

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

SECOND APPEAL NO. 373 OF 2017

APPELLANT: Suryabhan Rajaramji Hedao,
Org.Deft aged about 68 years, Occ. Retired,
 R/o. Ramsumerbaba Nagar, Kawarpeth,
 Nagpur.

...VERSUS...

RESPONDENTS: 1. Narendra Rajaramji Hedao,
Org.Plffs aged about 46 years, Occ. Private,

2. Smt. Meerabai wd/o Prakash Hedao,
aged about 46 years, Occ. Household,

3. Ku. Reshma d/o Prakash Hedao,
aged about 24 years, Occ. Student.

4. Ku. Madhuri d/o Prakash Hedao,
aged about 22 years, Occ. Student.

5. Ku. Venu d/o Prakash Hedao,
aged about 20 years, Occ. Student.

Respondent Nos. 1 to 5 all resident of
c/o. Anil Jangluji Bokades House,
Plot No. 354, Juni Mangalwari,
Near Chiteshwar Temple, Nagpur.

6. Smt. Chhabibai Chandrabhan Hedao,
Aged about 52 years, Occ. Housewife.

7. Devendra Chandrabhan Hedao,
aged about 32 years, Occ. Private,

8. Sandip Chandrabhan Hedao,
aged about 30 years, Occ. Private.

9. Rahul Chandrabhan Hadaoo,
aged about 28 years, Occ. Private.

10. Ku. Hemlata Chandrabhan Hedaoo,
aged about 25 years, Occ. Student,

Respondent Nos. 6 to 10 resident of
Mattipura, Juni Mangalwari, Nagpur.

11. Trambak Rajaramji Hedaoo,
aged about 51 years, Occ. Private,
Tandapeth, Ladpura, Swaminagar,
Nagpur.

12. Smt. Indubai w/o Mahadeorao Khapecar,
aged about 57 years, Occ. Housewife,
R/o. C/o. Janabai Ganpat Ramtekekar,
Juni Mangalwari, Telephone Exchange Road,
Talewar Mohalla, Nagpur.

13. Smt. Shashibai Morbaji Nanadanwar,
aged about 54 years, Occ. Housewife,
Tandapeth, Ladpura, Swaminagar,
Nagpur.

Shri M.K.Mishra, Advocate for the appellant.

Mr. N.V.Fulzele, Advocate for respondent Nos. 1 and 6 to 11.

None for other respondents.

CORAM : AVINASH G. GHAROTE, J.

DATE : 15/09/2022.

1] Heard Mr. Mishra, learned counsel for the appellant and
Mr. Fulzele, learned counsel for respondent Nos. 1 and 6 to 11. None
appears for other respondents, though served.

2] This Court by the order dated 7.07.2017 had framed the following substantial question of law.

Whether in the light of evidence on record, the appellate Court was legally justified in reversing the finding with regard to validity of the Will dated 24th March, 2004, executed in favour of the appellant?

3] **Admit** on the aforesaid substantial question of law.

Mr. Fulzele, learned counsel for the respondent Nos.1 and 6 to 11 waives service of notice.

Heard finally by the consent of the learned counsels appearing for the parties.

4] Regular Civil Suit No. 59/2011 was filed by the respondents herein, claiming a declaration, that the Will dated 24.3.04 executed by Tulsabai, their mother, bequeathing immovable property bearing Plot No.40, situated at Mouza Binaki, admeasuring 2300 sq.ft., in favour of one of her sons, namely Suryabhan (Defendant No.1), the appellant herein, was null and void and therefore, was required to be cancelled.

5] Before the learned trial Court, the plaintiff had examined himself as well as two more witnesses i.e. PW-2 Morba Nandeshwar and PW-3 Dr. Falodiya, who had issued a certificate at Exh.37 stating that Tulsabai was under his treatment and unfit to have executed a Will. On behalf of the defendant Suryabhan examined himself as DW-1 and one of the attesting witness to the Will namely Narendra Sastrakar as DW-2 at Exh.46.

6] The learned trial Court by its judgment dated 18.6.2014 dismissed the suit, holding that the execution of the Will was duly proved and there was no infirmity thereof.

7] The learned appellate Court by the impugned judgment dated 14.12.2016 has reversed the judgment of the learned trial Court and has set aside the decree and declared that the Will dated 24.3.2004 executed in favour of the defendant to be null and void.

8] Mr. Mishra, learned counsel for the appellant submits that since the Will dated 24.3.2004 was a registered Will, the presumption of law of its due execution was attracted in view of the

fact that the attesting witness was examined at Exh. 46 and has deposed in consonance with Tulsabai having executed the Will. The intervention of the defendant Suryabhan was only to the extent of taking Tulsabai to the office of the Sub Registrar. He further submits that the evidence of PW-3 Dr. Falodiya, as well as the certificate at Exh.37 was of no use, as the same was issued one year after the demise of Tulsabai, apart from which the only ailment which Tulabai was claimed to have been suffering was hypertension, paralysis and old age. He therefore submits that the participation in the matter of execution of the Will ought to be demonstrated to be of such a nature as to indicate an influence by the beneficiaries in the execution of the Will, which element is absent in the instant matter. He therefore submits that the learned appellate Court has erred in passing the impugned judgment and declaring the Will to be null and void.

9] Mr.Fulzele, learned counsel for the respondents (original plaintiffs) supports the judgment of the learned appellate Court and contends that the evidence of PW-3 Dr. Falodiya was more than sufficient to indicate a mentally unstable condition of Tulsabai,

who was an illiterate lady in the matter of execution of the Will. He further submits that since the defendant was the person who had taken Tulsabai to the office of Sub Registrar along with his relatives, that would be circumstance enough to indicate his participation in the matter of execution of the Will, which would vitiate the execution itself. He therefore submits that the learned appellate Court was correct in holding that the Will in question was null and void.

10] The Will was executed on 24.3.2004 by Tulsabai and is a registered document at Exh.47. Tulsabai passed away on 4.1.2010, that is nearly a period of six years after the execution of the Will. Though at the time of the execution of the Will, her age is claimed to be of 90 years, the certificate Exh.37 issued by Dr. Falodiya PW-3 (page 104 of the pursis dated 28.10.2021) would indicate that she was suffering from hypertention, paralysis and old age. Though the certificate indicates that she was suffering from paralysis, the certificate does not indicate what was the nature of the paralysis and to which part of the body, it had affected. It would therefore be apparent that the certificate dated 25.12.2010 at Exh.37 is a

generalized certificate issued by the doctor, that too nearly about 9 months after the demise of Tulsabai. The certificate also does not dilate upon any mental incapacity of Tulsabai or her capacity to execute the Will. The evidence of PW-3 Dr. Falodiya at Exh.36 only states that she was physically unfit and does not speak anything about her mental condition and capability regarding execution of the Will. In the cross examination, PW-3 Dr. Falodiya says that he was Ayurvedic Graduate and Exh. 37 was issued by him on the request of the plaintiff. It is thus apparent that neither Exh. 37 nor deposition of PW-3 in any way reflect upon the mental condition or capability of Tulsabai in executing the Will. The evidence of PW-2 Morba Nandwar is as vague as possible and does not assist the plaintiff in any manner, apart from the fact that he was an interested witness, being the husband of the plaintiff No.13. PW-1 the plaintiff has reiterated the plaint averments. In his cross examination, he admitted that in the year 1995 when Tulsabai, his mother, was residing with him, she had executed a Will of the suit property in his favour, which would indicate that Tulsabai was aware of the manner of execution of a Will and so also its effect.

11] It is thus apparent that the evidence on behalf of the plaintiffs does not assist them in any way in proving that the execution of the Will was in any manner fraudulent. Even the appellate Court in its judgment dated 14.12.2016, in para 35 has accepted the execution of the Will by Tulsabai, holding that Tulsabai had signed the Will. In this context, the evidence of DW-2 Narendra Sastrakar, the attesting witness becomes material. DW-2 was examined at Exh.46 (page 66 of the pursis dated 28.10.2021), in which he affirms that Tulsabai was his neighbour and therefore he was knowing her and he was called by Tulsabai for the purpose of execution of her Will. He asserts that the Will was drafted by the scribe Mr. Moundekar and the same was thereafter read over and explained to Tulsabai and him, whereupon Tulsabai had asserted that the contents were correct, thereafter they had all gone to the office of the Sub Registrar, whereupon the Will was again read over to Tulsabai and thereafter she had put her thumb impression, after which the DW-2 as well as another attesting witness Mr.Dhakate had put their signatures. The formalities of registration were completed thereupon. In the cross examination, it has been specifically stated by him that in the office of the Sub Registrar, the defendant or his

daughter were not present. He also claims ignorance, regarding the description of the property in the Will or the number of pages in which the Will ran into, however, apart from that nothing has been brought out in his cross examination to disprove the execution of the Will and as indicated above, even the learned appellate Court has rendered a finding that the Will was properly executed.

12] Two grounds on which the learned appellant Court has upset the Will are (i) the so called participation of the defendant in the execution of the Will and (ii) the evidence of PW-3 Dr. Falodiya.

13] In so far as the evidence of Dr. Falodiya PW-3 is concerned, the discussion made above would indicate that his evidence is of no assistance to the plaintiff to shed any light upon the execution of the Will or the mental condition of Tulsabai at the time of execution of the Will and therefore the certificate at Exh. 37 which was issued by him 9 months after the demise of Tulsabai can not be relied upon, considering its vagueness as well as absence of anything stated therein, regarding her mental condition or capacity to execute the Will. In his evidence of PW-3 Dr. Falodiya at Exh. 36, nothing is brought out regarding the mental condition of Tulsabai or

any incapacity in her at that point of time to execute and register the Will. That being the position the learned appellate Court could not have relied upon the testimony of PW-3 Dr. Falodiya to hold that the Will was null and void.

14] The next point relates to the so called participation of the defendant in the matter of execution of the Will. The evidence of DW-1 merely indicates that the nature of his participation was only to the extent of reaching Tulsabai to the office of the Sub Registrar, and nothing else. The Evidence of DW-2 Narendra Shastrakar categorically indicates that at the time of execution and registration of the Will at the office of Sub Registrar, neither the defendant nor his daughter were present. It is thus apparent that the plaintiffs have not brought anything on record to indicate that the participation of the defendant in the execution of the Will was of such a nature so as to indicate any influence upon the executant namely Tulsabai. The question of depriving his daughters and son of any right in the property has to be looked into in the background of the earlier Will dt 15.5.1995, claimed to have been executed and registered by Tulsabai, which also does not make any bequest of plot no. 40 in

favour of his daughters, but only to the plaintiff no.1. It is therefore apparent that all throughout Tulsabai was well aware of the nature, effect and import of her action in executing the Will and so also making a bequest of the property being plot no.40 being owned by her.

15] That being the position, in my considered opinion the impugned judgment of the learned appellate Court cannot be sustained and is hereby quashed and set aside. The substantial question of law framed on 7.7.2017 is hereby answered holding that the appellate Court was not legally justified in reversing the finding with regard to the validity of the Will dated 24.3.2004 executed in favour of the appellant. The judgment of the learned trial Court stands restored. The second appeal is accordingly allowed. No costs.

JUDGE

Rvjalit

Digitally sign byRAJESH
VASANTRAO JALIT
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