

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.437 OF 2013
with
CIVIL APPLICATION NO. 3525 OF 2008**

- 1) Kusumbai w/o Dharma Bedke
and Ors. **= APPELLANTS**
(orig. Deft.Nos. 1 to 7
9 and 10)

VERSUS

- 1) Kashibai w/o Dhondiram Waghmare
(Died through her Legal heirs)
- 1A) Subrao Dhondiba Waghmare & Ors. **= RESPONDENTS**
(orig.plaintiff)

Mr.SS Choudhari,Advocate for Appellants;

Mrs.MG Kasturkar,Adv. h/for Mrs. MA Kulkarni,Advocate for
Respondent Nos. 1-A to 1-E.

CORAM : SMT.VIBHA KANKANWADI,J.

DATE : 27th August, 2021.

PER COURT :-

1. Present appeal has been filed by original defendant Nos.1 to 7, 9 and 10, challenging concurrent judgment and decree passed by both the Courts below. Present respondent – Kashibai was original plaintiff, who filed Regular Civil Suit No.199/1985 before the learned Civil Judge, Junior Division, Kallam, for declaration of ownership and permanent injunction. The said suit came to be

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decreed on 21.4.2003. The appeal filed by the present appellants, being RCA No.109/2003, came to be dismissed on 18.9.2007 by learned District Judge-1, Osmanabad. Hence, the present Second Appeal.

2. Heard learned Advocates appearing for the respective parties. In order to cut short, it can be stated that both of them have made submissions in support of their respective contentions.

3. It is to be noted that during pendency of this appeal, appellant No. 2 – Sindhubai and Respondent – Kashibai expired and their respective legal representatives are brought on record.

4. It has been vehemently submitted on behalf of the appellants that both the Courts below have not properly considered the evidence and the law points involved in the case. Both the Courts below were not justified in placing reliance on the Will alleged to have been executed by Rakhmabai w/o Ganpati Bedke in favour of the plaintiff on

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17.9.1977 though the plaintiff did not adduce sufficient and cogent evidence in that regard. Both the Courts below erred in holding that the Will was executed by Rakhmabai in favour of the plaintiff without any undue influence and without playing fraud by the plaintiff in view of the fact that it has come on record that Rakhmabai was under the influence of the plaintiff and the plaintiff was instrumental in prejudicing mind of the appellant No.1 – Kusumbai, a daughter in law and appellant No.2 – Sindhubai, a grand-daughter in law of Rakhmabai by misleading them. When appellant No.1 Kusumbai; appellant No.2 – Sindhubai and plaintiff are the legal heirs of original holder of the property and they are entitled to receive share in the property, determined as per the provisions of Hindu Succession Act, 1956, both the Courts below erred in decreeing the suit filed by the plaintiff for declaration of ownership and perpetual injunction and dismissing the appeal by appellants.

5. Per contra, learned Advocate appearing for the respondents supported the reasons assigned by both the Courts below and submitted that both

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the Courts below, after having properly scanned the evidence brought on record, arrived at the findings which do not warrant interference by this Court and, therefore, the appeal does not involve any substantial questions of law and it deserves to be dismissed.

6. At the outset, it can be seen that both the Courts below have considered the facts and as to what would have been the relationship between the parties when Rakhmabai executed the Will. Further, it appears that when to prove the Will dated 17.9.1977, the plaintiff has examined attesting witnesses, therefore, there is compliance under Section 63 of the Indian Succession Act. PW 2 has categorically stated that Rakhmabai executed the Will in his presence. The contents of the Will were written by one Mullasaheb as per the instructions of Rakhmabai and thereafter, she had impressed her thumb impression in presence of PW 2 as well as PW 1 – Chitambar Kulkarni. Thereafter those two attesting witnesses have signed the said Will in presence of Rakhmabai. He has then stated that all of them went to Kallam and registered the

said document. Therefore, there was total compliance regarding proof of the Will. Merely because Rakhmabai was looking after by the plaintiff, it cannot be presumed that she would have contaminated mind of Rakhmabai against appellant Nos.1 and 2. For that purpose, the history will have to be considered. It is to be noted that originally the entire land belonged to Ganpati Bedke. Deceased Dharma was son of Ganpati and Rakhmabai. Ganpati expired on 22.11.1965. Thereafter, Dharma died on 8.12.1966, leaving behind defendant Nos.1, 2 as well as Rakhmabai – the mother. Thereafter, all the properties were jointly cultivated by them. However, differences arose and defendant Nos.1 and 2 filed RCS No. 211/1966 for partition and separate possession against Rakhmabai and the plaintiff. The said suit came to be decreed on 29.11.1967 and defendant Nos. 1 and 2 got in all $8/27^{\text{th}}$ share in the properties. Rakhmabai got $1/9^{\text{th}}$ share and plaintiff got $16/27^{\text{th}}$ share. Thereafter, defendant Nos.1 and 2 got actual possession in execution proceeding i.e. RD No. 56/1971. These facts would have definitely caused strained relationship between Rakhmabai and

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deft.Nos. 1 and 2. The plaintiff, being daughter of Rakhmabai, would have had love and affection of Rakhmabai and, therefore, possibility that due to that love and affection, she executed the Will in favour of the plaintiff, cannot be ruled out. The proof has been given regarding execution of the Will and, therefore, the suit was correctly decreed and the appeal has been rightly dismissed.

7. No substantial questions of law, as contemplated under Section 100 of CPC, are arising in this case, requiring admission of the Second Appeal. It deserves to be dismissed. Accordingly, the Second Appeal is dismissed. Pending Civil Application, if any, stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV