to note that even during the lifetime of Kalu, the husband of Gangubai, Kalu had gifted certain property to Shankar, the father of the respondents. It can thus be seen that since long Kalu and Gangubai were more close and affectionate towards Shankar and his

family, who happened to be the son of real sister of Gangubai. Thus, there is nothing unusual in the present case in Gangubi bequeathing the properties in favour of the respondents.

26. Even insofar as non disclosure of the will is concerned, the first appellate court has found, and to my mind rightly so, that there is evidence to show that at the time of execution of the will, Gangubai was accompanied by number of persons from the village and the will was written at Wai in Damodar Ashram with the help of the scribe Mr. Patankar.

27. It has indeed come on record that Gangubi went to Wai in the bullock-cart of father-in-law of respondent Mahadev. However, this is not a case where Gangubai is shown to have been taken surreptitiously to Wai and the respondents having got the will executed in their favour. It has come on record that following five witnesses are signatories to the said will: (i) Pandurang Gaikwad, the father-in-law of respondent Mahadeo; (ii) Haribhau Dhondur Mozar from Nhalewadi (PW 2); (iii) Jagu Patil from Pasrani; (iv) Krushna Patil from Minavali; and (v) the scribe – Mr. Patankar.

28. Admittedly, out of the aforesaid signatories, Pandurang Gaikwad, Jagu Patil and the scribe Mr. Patankar were dead and were not available to be examined during the trial. One of the attesting witnesses Haribhau Mozar has been examined by the respondents in

support of the will, which evidence has been accepted by both the courts below. It is neither urged nor shown as to how the evidence of PW 2 Haribhau is not acceptable.

29. It can thus be seen that the will was executed in the presence of several persons from different villages and merely because the same was not executed on a stamp paper nor it is a registered will, is not sufficient to discard the same.

30. Insofar as non-examination of second attesting witness Krushna Patil is concerned, it is now well settled that examination of one of the attesting witnesses is sufficient, and if evidence of such attesting witness is found to be acceptable, non-examination of other attesting witness is inconsequential. It appears that according to the respondents, they did not examine other witness viz. Mr. Krushna Patil, as he was more than 90 years of age. The first appellate court has also considered that the appellant Parabati Mozar stated in his evidence that the said Krushna Patil is known to him and was so close to him that when appellant Parabati's evidence was recorded in the court, Krushna Patil was present in the court. The first appellate court has noted that although the appellant Parabati claimed that he would be going to examine Krushna Patil as a witness, however, ultimately he was not examined. Be that as it may, unless and until a party fails to produce or holds back evidence, which it is bound to

produce in law, no case for drawing of adverse inference is made out. As noticed earlier, examination of one of the attesting witnesses is sufficient, and thus, no case for drawing of adverse inference is made out.

31. I have gone through the impugned judgment of the trial court, as well as the first appellate court and I do not find that that the appeal involves any substantial question of law, requiring interference by this court in the concurrent findings properly of fact recorded by the courts below. The appeal is without any merit and is dismissed with no order as to costs. Decree be drawn-up accordingly.

Sd/-
C.V. BHADANG, J.

Vinayak
P.
Halemath

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