

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

FIRST APPEAL NO. 305 OF 2005

1. Kantilal S/o Chhotalal Patel (**Dead**)
Aged about 68 years,
Occu. Business,

LRs of Appellant No.1

- 1(1) Smt. Lalitaben Kantilal Patel (Wife)
Aged about 82 yrs, Occ.: Household,
- 1(2) Smt. Ranjanben Rameshlal Patel
(Daughter),
R/o Sunil Co-operative Housing
Society, Above Kans, Isanpur,
Ahemdabad.
- 1(3) Smt. Sudhaben Patel (Daughter),
Aged about 47 yrs, Occ:Household,
R/o At Post Khadana, Tq. Petlad,
District : Anand, Gujrat.
- 1(4) Shri Umesh Kantilal Patel (Son),
Aged about 54 yrs, Occ: Business,
R/o Opposite Gandhi Chouk,
Main Road Khamgaon 444303.
- 1(5) Smt. KalpanaHarnish Patel
(Daughter),
Aged about 50 yrs, Occ: Household,
R/o Desplain, ILL, Chicago-USA.
- (Amendment carried
out as per Court
order dt.4/6/19.)
2. Naginbhai S/o Chhotalal Patel,
Aged about 56 years, Occ. Business

Both the appellants are resident
Of Main Road, Khamgaon,
Tq. Khamgaon, Distrcit:Buldhana.

3. M/s Dhanvantari Tobacco Products,
Through its Partner
Kantilal Chhotlalal Patel,
Resident of Main Road, Khamgaon,
Tq. Khamgaon, Distt. Buldhana.

APPELLANTS
(Org.Deft.Nos.1, 2 & 7)

// VERSUS //

- 1] Madhuben W/o Kanubhai Patel,
Aged about 50 years,
Occu. Household Resident of C/o
Aasam Tea and Tabacco Company,
Near Kedar Talkies, Warud,
Tq. Warud, District - Amravati. (Org. Plff. No.1)

- 2] Jasodaben W/o Jasbhai Patel,
Aged : 53 years, Occu.Household,
Resident of 7 Mandar Apartment,
Swati Panch Rasta, Near UCO Bank,
Navrangpura, Ahmedabad,
Tq. & Distt. Ahmedabad (Gujrat) (Org. Plff. No.2)

- 3] Purushottam S/o Chhotabhai Patel
(Dead), Aged 64 years,
Occu. Business. (Org. Deft. Nos.3)

- 3(1) Keshav Purushottambhai Patel
(Son), Aged about 57 years,
Occ. : Business.

- 3(2) Jagdish Purushottambhai Patel,
(Son) Aged about 53 years,
Occ : Business.

- 3(3) Jitesh Purushottambhai Patel,
(Son), Aged about 42 years,
Occ : Business,

All Resident of Mangal Tea,
Opp. Mohan Talkies, Main Road,
Khamgaon, Tah. Khamgaon,
District - Buldhana.

(Amended as per Courts
order dt. 24.08.2018)

- 4] Rmeshbhai S/o Chhotabhai Patel,
Aged 58 years, Occu. Business,

Respondent Nos.3 and 4 are
Resident of C/o Mangal Tee Depot,
Near School No.1, Khamgaon, Tq.
Khamgaon, Distt. Buldhana.

- 5] Smt. Chanchanben wd/o Chhotabhai
Patel, Since Dead Through L.R.

- 5A) Shardaben w/o Ishwarbhai Patel,
R/o C/o Patel Traders, Station
Road, At Post Sarangpur,
District : Rajgarh, (M.P.)

- 6] Central Bank of India,
Khamgaon, Through its Branch
Manager, Jalalpura, Main Road,
Khamgaon, Tq. Khamgaon,
Distt. Buldhana.

Ms. Deepali V. Sapkal, Advocate for appellants.
Shri A. V. Bhide, Advocate for respondent Nos.1 and 2.

CORAM: V. G. BISHT, J.

JUDGMENT RESERVED ON : 07/03/2022.
JUDGMENT PRONOUNCED ON : 21/03/2022.

JUDGMENT :

1. This First Appeal is directed against the Judgment and order dated 16/04/2005 passed by the Civil Judge, Senior Division, Khamgaon in Probate Case No.7/1993. The petition for probate was preferred by respondent Nos.1 and 2, who are

daughters, applying for probate in respect of Will dated 22/10/1991 executed by their father Chhotalal Patel, who died on 13/05/1992 at Khamgaon, whereunder various movable and immovable properties, as per Schedule-A, B and C, annexed to the probate petition, have been bequeathed in their favour.

2. According to respondent Nos.1 and 2, all the abovesaid movable and immovable properties were owned by their father as owner and the same were bequeathed in their favour by registered Will dated 22/10/1991. Therefore, they prayed for issuance of probate in their favour.

3. The said petition was resisted by the appellants. They denied that their father personally owned any movable or immovable property either at Khamgaon or at Jalundh, Tq. Khambhat, Dist. Khede in the State of Gujarat. According to them, properties were held by the deceased - father as Karta of Joint Hindu Family consisting of themselves along with others. The other properties acquired by the deceased - father were the result of the joint acquisition and joint labour of deceased, appellants and others. Some of the properties were also partitioned during their life time and the same was acted upon.

4. As far as Will is concerned, according to the appellants, no such Will was ever executed by their father as he had no right to execute any Will. Moreover, the deceased was incompetent to physically and mentally execute the Will. The said document is the result of fraud practised by respondent Nos.3 & 4. Therefore, they sought dismissal of the probate petition.

5. It appears from the record that respondent Nos.3 and 5 admitted the contents of probate petition and gave their no objection, if probate claimed by respondent Nos.1 and 2 is granted. It appears that during the pendency of the proceedings, respondent No.5 died and her legal representatives were brought on record. Out of them, respondent Nos.5-A filed his written statement (Exh.75) and supported the reply filed by the appellants herein.

6. On the basis of pleadings filed before the learned Trial Judge, the learned Trial Judge framed various issues on the point of ownership of the properties and execution of Will in question. The learned Trial Judge answered the issues pertaining to the Will and the nature of property in favour of respondent

Nos.1 and 2 that is to say the learned Judge held that the properties in question were the self-acquired property of deceased-Chhotalal and that he bequeathed the same in favour of respondent Nos.1 and 2. Accordingly, learned Trial Judge allowed the probate petition and directed issuance of Probate Certificate after compliance of Section 291 of the Indian Succession Act, 1925 (Hereinafter referred to as "the Act") and on payment of Court fees. This decision is challenged by the appellants by way of present First Appeal.

7. Before I enter into the controversy in respect of execution of Will in question, I may point out that the title or ownership of the deceased in respect of properties that is the subject matter of the Will could not have been gone into by the learned Trial Judge. The Hon'ble Apex Court in the case of Chiranjilal Shrilal Goenka (Deceased) through LRs Vrs. Jasjit Singh and others, reported in (1993) 2 SCC 507 ; 1993 AIR SCW 1439 has held that the grant of probate with a copy of Will annexed establishes conclusively as to the appointment of Executor and the valid execution of the Will. The Probate Court does not decide any question of title or of existence of properties itself. It may also be noted that in the Judgment of Baban Rambhau Jagdale Vrs.

Hanmant Rambhau Jagdale, reported in **2003 (1) Mh.L.J. 113**, it is held that it is well settled law that it is not the duty of Probate Court to consider any issue as to the title of the testator to the property with which the Will propounded purports to deal.

8. Interestingly, although learned Trial Judge did go through the Judgment of this Court in the case of **Baban Jagdale (supra)**, the learned Trial Judge still went ahead in deciding the title of the properties which are subject matter of the Will. In my view, the learned Trial Judge should not and could not have gone into that aspect.

9. Be that as it may, Ms. Deepali Sapkal, learned counsel for the appellants vehemently submits before me that the Will in question is not proved by respondent Nos.1 and 2 in accordance with law and have not been able to remove suspicious circumstances surrounding the execution of the Will by leading cogent and satisfactory evidence. They have simply failed to discharge their burden of execution of Will by proving all the essential requisites required for proving the Will. Therefore, on this ground alone, the impugned Judgment and order needs to be quashed and set aside.

10. Learned counsel then next submits that the probate was wrongly issued by overlooking the provisions of the Act and there was no necessity at all to issue the probate keeping in mind the requirements of Section 57 read with Section 213 of the Act. Thus, for all these reasons, the appeal deserves to be allowed, argued learned counsel for the appellants. Learned counsel for the appellants placed reliance in Janki Narayan Bhoir Vrs. Narayan Namdeo Kadam, reported in (2003) 2 SUPREME COURT CASES 91, Jyoti w/o Jagdish Singhai Vrs. State of Maharashtra, reported in 1979 Mh. L. J. 308 and Bhagwanji Karsanbhai Rathod Vrs. Surajmal Anandraj Mehta, reported in 2004 (1) Mh. L. J.

11. Mr. A. V. Bhide, learned counsel for respondent Nos.1 and 2, on the other hand, submits that the execution of Will is duly proved by adducing cogent and convincing evidence by the respondents - plaintiffs. The learned counsel invited my attention to the Paragraph Nos.17 to 20 of the impugned Judgment and order and would submit that learned trial Judge was right in granting the Probate Certificate.

12. Having considered the abovesaid submissions made by the learned counsel for the appellants and learned counsel for respondent Nos.1 and 2 and after going through the record of the case, the following point would arise for my consideration.

[i] "Whether respondent Nos.1 and 2 (original plaintiffs) have proved that deceased - Chhotalal bequeathed all the properties as per Schedules attached to the plaint in their favour by Will dated 22/10/1991.?

[ii] If answer to the first point is in affirmative, then whether the Khamgaon Court had jurisdiction to grant probate.?"

13. The mode of proving the Will does not ordinarily differ from that of proving of any other document except the special circumstances as incorporated in Section 63 of the Act. The existence of suspicious circumstances makes the onus of proof very heavy and such circumstances are required to be removed by the propounder before the document is accepted as a last Will of the testator.

14. In the instant case, both the respondents (plaintiffs) examined themselves in support of their case. They

deposed about various properties owned by deceased - father and about the execution of Will in their favour by their late father whereby according to them, he bequeathed his entire properties as per the details given in the Schedule annexed to the plaint in their favour. In support of their case, they also examined attesting witness, namely, Laxman Jitmal Chandak (Exh.86).

15. At the outset, it may be noted that out of two attesting witnesses, the only witness Laxman Chandak has been examined by respondent Nos.1 and 2 (plaintiffs) in order to prove the execution of Will.

16. In the case of Janki Narayan Bhoir (supra), the Hon'ble Supreme Court in Paragraph Nos.9 and 10 held as under :-

"9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness

alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of

attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

17. Attesting witness - Laxman Chandak states in his evidence that Chhotalal Kalidas Patel was known to him as he was his customer and he used to go to his shop for purchasing tobacco. According to him, 15 years ago i.e. from the date of recording of his evidence, sometimes in Diwali Holidays, Chhotalal had asked him and one Kailash Didwania to accompany him as witnesses as he wanted to execute the Will. Accordingly, he and Kailash went to Khanzode Typist. It is his further evidence that Chhotalal in his presence, gave instructions to the Typist for preparation of Will and he typed the Will in English. The Typist had interpreted the contents of the Will in Marathi to Chhotalal Patel in their presence, who admitted the contents to be correct.

18. His evidence next shows that Chhotalal in the said Will has given all movable or immovable properties to his two daughters and also had told that he had made provisions for his wife and had given sufficient estate to his sons, who according to him, were settled in life.

19. According to him, Chhotalal at that time was quite well and had no ailment of any kind. He knew what he was doing. After the Will was read over to Chhotalal, he executed the said Will in their presence by putting his signature then he and Kailash Didwania attested the said Will by signing as witnesses in his presence as told by Chhotalal. It was his last Will.

20. Lastly, he states that he then accompanied with Chhotalal Patel to Sub-Registrar's Office, Khamgaon where the Will was registered.

21. After having gone through the examination-in-chief and also the cross-examination carefully, I am of the considered view that this attesting witness is vague, doubtful and even conflicting on some material points, which I would be elaborating hereinafter. Let me qualify my views and findings with reasons.

22. The evidence of attesting witness is in three parts. The first part of evidence shows that in his presence and in the presence of another witness Chhotalal gave instructions for preparation of Will to Mr. Khanzode Typist, who typed the Will in English. If this piece of evidence is read simply, then it would give a semblance that Chhotalal had given instructions to draft the Will in English language. However, the further evidence of this witness belies this perception. It is his further evidence that the Typist after typing the Will in English interpreted the contents of the Will in Marathi to Chhotalal in their presence and Chhotalal admitted the contents to be correct. It is beyond comprehension, at the first instance, as to why the Will was typed in English language, particularly and admittedly, there is no clear evidence of this witness that the instructions were given in English. Assuming for the sake of argument that the instructions were given in English, then there was no necessity to explain or interpret the contents of Will in Marathi language to Chhotalal. It is also clear from the cross-examination of this witness though he was well acquainted with Chhotalal but expressed the ignorance as to whether Chhotalal was conversant with English language or not. It is also

perplexing to note that how Chhotalal admitted the contents of Will to be correct when admittedly neither he was knowing English language nor he had given instructions in Marathi language to Mr. Khanzode Typist to draft the Will accordingly.

23. Above all, the cross-examination of this witness further shows that he does not know in which language the Typist was instructed to draft the Will. This kind of evidence or rather, if I may say so, tantamounts to the absence of this witness when the instructions of drafting the Will came to be issued by Chhotalal to Mr.Khanzode Typist. This piece of evidence is also in direct conflict with his earlier evidence, wherein this witness states that in his very presence, the deceased - Chhotalal had given instructions to Mr. Khanzode Typist to prepare the Will. Then comes the serious blow when he further states in his cross-examination that the Will was already type-written when another attesting witness and Chhotalal reached the Court premises. Needless to say, this piece of cross-examination is full of significance and certainly signifies that the Will was already type-written when they all reached to the Court premises. This being so, this witness was not aware as to what kind of instructions were

given by Chhotalal or for that matter, as already noted, Chhotalal signed in his presence as to the correctness of the contents of the Will.

24. The second part of his evidence shows that Chhotalal in the said Will has given all his movable and immovable properties to his two daughters i.e. respondent Nos.1 and 2 herein and also had told him that he (Chhotalal) had already made provision for his wife and given sufficient estate to his sons, who were settled in life. This is again in conflict with the evidence given in the cross-examination when he clearly and categorically stated that the Will was already type-written when he had reached the Court premises. It is not his specific evidence that Chhotalal had told him about all the movable and immovable properties bequeathed by him in favour of his two daughters. Rather his examination-in-chief shows that it was the bestowing of movable and immovable properties incorporated in the Will. For him, there could not have any occasion to know this material fact, particularly when in his own words, when he had reached the Court premises, the Will was already type-written.

25. The third part of his evidence shows that after the Will was read over to Chhotalal, he executed the same in his presence by putting his signature followed by his signature and signature of another attesting witness Kailash Didwania. Again, if this piece of evidence is juxtaposed the evidence given in the first part of his evidence, then both the pieces of evidence are not compatible inasmuch as first part of evidence shows that the contents of Will was interpreted in Marathi by Mr. Khanzode Typist. It is not the case that the Will was drafted by Mr. Khanzode Typist on the instructions given by Chhotalal in Marathi language and after drafting of the same, the said Will was read over to him accordingly. There is much of difference between first part and the third part of his evidence, which just now I have discussed. For all the aforesaid reasons, I find that the evidence of this witness is of suspicious character.

26. In Gurdial Kaur and others Vrs. Kartar Kaur and others, reported in (1998) 4 SCC 384, the Hon'ble Apex Court at Paragraph No.4 held as under :-

"4. The law is well settled that the conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required

under the Indian Succession Act, 1925 but should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance".

27. In view of above observations, on a studied analysis of the evidence of attesting witness, which is seriously impaired in the cross-examination and cannot be said to be unimpeachable, I hold that doubts persist as to due execution of Will. The requirements of Section 63 (c) of the Act, have not been duly complied with. I, therefore, answer the first point in negative.

28. In view of answer to the first point in negative, the second point does not survive.

29. For the aforesaid reasons, this appeal, therefore, must succeed. Hence, I pass the following order :-

ORDER

i] The appeal is allowed with no order as to costs.

ii] The impugned Judgment and order dated 16/04/2005 passed by learned Civil Judge, Senior Division, Khamgaon in Probate Case No.7/1993 is quashed and set aside.

(V. G. BISHT, J.)

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