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

**SECOND APPEAL NO. 387 OF 2018
WITH
CIVIL APPLICATION NO.681 OF 2018**

Tipanna Amsidh Hatale ...Appellant
Versus
Somanna Mahadappa Hatale & Ors. ...Respondents

Mr. M. S. Bhandari a/w. Pranjali Bhandari, for the Appellant.

Mr. A. B. Tajane, for Respondent No.1.

Mr. Rajeev Ravi for Respondent Nos.2A to 7& 8B.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 10th APRIL 2023**

P.C. :

1. Heard Mr. Bhandari, learned counsel appearing for the Appellant, Mr. Tajane, learned counsel appearing for Respondent No. 1 and Mr. Rajeev Ravi, learned counsel appearing for Respondent Nos. 2A to 7 & 8B.

2. Mr. Bhandari, learned counsel appearing for the Appellant submitted that the following substantial questions of law are involved in this Second Appeal:-

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- i. Whether the burden to prove the Will dated 8th November 1995 of deceased Mahadappa has been wrongly placed on the Appellant i.e. original Defendant No.2?
 - ii. Whether the finding of the learned Trial Court and the learned First Appellate Court that the Will is not proved in accordance with the provisions of law is correct?
 - iii. Whether the Will in question dated 8th November 1995 is proved in accordance with Section 63 of the Indian Succession Act, 1925 and in accordance with Section 68 of the Indian Evidence Act, 1872?
 - iv. Whether the burden to prove that the said Will is executed under undue influence is on the Plaintiff?
3. Mr. Bhandari, learned counsel appearing for the Appellant submitted that both the Courts have recorded concurrent findings, however the said findings are not in accordance with law and not in accordance with evidence on record. He submitted that Narhari Kallappa Vare i.e. witness No.2 examined on behalf of D.W. No.2 has specifically stated in his evidence that he has signed the said Will as attesting witness and therefore, it has to be presumed that the testator

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i.e. Mahadappa has executed Will and thereafter he has signed as witness. Therefore, it is the contention of Mr. Bhandari that the Will is duly proved.

4. On the other hand, Mr. Tajane, learned counsel appearing for Respondent No.1 has contended that the said Will is not proved in accordance with the provisions of law. He relied on the decision of Supreme Court in the case of **Savithri & Ors. vs. Karthyayani Amma & Ors.**¹

5. Before considering the rival contentions, it is necessary to set out the requirements to prove the Will as held by the Supreme Court in **Savithri & Ors.** (supra). The relevant paragraph 17 reads as under:-

“17. The legal requirements in terms of the said provisions are now well-settled. A Will like any other document is to be proved in terms of the provisions of the Succession Act and the Evidence Act. The onus of proving the will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the will. It is

1 (2007) 11 SCC 621

required to be shown that the will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine.”

(Emphasis added)

6. Thus, onus of proving the Will is always on the propounder and what is required to be established is that Will has been signed by the testator in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine.

7. In the present case, the only evidence of the execution of Will is of witness No.2 for the Defendant No.2 i.e. Narhari Kallappa Vare who is one of the attesting witness. The relevant

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portion of his evidence reads as follows:-

“Contents of will were scribed as instructed by Mahadappa. I then signed the will-deed as witness thereto. Chincholkar and one another also signed it as witnesses. We then went before Sub Registrar. I then again signed in a register. I am now shown certified copy of the will-deed, it is the same. Mahadappa put his thumb impression on the said will-deed and then I signed it.”

(Emphasis added)

8. In view of the above evidence of the attesting witness, it is necessary to set out Section 63(c) of the Indian Succession Act which reads as under:-

“63(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 acknowledgement of his signature or mark, or 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.”

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(Emphasis added)

9. According to said Section, the Will shall be attested by two or more witnesses who have seen the testator affix his mark to the Will or have seen some other person sign the Will by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person and each of the witnesses shall sign the Will in the presence of the testator. It is also provided that it shall not be necessary that more than one witness will be present at the same time.

10. Perusal of the evidence of the attesting witness - Narhari Kallappa Vare shows that he has signed the Will as attesting witness and one Chincholkar and one another also signed it as witness.

11. A perusal of the Will shows that the attesting witnesses are Narhari Kallappa Vare and Mr. M. V. Aurangabadkar. Said Chincholkar was not the attesting witness. The deposition of the said Narhari Kallappa Vare further states that all of them went before the Sub-Registrar. However, what is significant to note is that he has not stated when the testator Mahadappa has

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signed the Will or put his thumb impression in the presence of said Narhari Vare and said M. V. Aurangabadkar. In fact, what is stated is that they went before the Sub-Registrar, again he signed in a register and testator Mahadappa put his thumb impression on the said Will Deed and then he signed the same. Therefore, it is clear that even if the evidence of said attesting witness -Narhari Vare is taken as it is, it is clear that the execution of said Will is not proved in terms of provisions of Section 63(c) of Indian Succession Act. As the execution of the Will itself is not proved and as per the settled legal position, the onus to prove the Will is on the propounder and therefore, Will has to be proved by the Appellant i.e. Defendant No.2. Therefore, there is no substance in the first three substantial questions of law raised by Mr. Bhandari.

12. Mr. Bhandari further contended that it is for the Plaintiff to prove that Will is executed under undue influence. However, the said question does not arise in this case as execution of Will itself is not proved.

13. Accordingly, there is no substance in any of the substantial questions of law raised by Mr. Bhandari.

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14. Both the Courts have concurrently held that the said Will is not proved. Mr. Bhandari has failed to point out that the said finding is not in accordance with the evidence on record and not in accordance with the relevant provisions of law. Therefore, there is no substance in the Second Appeal.

15. Accordingly, the Second Appeal is dismissed in above terms with no order as to costs.

16. As the Second Appeal is dismissed, nothing survives in the Civil Application and the same is also dismissed.

17. Mr. Bhandari, learned counsel appearing for the Appellant states that order of stay is in operation since 18th December 2020 and the same be continued for some period. Mr. Tajane, learned counsel appearing for Respondent No.1 and Mr. Rajeev Ravi, learned counsel appearing for Respondent Nos.2A to 7 & 8B oppose the said request. However, in the interest of justice the said order dated 18th December 2020 shall remain in operation till 10th October 2023.

[MADHAV J. JAMDAR, J.]