

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 184 OF 2019
WITH
CIVIL APPLICATION NO. 168 OF 2019
IN
SECOND APPEAL NO. 184 OF 2019**

Madhukar Krishna Patil

.... Appellant

v/s.

Shashikala Shamrao Kate

.... Respondent

Mr. Prajakt M. Arjunwadkar for the Appellant.

Mrs. A.R.S. Baxi for the Respondent.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 20th OCTOBER, 2023.

P. C. :-

. This is an Appeal under Section 100 of the Code of Civil Procedure raising challenge to the judgment and order dated 25/10/2018 in Regular Civil Appeal No.173 of 2017. By the impugned judgment, the First Appellate Court dismissed the appeal and confirmed the judgment and decree dated 09/02/2017 whereby the learned Civil Judge, Junior Division, Miraj, decreed the suit filed by the Respondent and declared the Will dated 17/05/2012 executed by Shamrao Kate in favour of the Appellant as forged and fabricated and further restrained the Appellant from interfering in the suit property.

2. The Respondent, who shall be hereinafter referred to as 'the Plaintiff, is the widow of Shamrao Kate. There was a matrimonial dispute between the Plaintiff and her husband, which led to filing of the proceedings under Domestic Violence Act as well as civil suits, wherein the Trial Court had restrained her husband Shamrao Kate from alienating or transferring the property under Gut No.246 of village Khanderajuri. Her husband Shamrao expired on 14/06/2012. The Defendant herein started interfering in the suit property on the strength of a Will dated 17/05/2012 purportedly executed in his favour by the deceased-Shamrao. The Plaintiff filed a suit for declaration that the Will executed by her husband in favour of the Appellant was forged and fabricated. The Plaintiff claimed that she is in possession of the suit property under Gat No.246 and sought to restrain the Defendant from interfering in the suit property.

3. The Appellant hereinafter referred to as 'the Defendant' claimed that the deceased – Shamrao Kate was his friend and that they shared a cordial and close relationship. The Defendant claimed that he took care of said Shamrao Kate during his sickness and admission in the hospital. He claimed that Shamrao executed the Will and bequeathed the suit property in his favour and put him in possession of the suit property

because of his close association and relationship.

4. The trial court as well as the Appellate Court appreciated the evidence on record and discarded the evidence of the attesting witnesses examined by the Defendant in view of the serious infirmities in their evidence. The Appellate Court also observed that said Shamrao Kate had expired within one month from the date of execution of the Will. The learned Judge observed that Shamrao Kate was a HIV patient and suffered from late stage infection. Relying upon the evidence of the Doctor, the Appellate Court recorded a finding that the deceased was not in a fit condition to execute the Will. The Appellate Court therefore confirmed the findings rendered by the trial court that the Will was forged and fabricated and further held that the plaintiff is in possession of the suit property and restrained the defendants from interfering with her possession.

5. Mr. Arjunwadkar, learned counsel for the Appellant-defendant submits that the plaintiff chose not to step in the witness box and adduced evidence through her power of attorney. He submits that both the courts below failed to consider that the power of attorney could not have deposed on behalf of the principle and grossly erred in relying on his evidence. He further submits that the courts below have also erred

in discarding the evidence of the attesting witnesses. He also urges that the Appellate Court could not have granted perpetual injunction in favour of the plaintiff in the absence of cross objection or cross appeal.

6. At the outset, it may be mentioned that the competency of the power of attorney to depose on behalf of the plaintiff is challenged for the first time before this Court. No such ground was raised either before the Trial Court or before the Appellate Court. It is also pertinent to note that the power of attorney is not a stranger to the family. He is the brother of the deceased and the brother-in-law of the plaintiff. It is not the case of the Defendant that the power of attorney had no personal knowledge of the facts of the case. In such circumstances, the submission that the power of attorney could not have deposed in the case cannot be countenanced.

7. As regards the issue of validity of the Will, it not in dispute that the Will was executed in favour of the Defendant who is a stranger to the family. The testator Shamrao Kate expired within a month of the execution of the Will. He was suffering from Aids and was admitted with late stage infection. In view of these suspicious circumstances, the Defendant was required to prove by satisfactory evidence that (i) the

Will was signed by the testator; (ii) the testator at the time was in sound and disposing state of mind; (iii) the testator understood the nature and effect of the dispositions; and (iv) that the testator had put his signature on the document of his own free will. Reliance is placed on the decision of the Apex Court in ***Rajkumar & Others vs. Surender Pal Sharma (2021) 14 SCC 500.***

8. In the instant case, the evidence on record reveals that in a suit filed by the plaintiff the trial court had restrained the testator from alienating or transferring the suit property, despite which the testator Shamrao executed the Will in favour of the Defendant who is a stranger to the family. Said Shamrao is survived by his wife as well as his mother and siblings. There was matrimonial dispute between Shamrao and his wife but there is nothing on record to indicate that his relationship with his mother and siblings was strained. On the contrary, the evidence on record reveals that the testator Shamrao was residing with his sister during his sickness. In such circumstances, there was no valid reason for Shamrao to execute the Will in favour of the Defendant by excluding his close family members.

9. It is also pertinent to note that said Shamrao expired within a month from the date of execution of the said Will. It is not in dispute

that the deceased Shamrao Kate was suffering from Aids and he was admitted in the hospital with fourth stage infection. The evidence of the Doctor reveals that Shamrao was also suffering from tuberculosis, meningitis which can affect physical as well as mental condition of the patient. The Doctor has also opined that meningitis and Stage IV infection can affect the activity of the brain. The patient can go into depression and may or may not be able to think rationally. It is in view of this evidence that the Appellate Court recorded a finding that the deceased was not in a fit condition to execute a Will.

10. Furthermore, both the Courts below have analyzed and appreciated the evidence of the attesting witnesses and have noted serious infirmities in their evidence and observed that the attesting witnesses are not trustworthy. The findings recorded by the courts below are based on the evidence on record and are neither perverse nor contrary to the settled principles of law.

11. The suit was essentially for a declaration that the Will dated 17/05/2012 is forged and fabricated, with an ancillary relief of perpetual injunction. The trial court has held that the Will was fabricated and forged and granted the declaratory relief but refused to grant the relief of perpetual injunction. In an Appeal, the Appellate

Court has confirmed the findings that the Will is forged and fabricated. The Appellate Court while confirming the declaratory relief that the Will is forged and fabricated, also granted the relief of perpetual injunction without cross objection.

12. It is well-settled that the Appellate Court under Order 41 Rule 33 of the Code of Civil Procedure, has powers to modify the decree when the portion of decree appealed against is inseparably connected with the portion not appealed from and if the portion of decree which is not challenged, if left untouched is likely to result in injustice. In the instant case, the Will is forged and fabricated and the Defendant has otherwise no right, title or interest to the property. In such circumstances, refusal of relief of perpetual injunction would render the declaratory relief nugatory. Hence, modification of the decree was necessitated to do complete justice between the parties.

13. Having gone through the entire material, in my considered view, the Appeal does not involve any substantial question of law. Under the circumstances and in view of discussion supra, the Appeal is dismissed. Pending Application(s), if any, stands disposed of in view of dismissal of the Appeal.

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(SMT. ANUJA PRABHUDESSAI, J.)