

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.71 OF 2017
WITH
CIVIL APPLICATION NO. 273 OF 2017

1. Ravindra s/o. Mahadu Chaudhari, .. Appellants
Age. 53 years, Occ. Business & [original
Agriculture Def.Nos. 2
to 6]
2. Suresh s/o. Mahadu Chaudhari,
Age. 51 years, Occ. Business &
Agriculture
3. Chandrakant s/o. Mahadu Chaudhari,
Age.49 years, Occ. Agriculture &
Business, Nos.1 to 3 are R/o. Kusumba,
Taluka and District Dhule.
4. Smt.Lilabai w/o. Uttam Chaudhari,
Age 57 years, Occ. Household &
Agriculture, R/o. At Post Kapadane,
Taluka and District Dhule.
5. Smt.Anjanabai w/o. Madhukar Chaudhari,
(Baviskar), Age 55 years, Occ. Household,
& Agriculture, R/o. Kusumba,
Taluka and District Dhule.

Versus

1. Anil s/o. Mahadu Chaudhari, .. Respondents
Age 44 years, Occ. Service & [No.1 ori.
Agriculture, plaintiff &
Nos.2&3 Ori.
Def.Nos.1&7]
2. Smt. Yamunabai w/o. Mahadu Chaudhari,
Age 79 years, Occ. Household,

3. Smt.Sulochanabai Prakash Chaudhari,
Age 47 years, Occ. Service,
All R/o. Kusumba, Taluka and
District Dhule.

Mr.S.G. Chapalgaonkar h/f.Mr. Deepak D. Choudhari,
Advocate for the petitioners.

Mr.V.D. Hon, Sr. Counsel i/b. Mr.A.V. Hon, Advocate for
the respondents.

CORAM : VINAY JOSHI, J.
RESERVED ON : 13.01.2022
PRONOUNCED ON : 18.01.2022

J U D G M E N T :-

01. This appeal is directed against the judgment and order dated 30.06.2016 passed by the Jt. Civil Judge, Senior Division, Dhule in Special Civil Suit No.43 of 2016. Initially respondent No.1-Anil has preferred an application under section 276 of the Indian Succession Act, bearing probate application No.6 of 2012 applying for grant of probate in respect of will-deed dated 11.10.2011 executed by his father Mahadu Nago Chaudhari. By said will agricultural land bearing Block No.459/1 situated at village Khede, Dist. Dhule and rights to recover amount which would be derived under different

legal proceedings has been bequeathed in his favour. Since the probate application was resisted by some of the legal heirs of deceased Mahadu, it was converted into Special Civil Suit No.43 of 2016. The testator Mahadu died on 29.08.2012 leaving behind four sons, namely, Anil, Ravindra, Suresh, Chandrakant, three daughters namely, Leelabai, Anjanabai, Sulochanabai and widow namely, Yamunabai. Deceased Mahadu bequeathed his entire property in favour of his younger son Anil, in exclusion of all other legal heirs. The probate application was resisted by three sons, two daughters whilst widow of Mahadu – Yamunabai and one of the daughters – Sulochanabai supported Anil in grant of probate.

02. The facts of the case in brief are that, on 11.10.2011 in presence of two attesting witnesses Mahadu had executed a will disposing his movable and immovable property. The will was registered with the office of Joint Sub-Registrar, Dhule. The testator Mahadu died on 29.08.2012 i.e. after eight months from the execution of

will. It is case of propounder (Anil) that deceased Mahadu was working as a contractor. Initially, he had a partnership firm with his brothers. However, it was dissolved. There was mutual agreement between Mahadu and his brothers in which all the rights to recover money from the debtors were assigned to Mahadu. During old age for the period of near about 5 to 6 years preceding to his death, Mahadu and his wife Yamunabai were residing with Anil. During lifetime Mahadu had disposed his most of the movable and immovable property in favour of his all sons. Mahadu at his own expressed his desire to bequeath the subject property to Anil and accordingly at his behest registered will was executed by him in presence of two attesting witnesses.

03. The contesting appellants (defendants) have denied the very execution of will. It is denied that Mahadu had executed will during his lifetime. They denied that Mahadu was mentally and physically fit at the time of execution of will. According to defendants,

plaintiff Anil under guise of executing power of attorney on the same day fraudulently got executed document of will. It is submitted that there was improper disposition of the property which is a suspicious circumstance. Therefore, the suit for grant of probate was resisted.

04. In the Trial Court the parties led evidence. After appreciating the facts and various relevant circumstances, the Trial Court held that it was a genuine last will executed by the testator while in sound disposing state of mind and granted probate. The Trial Court has also framed issue – whether deceased Mahadu was having right to dispose the property? It reveals from the impugned judgment that at the behest of contesting defendants, said issue was framed and answered in the affirmative.

05. The learned Counsel appearing for the appellant (defendant) strongly assailed the impugned judgment by

stating that the will is suspicious. Mahadu was 88 years of age at the time of execution of will. He was not mentally and physically sound to execute the will. On the very day, Mahadu had executed a power of attorney in favour of plaintiff Anil authorizing him to attend the pending Court proceedings. It is argued that under guise of executing power of attorney, plaintiff – Anil by misrepresenting his old aged father Mahadu also got executed the document of will. It is argued that within one year Mahadu died and therefore this circumstance also speaks that Mahadu was not in a sound disposing state of mind at the time of execution and registration of will.

06. It is submitted that medical fitness certificate annexed to the will was dated 07.10.2011 i.e. four days prior to the execution of will. According to the defendant, in absence of evidence of Medical Officer, it is difficult to hold that Mahadu was in a fit state of mind. It is the contention that the very circumstance that entire property was bequeathed to only one son

excluding other three sons, three daughters itself is suspicious circumstance. Besides that it is argued that it was not within the domain of the Trial Court to examine the issue whether the testator had legal right to bequeath the property and therefore the said finding requires to be quashed.

07. Heard both sides exhaustively and examined the record and proceedings. Admittedly, testator Mahadu was survived by three sons, three daughters and a widow. It is not in dispute that Mahadu was a contractor and had handsome income from his business. The disputed will is a registered document which is annexed with medical certificate issued by Civil Surgeon, Dhule about mental fitness of Mahadu. Undoubtedly, onus lies on propounder to establish genuineness of will. In this regard plaintiff Anil led evidence on affidavit at Exh.40. It is his specific evidence that at the instance of Mahadu the document of will was got typed. The stamp paper for will was purchased by testator. In presence of two

attesting witnesses, namely, Bhagwan Chaudhari and Pundlik Pardeshi, Mahadu has signed the will after reading the contents. He deposed that at the time of executing will Mahadu was mentally and physically fit. It was a last will executed by Mahadu.

08. In support of said contention, plaintiff Anil has examined one of the attesting witnesses PW-2 Pundlik Pardeshi at Exh.87. It is his evidence that at the time of execution of will, the testator put his signature in his presence. He has signed the will in presence of testator as well as another attesting witness also signed on the will in his presence and before testator. He has seen testator signing on will and identified the signature of testator as well as another attesting witnesses. During cross-examination this witness has explained that at the time of executing will, Mahadu was maintaining sound health and capable of executing will. Pertinent to note that this witness was 75 years of age which supports his evidence that he was well acquainted

with deceased Mahadu since long. It has come in his evidence that Mahadu was running one social and cultural organization of which Mahadu was President and he was Secretary. Therefore, it is quite natural that he was summoned by Mahadu being a man of confidence for execution of will.

09. It is argued that despite objection raised about ill-health of Mahadu, the plaintiff has not examined Medical Officer. It requires to be noted that examination of Medical Officer is not a *sine qua non* to prove the document of will. The evidence of plaintiff as well as attesting witness is sufficient and convincing about the sound and mental fitness of Mahadu at the time of execution of will. Moreover, the will was registered in the office of Sub-Registrar. It has also come in the evidence that the Sub-Registrar has verified the contents with the testator at the time of its execution. Therefore, there is no substance in the contention that non-examination of Medical Officer is fatal to the

plaintiff's case.

10. It is argued that since the property was bequeathed to one of the son leaving other three sons and three daughters, it is suspicious circumstance. In fact the nature of document of will is that it diverts the natural course of succession. In other words, the very purpose of will is to dispose the property against the natural course of succession. However, the beneficiary must offer a plausible explanation for divesting other natural legal heirs. In this regard it has come in the evidence that during last 5-6 years, Mahadu and his wife were residing with plaintiff Anil. The document of will itself bears recitals that testator Mahadu was staying with Anil who was taking his care in old age. There is reference in the will that during lifetime Mahadu has assigned movable and immovable property to his other sons. The testator expressed in the will that he made arrangement of other sons who started residing separately and living happily. The will bears reference that

plaintiff Anil is assisting him in court proceeding. Anil has also spent for that purpose. There is also reference that Anil has also satisfied some of the private loans incurred by testator Mahadu. Moreover, the testator expressed that he was sure that in future also Anil and his wife would take his care properly. The said recital itself speaks that the testator was having close relations with Anil, who was maintaining and assisting him in old age. In the circumstances, it is quite natural for testator to have love and affection towards Anil as they were residing together. Moreover, it is not denied that some of the properties were already distributed to other sons and therefore bequeath in favour of one of the son cannot be treated as suspicious circumstance to doubt the genuineness of will.

11. Besides that it reveals from the record that the relations of testator Mahadu with his other sons were not cordial. It is a matter of record that admittedly, during lifetime Mahadu had filed a Special Civil Suit

No.445 of 2012 for injunction against his son Chandrakant. Moreover, it has come in the evidence that disinherited three sons of Mahadu, namely, Ravindra, Suresh and Chandrakant had filed RCS No.541 of 2012 against Mahadu and Anil for declaration and injunction. Copies of these civil proceedings produced on record by itself reaffirms that relations of Mahadu were not cordial with his other three sons whilst Anil was with Mahadu. Therefore, there is no reason to doubt the genuineness of will on the aspect of disinheriting other legal heirs. So far as daughters of Mahadu are concerned, the will bears reference that he had already spent and performed marriages of all three daughters who are residing at their matrimonial houses. In view of that the submission in this regard bears no substance at all.

12. It is pertinent to note that defendant No.1 Yamunabai i.e. widow of Mahadu as well as one of the daughter Sulochanabai have supported the plaintiff's

claim by affirming that Mahadu had executed a will during his life time. Moreover, they asserted that in last days, Mahadu and Yamunabai were residing with Anil. It requires to be noted that Yamunabai and Sulochana have supported the plaintiff claimed against their interest, which is a matter for consideration.

13. Next submission is about execution of power of attorney by Mahadu on the same date. Admittedly, on the date of execution of will i.e. on 11.10.2011 Mahadu had also executed a power of attorney (Exh.52) authorizing Anil to attend various Court proceedings initiated by him. Admittedly, during lifetime Mahadu has instituted various recovery suits. Some of which are pending whilst he had filed some execution proceedings which are in process. In this regard Mahadu has authorized his son Anil to look after all the Court proceedings, on the strength of said power of attorney. In that regard it is argued that since both the documents were registered on the very day, it creates suspicion

that under guise of executing power of attorney, Anil has also got registered document of will by misrepresentation. In view of the specific evidence of plaintiff Anil and attesting witness, it is difficult to accept said submission. Moreover, admittedly, Mahadu was a wise businessman. He had explained all the circumstances in the document of will itself. Naturally, due to his extreme old age, he was worried about pending Court proceedings for which he has authorized Anil to do the things. The matter can be looked from one another angle that since Mahadu was intending to assign his all the property to Anil, he has executed will and simultaneously also executed power of attorney authorizing him to look after the Court proceedings. Thus, these simultaneous documents on the other hand assists to infer that Mahadu had full confidence on his son Anil. Therefore, he had bequeathed in his favour as well as executed power of attorney.

14. It is settled law that in case of a will, Court

must be satisfied that the will in question was executed by testator and it is a product of free volition of the executor who had voluntarily executed the same after knowing and understanding contents of will. The propounder i.e. Anil has successfully dispelled all the circumstances which are tried to be shoved against him. It is the duty of the Court to honour wishes of a dying man by considering entire circumstances. It reveals that during fag-end of life Mahadu was living with his younger son Anil, who was assisting him in all manner. Mahadu had confidence in his son and therefore had love and affection towards Anil and his wife. Moreover, during lifetime Mahadu had also assigned some properties to other sons. Besides that the attesting witness has specifically led evidence about due execution and attestation of the will. The document of will is supported by a medical certificate issued by the Civil Surgeon and it is a registered document. Moreover, there is evidence that civil litigation was pending between testator Mahadu and his other sons showing that their

relations were not cordial. Therefore, I fully agree with the view expressed by the Trial Court that it was a last and genuine will executed by deceased Mahadu.

15. It takes me to consider one another aspect which unnecessarily emerges in the proceeding. In probate proceeding the Trial Court has framed issue No.3 in the form that – whether testator was having right to dispose of the property by way of will? In other words, the issue regarding authority or title of testator was framed as well as answered by the Trial Court. In this regard, the learned Counsel for the appellants (defendants) submitted that the Trial Court has exceeded its jurisdiction by deciding the issue of title. In support of said contention he relied on the decisions of this Court in the cases of Baban Rambhau Jagdale Vs. Hanmant Rambhau Jagdale, 2003(1) ALL MR 145 and Ratnaprabha w/o. Digambar Nemade and Ors. Vs. Kisan s/o. Laxmanrao Deshmukh, 2015(6) Mh.L.J.345. No doubt, this Court has reiterated the legal position that it is not the domain

of probate Court to consider and decide the issue of title of the testator of the property with which the will propounded purports to deal. It is clarified that the only question which the Court is called upon to determine is – whether the will is true or not and it is not the province of the Court to determine any question of title with reference to the property covered by the will.

16. There can be no dispute about said legal proposition. However, the learned Counsel appearing for the respondent/plaintiff took me through para 7 of the judgment to contend that the issue of title was framed at the behest of the appellant/defendant. He would submit that initially the Trial Court has not framed the issue of title. However, at the request of the defendant said issue was framed and decided. The record indicates that initially the issue of title was not framed. The Trial Court has specifically referred in para 7 of the judgment that the defendant has urged to frame the issue of title on which upon consultation of both sides, such issue was

framed and taken for decision.

17. The learned Counsel for the appellant submitted that though the facts are so, however, the finding on the issue of title was uncalled or beyond the scope of probate Court. Therefore, it is to be set aside. He would submit that already the defendant has filed substantive suit for partition in which the issue of title is in question. Therefore, he urged for setting aside the finding of title recorded by the Trial Court.

18. It is settled law that a Court of Probate is only concerned with the question as to whether the document put forward is the last will and testament of deceased person was duly executed and attested and whether at the time of execution the testator has sound disposing mind. Obviously, the question whether a particular bequeath is good or bad is not within the purview of the Probate Court. However, in case at hand already Probate Court has framed the issue as well as

ventured into deciding the same. Since the issue of title was out side the scope of Probate Court, even if, it was framed at the behest of defendant, the principle of estople would not apply against the legal position. The Probate Court is concerned with examining validity of will only.

19. These are the two separate aspects, one about validity of the will and second about title and interest of the testator to dispose the property. Always the issue of title which is of comprehensive nature has to be dealt by Civil Court having competent jurisdiction. The Court dealing Probate proceeding has limited jurisdiction in terms of the Succession Act, which is self-contained Code. The question of title is a question of facts which is intricate and requires to be dealt in appropriate proceeding.

20. Though the trial Court has framed issue of title, however, it was not directly and substantially in

issue in Probate Proceeding. The finding recorded by the trial Court while deciding the core issue was unwarranted. One can profitably refer to the decision of the Supreme Court in the case of Madhvi Amma Bhawani Amma and Others Vs. Kunjikutty Pillai Meenakshi Pillai and Others (2000) 6 SCC 301, wherein, it is expressed that any adjudication made while issuing succession certificate does not bar raising same question in subsequent substantial suit or proceedings. Certainly the nature of Probate Proceeding falls on the same line and therefore, finding recorded by the trial Court, which is outside of the proceedings has no effect. In view of that, certain clarification is needed.

21. In view of above, on re-examination of entire material I fully agree with the view expressed by the trial Court that the questioned will was the last will of the testator executed by the testator while in a sound disposing state of mind and therefore the plaintiff was entitled for issuance of probate. In view of that the

appeal calls no interference to the extent of said finding. However, while parting with the judgment I may clarify that the findings recorded by the trial Court vide issue No. 3, regarding title of the property has no effect on the substantive proceeding between the parties.

22. The appeal stands disposed of in above terms. Pending Civil Application stands disposed of.

[VINAY JOSHI,J.]