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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 674 OF 2013

Shri. Shashikant Appa Kadu
Aged about 52 years, Occ. Retired
R/o Achirne (Kaduwadi) Tal.
Vaibhavwadi, District: Sindhudurg

....Appellant

Vs.

Shri. Appa Babla Kadu,
Since deceased through his legal
heris.

1. Parvati Appa Kadu,
Age 65, wife.

2. Prakash Appa Kadu
Age 51, son

3. Shashikant Appa Kadu
Age 54, son

4. Sunita Appa Kadu
Age 30, Daughter

5. Laxmi Gajanan Walawalkar
@ Vanita Appa Kadu,
Age 38, Daughter

6. Shubhangi Vijay Kavathkar
@ Vasanti Appa Kadu
Age 40, daughter

Sr. No. 1, 3 and 4 r/o Achirne,
Taluka Vaibhavwadi, Dist. Sindhudurg.

Sr. No. 2 R/o B.I.T. Chawl no. 21,
Room No. 25, First floor,
Madhavrao Gagan Marg, Mumbai
400 011.

Sr. No. 5 R/o Tridevi Housing
Soc. Dindayal Road, Anang Nagar,
Dombivali, West, Thane.

7. Prakash Appa Kadu,
age 49 Occ. Service,
B.I.T. Chawl no. 21,
Room No. 25, First floor, Madhavrao
Gagan Marg, Mumbai 400 011.

8. Shri. Prabhakar Sitaram Kadu
Aged about 63 years, Occ: Agriculture
and Pensioner, R/o Vaibhavwadi
Behind Tahsildar Office.

9. Sudhakar Sitaram Kadu
Aged about 57 years, Occ: Service
R/o Achirne (Kaduwadi),
Tal. Vaibhavwadi, District: Sindhudurg

10. Mahadeo Sitaram Kadu
aged about 55 years, Occ: Agr.
R/o Achirne (Kaduwadi),
Tal. Vaibhavwadi, District: Sindhudurg

11. Madhukar Sitaram Kadu
Aged about 52 years, Occ: Business
R/o Sajan Stores, Bazarpeth
Devgard Tal. Devgad, Dist. Sindhudurg

12. Prema Sitaram Kadu,
Since deceased through her
legal representatives.

1. Maruti Sakharam Shinde,

Adult, Occ: Agri.

2. Shyam Maruti Shinde,

Adult, Occ: Agri.

3. Ravindra Maruti Shinde

Adult, Occ: Agri.

4. Shobha Maruti Shinde

Adult, Occ: Household

*Nos. 7(1), 7(3) and 7(4)
residing at Achirne, (Kaduwadi)
Tal. Vaibhavwadi, Dist. Sindhudurg
No. 7(2) residing at 3/33, Shanti
Niketan, Kanjur Village, Bhandup
(East), Mumbai. (sic)*

**13. Vimal Sitaram Kadu @ Mangal
Maruti Bhirawandekar,**

aged about 48 years, Occ: Household,
R/o Kanedi, Parat Kam Wadi,
Tal: Kankavali, Dist: Sindhudurg

**14. Sakuntala Sitaram Kadu @ Ranjana
Mahadeo Shinde,**

Aged about 45 yrs, Occ: Agr.
R/o Vaibhavwadi, Dist. Sindhudurg

15. Subhadra Sitaram Kadu,
aged about 85 years, Occ: Household
Work, Trimbak, Tal. Malvan,
Dist. Sindhudurg.

16. Champu Babu Trimbakkar
Aged about 68 yrs. Occ: Household
Work, R/o Trimbak Tal. Malwan
Dist: Sindhudurg.

.....Respondents

Mr. Pravin G. Sawant advocate for the appellant
Mr. Sanskar Marathe for the respondent nos. 8 to 14

CORAM : GAURI GODSE, J.

DATE : 19th DECEMBER 2024.

ORAL JUDGMENT:

1. Heard learned counsels for the parties. This second appeal is preferred by the original defendant no. 1 to challenge the concurrent judgments and decrees granting partition and separate possession. The second appeal is admitted on the following substantial questions of law by order dated 3rd March 2014, which read as under:

“i. Whether the Courts below have rightly held that the appellant (original defendant No. 1) did not prove the Will dated 09.08.1977 executed by Dhaku having regard the evidence of DW No. 2?

ii. Whether the Court below have properly interpreted the provision of section 63(c) of the Indian Succession Act, 1925?

iii. Whether the Court below have rightly determined the shares to the parties?”

2. Learned counsel for the appellant submits that:

(a) Dhaku had executed a Will in favour of defendant no. 1 in the presence of two witnesses at Achirne village. Though the Will

was prepared at Achirne village, it was signed at Gaganbawada Village. A perusal of the Will would indicate that it is signed by two witnesses and the testator. Execution of the Will is proved by defendant no. 1 by examining one attesting witness. Even defendant no. 1 has deposed in favour of the Will and explained all the circumstances under which the Will was executed.

(b) Both the Courts have incorrectly referred to stray admissions in the cross-examination by DW-2, who was an attesting witness and disbelieved the Will. Evidence by DW-2 and defendant no. 1 amounts to sufficient compliance with the requirement for proof of a Will as provided under Section 63 of the Indian Succession Act, 1925 ('the Succession Act') and in particular clause (a) of Section 63. For the execution of a valid Will, the testator is required to sign or affix his mark in the presence of a witness. Once defendant no. 1 proved that the testator, i.e. Dhaku, had signed in the presence of two attesting witnesses, both the Courts erred in not correctly appreciating the evidence on record.

(c) A perusal of the evidence of DW-2 would indicate that he has

clearly stated in his examination-in-chief that Dhaku had put his thumb impression on the Will in his presence and the presence of another attesting witness. Both the Courts erred in not properly interpreting clause (c) of section 63 of the said Act while recording findings on the validity of the Will.

(d) Thus, based on the validly executed Will in favour of defendant no. 1, he would be entitled to claim $1/3^{\text{rd}}$ share of Dhaku. Therefore, in addition to his own share, defendant no. 1 would also be entitled to claim $1/3^{\text{rd}}$ share of Dhaku. Therefore, the decree passed by the trial Court and confirmed by the Appellate Court granting $1/6^{\text{th}}$ be modified by accepting the validity of the Will in favour of defendant no. 1. He, therefore, submits that all the three questions of law be answered in favour of defendant no. 1.

3. Learned counsel appearing for respondent nos. 8 to 14 supports the impugned judgments and decrees. He submits that:

(a) DW-2, i.e. the attesting witness, admitted in the cross-examination that the testator was not present when he signed the Will. Thus, the glaring admissions given by DW-2 in the

cross-examination indicate that the Will relied upon by defendant no. 1 is a suspicious Will. The admissions given by the attesting witness indicates that none of the attesting witnesses had seen the testator signing or executing the Will. Even defendant no. 1 in his cross-examination has given admissions contrary to his case in the examination-in-chief. In the examination-in-chief, defendant no. 1 as well as defendant no. 2 stated that the Will was executed at Achirne village; however, in the cross-examination, they admitted that the Will was executed at Gaganbawada village.

(b) Both the courts have correctly appreciated the evidence on record and, based on the admissions given by defendant no. 1 and DW-2, refused to accept the validity of the Will.

(c) To support his submissions, learned counsel for the respondents relied upon the decisions of the Hon'ble Apex Court in the case of *Girija Datta Singh Vs. Gangotri Datt Singh*¹, *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and others*², *Joseph Antony Lazarus Vs. A. J. Francis*³, *Apoline D'Souza V.*

¹ AIR 1955 SC 346

² AIR 1977 SUPREME COURT 74

³ AIR 2006 SC 1895

John D'Souza⁴ and Kavita Kanwar Vs. Pamela Mehta and Ors⁵.

- (d) It is a well-established principle of law that to prove valid execution of a Will; it has to be proved that both the attesting witnesses had seen the testator signing the Will in their presence. As per the well-settled principles of law, the Will must be proved beyond doubt to overcome all the suspicious circumstances which would satisfy the conscience of the Court that the testator intended to execute the Will. The evidence of the attesting witness is crucial and necessarily should support the execution of the Will by stating that the Will was signed by the testator in the presence of both the attesting witnesses and they had seen the testator signing.
- (e) In the facts of the present case, the legal principles settled regarding the execution of the validity of the Will squarely apply to this case. He, therefore, submits that the questions of law framed in the second appeal do not arise for any consideration of this court in view of the settled legal position.
- (f) Considering the correct appreciation of the evidence on

⁴ AIR 2007 SUPREME COURT 2219

⁵ 2021 (11) SCC 209

record by both Courts, the questions of law be answered in favour of the respondents by accepting the concurrent findings recorded by both courts.

4. To consider the submissions made on behalf of the parties, I have carefully examined the evidence on record and the pleadings. A perusal of the examination-in-chief of DW-2 and defendant no. 1 indicates that it is their case that the Will was executed at Achirne village. However, in the cross-examination, both the witnesses stated that the Will was executed at Gaganbawada village. DW-2, in his cross-examination, admits that he had not seen the testator affix his thumb impression on the Will. He also admits that when he signed the Will, the Will did not contain the testator's thumb impression. The attesting witness has admitted that the thumb impression of the testator was also not endorsed by any other witness. Even defendant no. 1 has given admissions in the cross-examination, which indicates that he has taken a contrary stand regarding the place of the execution of the Will.

5. In response to the arguments made on behalf of the respondents, learned counsel for the appellant submitted that both

courts do not correctly interpret the examination-in-chief of defendant no. 1 and DW-2. He submits that in the examination-in-chief, DW-2 stated that the Will was prepared at Achirne village, and the same was executed at Gaganbawada Village. He submitted that both courts misinterpreted admissions given by DW-2 and defendant no. 1.

6. To consider the submissions made on behalf of the appellant, I have minutely perused the pleadings, evidence and the reasons recorded by both the courts. The trial court considered the evidence of defendant no. 1 and the attesting witness in detail. The learned trial court refers to all the admissions given by the attesting witness. On examining the evidence, the trial court held that from the admissions given by the attesting witness, it is clear that the testator was fully dependent upon defendant no. 1, and he was in a dominating position. The trial court further held that Dhaku was an illiterate person, and thus, in view of the admissions given by the attesting witness, the Will executed by Dhaku cannot be accepted as a document executed by his free consent. The admissions given by the attesting witness regarding the attesting witness not signing in the presence of the testator and the admissions that the testator did not sign in the presence of the attesting witness is considered by the trial court to

hold that the Will is a suspicious document and cannot be accepted as a validly executed document.

7. A perusal of the reasons recorded by the First Appellate Court indicates that the entire evidence is reappreciated by the First Appellate Court. The First Appellate Court recorded all the admissions in the examination-in-chief and the cross-examination. By considering admissions given by the attesting witness, the Appellate Court held that the admissions falsified the statements made by the attesting witness in his examination-in-chief that the testator had put his thumb impression on the Will in the presence of the attesting witness. The contradictory admissions by defendant no. 1 and DW-2 regarding the place of execution of the Will are also considered by the first Appellate Court as a necessary factor to hold that the Will was a suspicious document.

8. On perusal of the evidence of defendant no. 1 and DW-2, I do not find any illegality or perversity in the reasons recorded by both the Courts in not accepting the Will as a valid document. The findings recorded by both courts are based on correct appreciation of the evidence on record. I find substance in the arguments made on behalf

of the respondents that defendant no.1 and DW-1 have given contrary admissions on the place of execution of the Will. The evidence adduced to support the Will is not satisfactory. The facts and circumstances of the case and the evidence on record create doubt about the genuineness of the Will. There is no satisfactory evidence to prove that the testator signed the Will in the presence of the attesting witnesses, that the testator was aware of the contents of the Will, and that he signed on his free volition.

9. The Hon'ble Apex Court, in the case of ***Girija Datta Singh***, held that the Will is required to be proved by evidence that the testator signed the Will in the presence of both the two attesting witnesses and they both also signed the Will in the presence of the Testator, as required under Section 63 of the Succession Act. The Hon'ble Apex Court, in the case of ***Jaswant Kaur***, held that Section 63 of the Succession Act requires a Will to be attested, and it cannot be used as evidence until one attesting witness has been called to prove its execution as required under Section 68 of the Evidence Act. Thus, it is held that normally, the onus which lies on the propounder, can be taken to be discharged on proof of the essential facts which go into the making of the Will. It is, thus, held that the cases in which the

execution of the Will is surrounded by suspicious circumstances cannot be accepted until the propounder removes all the legitimate suspicions before the document can be accepted as the validly executed Will of the testator.

10. The Hon'ble Apex Court, in the case of ***Joseph Lazarus***, while dealing with a case where the beneficiary was residing with the testator, held that the cumulative effect of all the circumstances taken together would give rise to doubt the genuineness of the Will and whether it has been executed by testatrix out of free volition. Thus, as held by the Hon'ble Apex Court, it is the burden upon the propounder to remove all the suspicious circumstances. The Hon'ble Apex Court, in the case of ***Apoline D'Souza***, held that in the absence of any evidence that the contents of the Will were read over to the testator and the testator had put his signature in the presence of two attesting witnesses, it cannot be held that the suspicious circumstances are removed for accepting the document as a validly executed will.

11. The Hon'ble Apex Court, in the case of ***Kavita Kanwar***, has relied upon the legal principles summarised by the Hon'ble Apex Court in the case of ***Shivakumar Vs Sharanabasappa***⁶ regarding the factors and

⁶ (2021) 11 SCC 277

circumstances that are required to be considered for examining the validity of the execution of a Will. The Hon'ble Apex Court held that any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder; however, such suspicion cannot be removed by mere proof of sound and disposing of state of mind and signature with the proof of attestation. The Hon'ble Apex Court further held that 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 circumstances, and while applying such test, the court is required to 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 disposition of the Will. Thus, it is held that 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 that sets up the Will has to offer a cogent and convincing explanation of the suspicious circumstances surrounding the Will.

12. In view of the aforesaid legal principles, I am satisfied that the findings recorded by both courts are on the correct interpretation of the provisions of Section 63(c) of the said Act. I am also satisfied that both

the Courts have rightly held that the execution of the Will is not as required under section 63(c) of the said Act read with Section 68 of the Indian Evidence Act. In the absence of any evidence that the contents of the Will were read over to the testator and the testator had put his signature in the presence of two attesting witnesses, it cannot be held that the suspicious circumstances are removed for accepting that the Will was validly executed document.

13. The relations between the parties are not in dispute. The genealogy, as recorded by the trial Court, is not disputed by any party. The plaintiff has claimed share through the original holder, Babla, who admittedly had three sons, Appa, Sitaram, and Dhaku. Dhaku died issueless. The heirs and legal representatives of Appa and Sitaram are the parties who have been allotted shares as directed by the trial court. The present appellant, i.e. defendant no. 1, claimed Dhaku's share based on the Will. I have already recorded reasons for accepting the findings recorded by both courts to be correct in disbelieving the validity of the Will. Hence, in view of the findings on the Will, defendant no. 1 would not be entitled to claim Dhaku's share. It is not in dispute that Dhaku expired issueless. Hence, the determination of the shares by the trial court, accepted by the Appellate Court, is between the heirs

and legal representatives of Appa and Sitaram.

14. Learned counsel for the appellant submits that the points argued on the determination of the shares were only based on the claim of defendant no. 1 through Dhaku in view of the Will. There is no other dispute on the determination of the shares recorded by the trial court. Thus, the determination of the shares would not require any consideration by this court. Hence, all three questions of law are answered accordingly in favour of the respondents.

15. Therefore, for the reasons recorded above, the second appeal is dismissed, and the impugned judgments and decrees are confirmed.

[GAURI GODSE, J.]