

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 322 OF 2019

APPELLANTS :- 1] Kantabai w/o Shravan Urkude
ORI. PLAINTIFFS aged about 74 years, Occ: business,
On R.A. R/o Deoli (Pendhari), Post Kanholi
 (Bara), Tah. Hingna, Dist. Nagpur.

2] Babarao Namdeorao Khobe,
Aged about 69 years, Occu:
Cultivation, R/o Jamni, Post Akoli,
Tah. Seloo, Dist. Wardha Mob. No.
E-mail : Nil.

VERSUS

RESPONDENTS :- 1] Mirabai Gajanan Bhurse
ORI. DEFENDANTS R/o Behind Central Jail, FCI
ON R.A. Godown, Ajni Chowk, Chunabhatti,
 Opposite Mahajan Kirana Stores,
 Ajni, Nagpur-440018.

2] Kishor Wasudeorao Dange,
Aged about 69 years,
Occu: Cultivation, r/o Jamni, Post
Akoli, Tah. Seloo, Dist. Nagpur.

Shri A.D. Patil, counsel for the appellants.
Smt S.J. Banerjee, counsel for the respondent No.1.

CORAM : ANIL S. KILOR, J.
DATE : 08th DECEMBER, 2021

ORAL JUDGMENT :

1] This appeal is arising out of the judgment and decree dated 29/03/2019 passed in Regular Civil Appeal No. 65/2015 by the District Judge-1, Wardha allowing the appeal and thereby setting aside the judgment and decree dated 26/02/2015 passed in Regular Civil Appeal No. 15/2008 by the Civil Judge, Junior Division, Seloo, thereby decreeing the suit for declaration, partition, separate possession and cancellation of Will dated 04/05/1998.

2] The brief facts which are relevant and necessary for deciding the controversy involved in the present appeal are as follows: (The parties are referred to as per their status before the trial Court).

3] The plaintiffs/appellants filed the suit for

declaration, partition and cancellation of Will dated 04/05/1998.

4] It is the case of the plaintiffs that defendant No.1 and the plaintiffs are real brothers and sisters of the deceased Ramchandra Khobe and deceased Parvatabai is the uncle and auntie of the plaintiff, and defendant No.1- Namdeo was their father who died during the trial of the First Appeal.

5] It is further case of the plaintiff that, Grandfather of plaintiffs and defendant no.1, deceased - Nagorao left some movable property i.e. cash and gold, which inherited by Namdeo and Ramchandra thereafter, Namdeo and Ramchandra had purchased agricultural land and house property. Thereafter, they were entered into mutual partition, in which suit property allotted in the possession of deceased - Ramchandra. After death of Ramchandra, suit property entered in the name of Parvatabai. However, plaintiff no.2 was cultivating the suit field property. It is alleged that after death of Parvatabi, plaintiffs and defendant

no.1 being member of joint family entitled for equal shares.

6] It is further alleged that Parvatabai was sick in the month of April-1998. At that time, defendant no.1 had come from Nagpur and taken undue advantage of her illness and illiteracy and prepared fraudulent and bogus Will. According to plaintiffs, Will being bogus not binding on them. Therefore, they have send registered notice dated 24/05/1999 through their advocate M.Z. Babhade to defendant no.1 and requested for their shares. However, defendant No.1 neither replied nor complied and therefore, the present suit is filed.

7] Defendant No.1 resisted the suit by her written statement at Exh-11. She has specifically alleged that the suit properties were exclusively owned by deceased – Parvatabai. Deceased – Parvatabai was having good health till her death. She was died due to old age and a short one week illness in the month of November-1998. Defendant no.1 had taken care of deceased- Parvatabai and therefore, she had executed a

Will in favour of her in presence of two attesting witnesses. As per Will, suit property bequeathed in her favour and therefore, she is the owner of the same. According to defendant No.1, suit is deliberately filed with intend to cause loss to her and therefore, liable to be dismissed with cost.

8] learned Trial Court after considering the oral as well as documentary evidence available on record, decreed the suit in favour of the plaintiffs and thereby declared that Will dated 04/05/1998 is not genuine and the learned Trial Court further declared that plaintiffs and defendant No.1 have $\frac{1}{3}^{\text{rd}}$ share each in the suit property vide impugned judgment and decree dated 26/02/2015.

9] Defendant no.1 feeling aggrieved by the said judgment and decree, preferred an appeal namely Regular Civil Appeal No. 65/2015, which came to be allowed vide impugned judgment 29/03/2019, the same is under challenge in this appeal.

10] I have heard learned counsel for the respective parties.

11] This Court, on 02/08/2019, while issuing notices to the respondent has framed the following substantial questions of law :-

“(i) Whether Will (Exh.-42) can be accepted in evidence?

(ii) Whether the appellate Court was justified in upsetting the judgment and decree passed by the Court below?”

12] The learned counsel for the appellant submits that the learned trial Court has discussed the suspicious circumstances found to be surrounded to the execution of Will in question and after considering the oral as well as documentary evidence in detail and also the law in that regard has held that Will cannot be said to be the last Will of the free and capable testator. It is submitted that while reversing the judgment, no reasons have been recorded by

the learned Lower Appellate Court. The learned Lower Appellate Court has held that there are no suspicious circumstances surrounded to the execution of the Will. Thus, according to him, this finding recorded by the learned Lower Appellate Court is perverse and contrary to the evidence available on record.

13] Learned counsel for the appellant submits that though the learned trial Court has recorded its findings in detail after appreciating the oral as well as documentary evidence, all such findings have been reversed by the learned Lower Appellate Court without assigning any proper reason. It is submitted that the First Appeal is the continuation of suit and it is mandatory for the learned Lower Appellate Court to consider the oral as well as documentary evidence afresh and give its findings on the points involved. It is also binding on the learned First Appellate Court to record the reasons for reversing the findings recorded by the Trial Court. He, therefore, submits that the judgment and decree passed by the learned Lower Appellate Court is liable to be set aside

and the matter needs to be remanded back for decision afresh.

14] *Per contra*, the learned counsel for the respondent supports the impugned judgment and decree and submits that the learned Lower Appellate Court has considered the evidence available on record and thereupon has arrived at a conclusion that there are no suspicious circumstances surrounding the execution of Will. It is submitted that the learned Appellate Court is the last Court of recording of facts and this Court may not interfere with such facts recorded by learned Lower Appellate Court, unless it is found to be perverse.

15] Considering the rival contentions of the parties, I have gone through the record and also perused the judgments and decree of both the Courts below.

16] It is apparent on the face of the record that the trial Court while considering the circumstances found to be

suspicious surrounding the execution of Will has discussed the evidence oral as well as documentary in detail and has devoted as many as more than 35 paragraphs. The learned trial Court has also discussed the law on this point by referring to the relevant provisions and the judgments of the Hon'ble Apex Court, thereafter arrived at definite conclusion that the Will in question is not genuine and it cannot be said that it is the last Will of free and capable testator.

17] The learned Lower Appellate Court on the other hand reversed this findings by recording its observation in paragraph-14 which reads thus:-

*“14. As far as the execution of Will is concerned, there is no suspicious circumstance surrounding the execution thereof. The plaintiffs and defendant no.1 were not the children of the testatrix and therefore their exclusion does not amount to a suspicious circumstance. Similarly, it is a matter of common knowledge that surgery for breast cancer does not lead to impairment of mental faculties. The Will has been duly attested and its execution has been proved as laid down in the citations of **Dr. Prakash, Ruprao and Shirin (supra)**. Lastly, as far as the argument of the Ld. Advocate for the respondents regarding non-taking of objection under Order 1 Rule 13 of C.P.C. at the initial stage, the said line of argument is not relevant to the*

facts of the present case in as much as the objection of the defendant no.1 did not pertain to non-joinder or mis-joinder of parties. In view of the foregoing discussion, I am of the considered opinion that the learned Trial Court has erred in allowing the suit.”

18] Thus it is clear from para-14 of the judgment of the learned Lower Appellate Court that no proper reasoning has been assigned by the learned Lower Appellate Court while reversing the findings of the learned Trial Court. In that view of the matter, as the learned Lower Appellate Court has failed in its duty to consider and appreciate the complete oral as well as documentary evidence available on record and also reasons while reversing the findings recorded by the learned trial Court, I am of the considered view that the present matter needs to be remanded back to the learned Lower Appellate Court for a decision afresh. Accordingly, I have answered the substantial questions of law in the above terms. In the circumstances, I pass the following order:-

ORDER

a] Appeal is allowed.

- b] The judgment and decree dated 29/3/2019 passed in Regular Civil Appeal No. 65/2015 by District Judge-1, Wardha is hereby quashed and set aside.
- c] The appeal shall be restored to its original number.
- d] Parties shall appear before the learned Lower Appellate Court on 10/01/2022.
- e] The learned Lower Appellate Court is requested to decide the appeal by the end of July, 2022.
- f] No order as to costs.

[ANIL S. KILOR, J.]

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