

Neeta S.
Sawant

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Second Appeal No. 478 / 2018

Alongwith

Civil Application No. 598 / 2017

Mr. Ravindra Ramchandra Upadhye

.. Appellant

Vs.

Shri. Avinash Ramchandra Upadhye

.. Respondent

Mr. Siddharth C. Wakankar, Advocate for Appellant.

Mr. R.B. Jagtap a/w Mr. Aniesh S. Jadhav, Advocate for
Respondent.

CORAM : SANDEEP K. SHINDE J.

DATE : 15th MARCH, 2021.

P.C. :-

Heard.

1. Execution and attestation of the Will (Exhibit-16) dated 26th

May, 1995 of Jankibai has been challenged and disputed by the Defendant in the Special Civil Suit No. 2146 / 2008 filed by the Respondent (Original Plaintiff).

2. Briefly stated it is plaintiff case that, his mother Jankibai executed the Will on 26th May, 1995 and bequeathed the suit property to him. The Will was attested by two witnesses. Besides, Supriya Bhatt, had also attested thumb impression of Jankibai. Relying on the Will, plaintiff sought a declaration that he is entitled for 62.5% shares equivalent 1080 sq. ft. in the constructed area and 825 sq. ft. in the vacant area of the property bequeathed to him by his mother Jankibai. Appellant – Defendant, brother of the plaintiff disputed the execution of the Will. As such the suit was instituted. It was decreed by the trial Court by judgment and order dated 17th August, 2012. Aggrieved Defendant, preferred Civil Appeal No. 1116/2012. It was dismissed by judgment and order dated 3rd

September, 2016. Against the judgment and decree of the Appellate Court, Defendant has preferred this Second Appeal.

. The only question for determination is; Whether execution of Will of Jankibai at Exhibit-16 has been proved in terms of Section 68 of the Evidence Act read with Section 63(1) (c) of the Succession Act?

3. I have perused the evidence of attesting witness Gajanan Vishnu Upadhye. His testimony, divulge that on 26th May, 1995, Jankibai had called him at home and disclosed her wish to bequeath the properties. At the material time, Gopal Govind Shinde, Supriya Bhatt, her Daughter Shashikala Vartak and Advocate of Jankibai were present. Attesting witness stated Jankibai was examined by Dr. Godbole. He certified, she was in sound the state of mind. Accordingly, doctor made an endorsement on the Will. He further stated, that Will was read over to, Jankibai by Advocate and she

admitted the, contents were correct. Thereafter Jankibai, put her thumb impression, which, was identified by Ms. Supriya (PW-3). Soon thereafter himself and Gopal Shinde put their signatures on the Will in the presence of each other and in the presence of Jankibai. He admitted his signature and would also depose that the Will was registered with the Sub-Registrar. However, appears this witness filed had one affidavit sworn on 18th March, 2019 at Exhibit-32. Vide this affidavit, he resiled from affidavit in lieu of examination-in-chief and would state, that someone had obtained his signature on Will. In short, he denied, that the Will was executed by Jankibai in his presence. However, in cross-examination, he simply affirmed the contents of affidavit at Exhibit-32 sworn on 13th March, 2019; whereas affidavit in lieu of examination-in-chief was filed on 2nd December, 2019.

4. Trial Court as well as First Appellate Court relied on the

evidence, and held that the plaintiff had proved, execution of the Will.

5. I have perused the evidence of Gajanan Upadhye PW-2 and his affidavit at Exhibit-32. His evidence has not been questioned by the defense, at all. The defense has simply placed on record Exhibit-32 (affidavit of Gajanan Upadhye), wherein he would deny the execution of Will.

6. It may be stated that the plaintiff had also examined Supriya Bhatt as PW-3. This witness had identified and attested the thumb impression (दस्तूर) of Jankibai. Her evidence has proved, that the Will was executed by Jankibai.

7. Thus, in consideration of the evidence on record, in my view the plaintiff has proved, 'execution' and 'attestation' of the Will and it cannot be faulted with. On the contrary, it may be stated that the

defendant, had not approached the Court with the clean hands. Though he had disputed the execution of the Will, he admitted, that under the subject disputed Will property at Village Darawli was bequeathed to him by his mother, Jankibai. Also it appears from his evidence that other disputes were pending, between him and his brother, since 1992-93.

8. In consideration of the facts of the case, in my view, the appeal does not give rise to any substantial question of law. Appeal is dismissed. All Civil Applications therein, are disposed of.

(SANDEEP K. SHINDE, J.)