

VRJ

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

**FIRST APPEAL NO.1649 of 2019
WITH
INTERIM APPLICATION NO.1358 OF 2019
IN
FIRST APPEAL NO.1649 OF 2019**

Dnyanoba Narayan Shedge & Anr. ... Appellants
V/s.
Dattatraya Rambhau Wagh Since
Deceased, Thr. LRS. Sulochana
Dattatraya Wagh & Ors. ... Respondents

Mr. Niranjan Mogre i/by Mankirat Singh Chhabra for
the appellants.

Mr. R.S. Kate for the respondent Nos.1a to 1d.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 14, 2023

P.C.:

1. The appellant is challenging the judgment and order passed by the Joint Civil Judge, Senior Division, Baramati, in Regular Civil Suit No.605 of 2012, granting probate to the respondents. The facts giving rise to the filing of the appeal are as under:

2. The land bearing Gat No.138/2, admeasuring 1 Hectare 21 Are and Plot No.30 out of Gut No.244, admeasuring 400 sq. ft., are the properties in dispute which the husband of the deceased

received under the rehabilitation of scheme.

3. On 25th January 1986, Mr. Haribhau Vithu Shedge, the original owner and husband of the deceased, expired. According to the respondent, on 3rd August 1995, the deceased executed a Registered Will in favour of respondent No.1. During the pendency of probate proceedings, beneficiary Mr. Dattatraya Rambhau Wagh died. His legal representatives were brought on record.

4. The appellant filed a written statement contesting the suit, contending that the appellants are the property owners. It is contended that by taking disadvantage of the illiteracy of the deceased, the alleged Will-deed is prepared. Therefore, the deceased had no right in the suit properties.

5. The learned Trial Court considering the evidence on record, granted probate in favour of the plaintiff. Aggrieved thereby, the defendants have filed the present appeal.

6. The learned advocate for the appellant submitted that the execution of the Will is shrouded in suspicious circumstances. According to him following are the suspicious circumstances:

- 1) The nature of the property was ancestral.
- 2) One attesting witness stated in his examination-in-chief that the deceased signed on the Will, but the Will bears a thumb impression.
- 3) The second attesting witness deposed in favour of the defendant that he had not signed the Will.

- 4) The deceased was illiterate.
- 5) The Will was registered after the alleged execution of the Will.
- 6) The Will saw the light of the day after 14 years.
- 7) The plaintiff's wife admitted that the plaintiff told the deceased to execute the Will.

7. Learned advocate for the respondents supported the judgment pointing out that the necessary ingredients of section 68 have been fulfilled. The genuineness of the Will is proved based on the testimony of the attesting witnesses. The suspicious circumstances, as alleged, do not relate to the genuineness of the Will.

8. Rival contentions fall for consideration. The Apex Court has laid down the relevant principles governing the adjudicatory process concerning proof of a Will in ***Shivakumar v. Sharanabasappa***, (2021) 11 SCC 277.

“12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion etcetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and

particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder etc. are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such a test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.”

9. It is well settled that the scope of probate proceeding is restricted to the genuineness of the Will. Section 68 of the Evidence Act deals with proof of execution of the Will. The mandate of section 68 of the evidence Act is to prove the Will based on evidence of at least one attesting witness. Another requirement is that the attesting witness needs to state on oath that he had seen the testator either dictating the Will or himself writing the Will and signed. Section 63 of the Evidence Act requires at least two or more attesting witnesses.

10. There is no dispute that the will in question is a registered document. The certified copy of the Will deed was produced before the learned Trial Court below Exhibit-71. The two witnesses, namely Bhanudas Ramdas Awatade and S. D. Pasalkar, were attesting witnesses. The plaintiff examined Bhanudas Awatade in support of his case, while the defendants examined Shankar Dhondiba Pasalkar in support of their defence. Bhanudas Awatade, in his evidence, stated that the petitioner prepared the Will in question as per the say of the deceased testator. The deceased signed the Will after reading and understanding the contents of the Will-deed. He, along with another attesting witnesses, signed on the Will. She was in sound physical and mental condition on the date of execution of the Will. He specifically stated that the testator signed the Will after fully understanding the contents of the Will. In the cross-examination, he denied the suggestion that the testator had not dictated the contents of the Will. He also denied the suggestion that the testator was not in sound mental condition on the date of execution of the Will.

11. The second attesting witness, Mr. Shankar Pasalkar, stated in his evidence that the plaintiff obtained his signature on the Will-deed dated 3rd August 1995 by telling him that the said document needs to be executed for installation of the pipeline. But in the cross-examination, the witness admitted his signature on the Will-deed dated 3rd August 1995. Moreover, he admitted that on the day of execution of the Will-deed, he accompanied Bhanudas Awatade (first attesting witness).

12. The learned Trial Court rightly disbelieved the evidence of

Shankar Pasalkar, denying his role in the execution of the Will, holding that Mr. Pasalkar being in employment in a local school, would not have signed the will without reading the contents of the document.

13. The evidence of both attesting witnesses is sufficient to fulfill the ingredients of section 68 of the Evidence Act. There is no serious dispute about the physical and mental capacity of the deceased on the date of execution of the Will-deed. The period of 14 years from the date of the execution of the Will-deed till the death of the testator indicates the sound, mental and physical capacity of the testator. Therefore, in my opinion, the evidence in the form of one attesting witness and document and the Will being registered is sufficient to prove the genuineness of the Will-deed.

14. The suspicious circumstances, as alleged by the appellant, are insufficient to cast serious doubt about the genuineness of the Will. The nature of the property has no consequence on the genuineness of the Will. The authority to execute the Will needs to be adjudicated before the appropriate proceedings before the appropriate Court having the power to adjudicate such issues. The admission, as alleged by the appellant stating that the wife of the plaintiff admitted in her cross-examination that the plaintiff told the deceased to execute the Will-deed is of no help to the appellant as the wife in her cross-examination, categorically stated that the event of execution of the Will-deed occurred before her marriage and she had no personal knowledge about the said event, therefore, the admission as alleged is of no help to the appellant. The other suspicious circumstances, namely that the testator was

illiterate and Will had seen the light of the day after 14 years, are not sufficient to cast doubt of the genuineness of the Will supported by the testimony of attesting witnesses.

15. For the aforesaid reason, in my opinion, the applicants have sufficiently proved the genuineness of the Will based on the testimony of attesting witnesses, the document is registered, and the testator died after a period of 14 years from the date of execution of the Will.

16. On consideration of the evidence on record, the learned Trial Court recorded a finding that the applicant has proved the genuineness of the Will and has issued probate. The plaintiff has proved the genuineness of the Will by adducing secondary evidence after getting permission from the Court. With the result, there is no merit in the first appeal. The first appeal is, therefore, dismissed.

17. In view of the dismissal of the first appeal, the interim applications do not survive.

(AMIT BORKAR, J.)