

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

**SECOND APPEAL NO.317 OF 2018
AND
CIVIL APPLICATION NO.5893 OF 2018**

Raghunath s/o. Eknath Shelke,
Age:58 years, Occ. Agri.,
r/o. Wadegavhan, Tq.Parner,
Dist. Ahmednagar

..Appellant
(Orig. Deft. No.1)

Vs.

1. Leelabai w/o. Balasaheb Shelke,
Age:52 years, Occ. Nil,
r/o. Wadegavhan, Tq. Parner,
Dist. Ahmednagar

..(Orig. Plaintiff)

2. Ganesh s/o. Maroti Shelke,
Age:38 years, Occ. Agri.,
r/o. As above

3. Satish s/o. Maroti Shelke,
Age:34 years, Occ. Agri.,
r/o. As above

4. Bayadabai w/o. Maroti Shelke,
Age:53 years, Occ. Household,
r/o. As above

5. Sangeeta w/o. Mukund Kandekar,
Age:43 years, Occ. Household,
r/o. Narayan Gavahan, Tq. Parner,
Dist. Ahmednagar

6. Vastalabai w/o. Eknath Shelke (Died),
Through her L.Rs. are already on record

..Respondents
(Orig. Defendants)

Mr.S.B.Bhapkar, Advocate for appellant

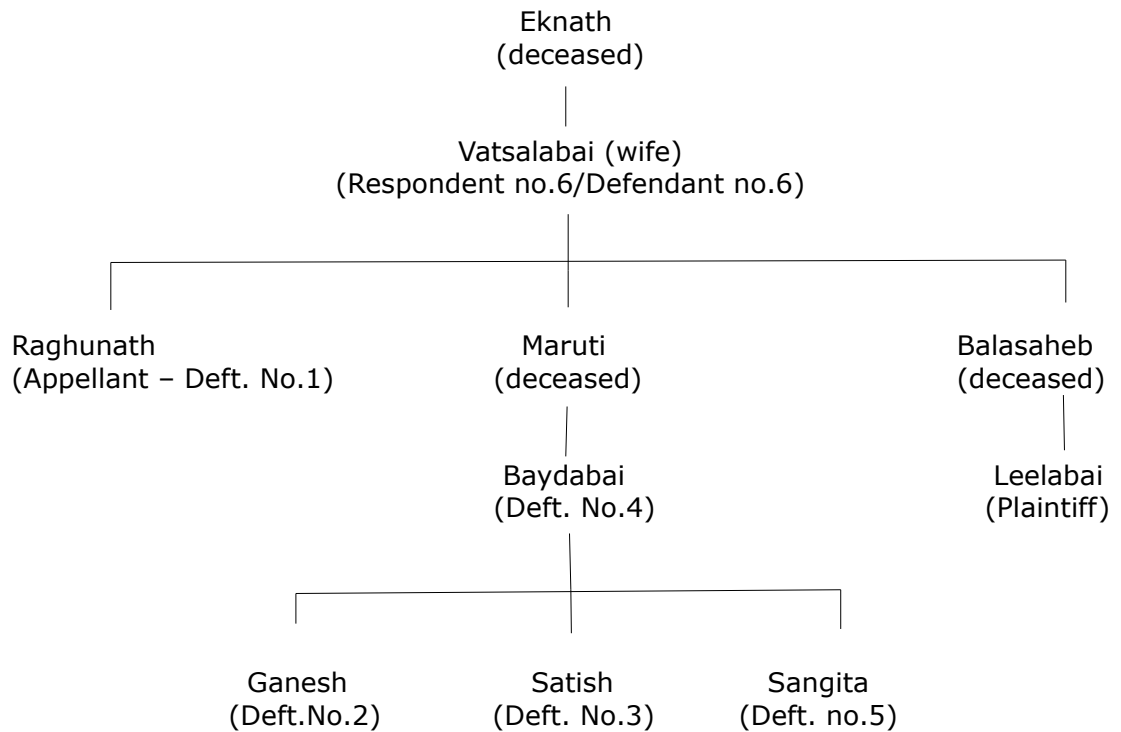
Mr.S.S.Bora, Advocate for respondent nos.1 to3 and 5

**CORAM : R.G. AVACHAT, J.
RESERVED ON : JUNE 27, 2022
PRONOUNCED ON : JULY 04, 2022**

ORDER :-

This is original defendant no.1's Second Appeal against the judgment and decree dated 21.07.2017 passed by learned Adhoc District Judge-4, Ahmednagar, in R.C.A. No.327 of 2014, whereby the judgment and decree dated 24.01.2012 passed by learned Civil Judge, Junior Division, Parner, Dist. Ahmednagar, in R.C.S. No.374 of 2002, came to be modified.

2. The facts in brief giving rise to this Second Appeal are as follows:-

PEDIGREE

3. The suit for partition and separate possession of the plaintiff's (respondent no.1 herein) share in the property specifically described in paragraph no.1 of the plaint was filed against her brother-in-law (Defendant no.1 herein), children and widow of deceased brother-in-law – Maroti (defendant nos.2 to 4/respondent nos.2 to 4 herein) and the mother-in-law (deceased) (defendant no.6).

Pending the suit, Vatsalabai, defendant no.6 executed a will on 06.03.2005 in favour of the appellant (defendant no.1) herein.

The trial Court decreed the suit holding the will to have been duly proved and declared the appellant/defendant no.1 to have 1/4th share in the suit properties by succession and 1/4th share by will executed by defendant no.6. It was also declared that the plaintiff on one hand and defendant nos.2 to 5 together on the other too have 1/4th share each.

4. The plaintiff and defendant nos.2 to 5/respondent nos.1 to 5 herein preferred first appeal (R.C.A. No.327 of 2014). Learned Ad-hoc District Judge-4, Ahmednagar, partly allowed the appeal holding the will to have not been duly proved. The reasons given by

the first appellate court in support of such findings are in paragraphs 22 to 23 and 26. The reasons in the aforesaid paragraphs are reproduced below:-

22. Defendant No.1 has filed on record the original will which is marked Exh.123. He examined witness Bapu Darekar to identify the signature of deceased defendant No.6 on the said will. But on perusal of his cross-examination, it is apparent that he knows nothing about the said document. He specifically admitted in his cross examination that he does not know as to on what document his signature was taken and what was the purpose of the said document. Hence, examination of witness Bapu Darekar proved futile to defendant No.1.

23. Defendant No.1 examined witness Santosh Gadhve, a petition writer who had scribed the will deed Exh.123. According to him he had taken the signature of vatsalabai on the said will and thereafter put his signature on it. But on perusal of his cross examination, it is apparent that the contents of the said will were written as per the say of defendant No.1. The said witness gave a clear admission in his cross examination that the contents of the said will were written by him as per the direction of defendant No.1. The said admission given by witness Santosh Gadhve creates a big doubt whether the said will was executed willfully, and on her own by deceased defendant No.6 without any pressure, force or undue influence.

26. The defendant No.1 has not examined any attesting witness to the will Exh.123. According to his Advocate the examination of petition writer Santosh Gadhve is as good as examination of an attesting witness of the will. According to him he is the witness who scribed the will as per the instructions of deceased defendant No.6 and so he is no less than an attesting witness. Further according to him plaintiff has no locus standi to challenge the said will as she is not a

beneficiary nor interested person. Further according to him defendant No.6, who was the mother of defendant No.1, executed the will out of love and affection. There is no suspicious circumstance in it as it is normal and natural for a mother to bequeath her property in favour of her son who is taking care of her. According to him on the above discussed grounds, examination of an attesting witness is not necessary.

5. *Locus Standi* of the plaintiff/respondent no.1 to challenge the will had also been taken exception to, on the ground that had defendant no.6 died intestate, the plaintiff/respondent no.1 would not have been one of the heirs to succeed to the estate of the deceased. Relying on Section 15 of the Hindu Succession Act, 1956, the first appellate Court negated said contention. Following two substantial questions of law, therefore, arise in this Second Appeal:-

- (i) Whether the first appellate Court was justified in negating the claim of the plaintiff/respondent no.1 to be legatee under the will dated 06.03.2005 on account of the will to have not been duly proved?
- (ii) Whether the first appellate Court was justified in holding the plaintiff/respondent no.1 to have *locus standi* to take exception to the will?

6. Heard learned counsel appearing for the parties.

7. Mr.S.B.Bhapkar, learned counsel for the appellant/defendant no.1, would submit that the scribe of the will, one of the attesting witness thereto besides official from the office of the Sub-Registrar whereat the will was executed, were examined in proof of the will. Learned counsel took me through the evidence of these witnesses, to ultimately submit that the judgment given by the first appellate court is inconsistent with the evidence on record and therefore, perverse one. On the second substantial question of law, learned counsel reiterated the reasons given by the trial Court.

8. Mr.S.S.Bora, learned counsel for the respondents (plaintiff and defendant nos.2 to 6), would, on the other hand, reiterated the reasons given by the first appellate court. According to him, the scribe of the will has given unequivocal admission, stating therein that the contents thereof were taken down on the direction of the appellant/defendant no.1, beneficiary under the will. The will has not been duly proved to have been executed by deceased defendant no.6. According to him, it has not been proved that the will was attested by two witnesses. In support of his contention, he relied on the Apex Court judgment in the case of **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, AIR 2003 SC 761.**

9. Considered the submissions advanced. Perused the judgments of both the Courts below.

Point No.1:-

10. In paragraph 4-B of the plaint, it has been averred a under :-

"४ब) मयत प्रतिवादी नंबर ६ वत्सलाबाई ही मयत होण्यापूर्वी साधारण ४ वर्षांपासून वाध्याक्यामुळे ती नेहमी आजारी असून बिछान्यावर पडून होती, तिला ऐकू येत नव्हते व बोलताही येत नव्हते व तिची सारासार विचार करण्याची मानसिक व बौद्धिक क्षमता नष्ट झालेली होती त्यामुळे प्रतिवादी नंबर ६ हिची आपण काय करतो किंवा काय करत नाही ह्याची विचार करण्याची विचारशक्ती नष्ट झालेली होती व तिचे मानसिक दौर्बल्याचा फायदा घेऊन तिला प्रतिवादी नंबर १ ने कशासाठी दुय्यम निबंधक कार्यालय, पारनेर येथे कशासाठी जावयाचे आहे याची काही एक माहिती होऊ न देता अगर मृत्युपत्रांतील काही एक मजकूर न सांगता तारीख ६/३/२००५ रोजीचे मृत्युपत्र करून घेतलेली आहे व त्यामुळे ते मृत्युपत्र रद्दबादल व बेकायदेशीर आहे व ते वादीवर बंधनकारक नाही असा ठराव करून मिळण्यासाठी वादीचा दावा असे"

The aforesaid averments indicate the plaintiff/respondent no.1 to have taken exception to the will dated 06.03.2005 as the same to have been got executed from deceased – Vatsalabai (defendant no.6).

11. Section 63 of the Indian Succession Act is as under:-

Execution of unprivileged wills.— Every testator, not being a soldier employed in an expedition or engaged

in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

12. It is true that a will has to be proved by propounder thereof. In the case in hand, the appellant/defendant no.1 claimed to be a legatee under the will executed by deceased - Vatsalabai. However, since the plaintiff came with a suit for declaration that the will executed by Vatsalabai in favour of the appellant herein, is illegal and liable to be revoked for reasons averred in paragraph 4-B of the plaint (supra), initial burden would always be on him to prove his case. The pleadings in paragraph 4-B, undoubtedly, indicate the plaintiff to have admitted execution of the will by Vatsalabai.

13. PW 3 – Bapu Darekar was one of the attesting witnesses to the will Exh.123. The will was shown to him. He acknowledged his signature appearing thereon. True, during his cross-examination, he admitted to have been unaware about nature of the document (Exh.123) on which his signature was obtained. It may, therefore, appear that the evidence of this witness is of little assistance to defendant no.1 (appellant). Admittedly, other attesting witness of the will was not examined. The question is, whether, in the facts and circumstances of the case, examination of the attesting witness and proof of factum of attestation of will by, at least, two persons, was necessary. During cross-examination of the appellant, it was suggested on behalf of the plaintiff that his relation with both the attesting witnesses to the will namely, Bhaskar and Bapu Darekar, have all along been cordial. This suggestion goes a long way to suggest respondent no.1/plaintiff to have admitted the will to have been attested by these two named persons.

14. PW 2 – Santosh was a professional bond writer. It is in his evidence that he scribed the will, obtained Vatsalabai's thumb impression thereon. True, during cross-examination, he testified that the contents of the will were narrated by the appellant herein. The first appellate court has made much capital of this admission.

15. Admittedly, the will has been executed and registered in the office of Sub-Registrar. It bears medical certificate given by Dr.Amul Zumbarlal certifying the deceased to have been physically and mentally fit to execute the will. Needles to mention, the factum of registration of documents carries with it presumption of the same to have been duly executed.

16. Considering the averments in paragraph 4-B of the plaint coupled with factum of the will to have been registered before the Sub-Registrar and suggestion to the appellant, during his cross-examination, that his relation with both the attesting witnesses to the will were cordial one, the first appellate Court ought not to have observed that second attesting witness to the will was not examined. It is reiterated that the burden to prove that defendant no.1 got executed the will from defendant no.6 - Vatsalabai, as has been averred in paragraph 4 of the plaint, did rest on the plaintiff/respondent no.1. There is evidence to suggest that the deceased and the plaintiff/respondent no.1 were residing in two different villages. True, distance between the two was not much. The admission given by the scribe that the contents of the will were given by the plaintiff, appears to be as a result of he have been won

over since the deceased – Vatsalabai executed the will in the office of Sub-Registrar and got it duly registered. When there was overwhelming evidence about due execution of the will, the first appellate Court ought not to have given much importance to a stray admission given by the scribe of the will, who had, in fact, in examination-in-chief, admitted to have had taken down the contents of the will on the instructions of the deceased Vatsalabai. For all the aforesaid reasons, the finding recorded by the trial Court holding the will to have not been duly proved is found to be perverse.

Point No.2:-

17. Admittedly, the plaintiff was widow of the predeceased son (Balasaheb) of Vatsalabai (testator). The pedigree would indicate that the plaintiff did not have issue (child). The appellant herein was one of the three sons of Vatsalabai. When the suit was filed, her two sons namely, Maroti and Balasaheb were no more. Defendant nos.2 to 5/respondent nos.2 to 5 (heirs of deceased Maroti) along with the appellant/plaintiff filed their common written statement, wherein the legal representatives of the deceased Maroti admitted execution of the will by late Vatsalabai in favour of the appellant herein. When the plaintiff amended the plaint introducing

paragraph 4-B therein and the appellant herein filed his counter thereto, other defendants namely, heirs of the deceased Maroti neither amended their written statement nor did they file their additional written statement taking exception to execution of the will. Moreover, when the appellant herein produced evidence in proof of the execution of the will, the same has not been taken exception to on their (defendant nos.2 to 5) behalf. As such, they shall be presumed to have admitted execution of the will in favour of the appellant herein.

18. The trial Court has specifically observed that defendant nos.2 to 5/respondent nos.2 to 5 had adopted the written statement filed by the appellant (defendant no.1), whereunder he had claimed to have been a legatee under the will executed by Vatsalabai (defendant no.6). The question was, therefore, how could these defendants were allowed to take exception to the decree passed by the trial Court.

19. Deceased – Vatsalabai died issueless. Her husband predeceased her. Succession to her property would have been governed by Section 15 of Hindu Succession Act. For better appreciation, Section 15 is reproduced as under:-

15. General rules of succession in the case of female Hindus.—

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

- (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

20. As per clause (a) of Section 15(1), property of Vatsalabai would have been inherited by her sons and daughters (including the children of any pre-deceased son or daughter). Here, the appellant herein and defendant nos.2 to 5/respondent nos.2 to 5 could have

inherited Vatsalabai's property had she died intestate. The plaintiff is widow of predeceased son of late Vatsalabai. This predeceased son did not have any issue. The plaintiff would, therefore, not have been successor to inherit, along with other parties to the suit, the property of late Vatsalabai. As such, it is not the question of plaintiff to have been disinherited under the will executed by Vatsalabai. The plaintiff/respondent no.1, therefore, did not have *locus standi* to take exception to the will. The trial Court, therefore, was right in so observing. The first appellate Court misread the provision of Section 15 of Hindu Succession Act, 1956.

21. For the aforesaid reasons, both the substantial questions of law are, therefore, answered in negative. Interference with the judgment and decree of the first appellate Court is, therefore, warranted.

- (i) In the result, the Second Appeal succeeds. The same is, therefore, allowed.
- (ii) The decree dated 21.07.2017 passed by learned Adhoc District Judge-4, Ahmednagar, in R.C.A. No.327 of 2014, is set aside.

- (iii) The decree dated 24.01.2012 passed by learned Civil Judge, Junior Division, Parner, Dist. Ahmednagar, in R.C.S. No.374 of 2002, is restored.
- (iv) In view of disposal of the appeal, Civil Application stands disposed of.
- (v) No costs.

[R.G. AVACHAT, J.]

KBP