

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

**SECOND APPEAL NO. 443 OF 2023**

Shri. Dattatray Gopal Mhatre Age-48  
years, Occ- Agriculture R/o-  
Devichapada, At Post Dhokawade,  
Taluka Alibag, District Raigad.

**.....Appellant**  
(Orig.Defendant No.1)

V/s.

1.Smt. Neerabai Tukaram Mhatre Age-  
76years, Occ- Agriculture R/o- 15 A,  
Laxman Aitvar Koli Chawl, Bhond Galli,  
Worli Koliwada, Mumbai 400 030  
2.Shri. Suresh Gopal Mhatre Age-51  
years, Occ- Agriculture  
3. Shri. Arun Gopal Mhatre Age-44 years,  
Occ- Agriculture  
4. Shri. Pandurang Gopal Mhatre Age-42  
years, Occ- Agriculture  
5. Shri. Pramod Gopal Mhatre Age-41  
years, Occ- Agriculture  
2 to 5 R/o- Devichapada, At Post  
Dhokawade, Taluka Alibag, District  
Raigad.

**.....Respondents**  
(Resp. No.1/ Orig.  
Plaintiff and Resp.  
Nos. 2 to 5/ Orig.  
Defendants)

...

***Mr.Rohit Joshi***, for Appellant.

***Mr. Drupad Patil***, a/w Mr. Suyash Sule for Respondent No.1.

...

**CORAM : SANDEEP V. MARNE, J.**

**RESERVED ON : 10 JANUARY, 2024.**

**PRONOUNCED ON :19 JANUARY 2024.**

**JUDGMENT:**

1. The Second Appeal is filed against concurrent findings of the Trial Court and the first Appellate Court decreeing Plaintiff's suit for declaration of ownership and possession of suit property. The appeal challenges Judgment and Decree dated 07 December 2022 passed by District Judge-III, Raigad at Alibaug in Civil Appeal No. 64 of 2010 thereby confirming the Judgment and Decree dated 23 April 2010 passed by the 3<sup>rd</sup> Joint Civil Judge, Junior Division, Alibaug in Regular Civil Suit No. 170 of 2005.

2. Briefly stated, facts of the case are that, one Hiru Gopal Mhatre was the owner of various properties and after his demise, his two sons Krishna Hiru Mhatre and Narayan Hiru Mhatre inherited them. By way of Mutation Entry No.1779 effected on 01 May 1969, a partition was recorded between the two sons-Krishna and Narayan, in which the lands bearing Gat Nos. 654, 673, 680 and 721 came to the share of Narayan Mhatre. He purchased properties bearing Gat Nos. 653 and 678 as a tenant under provisions of Sections 32-G of the Maharashtra Tenancy and Agricultural Lands Act, 1948. Narayan also purchased land bearing Gat No. 829 by Sale deed dated 07 June 1943.

3. Out of the lands owned by Narayan, the land bearing Gat Nos. 653, 654, 673, 678, 680, 721 and 829 and House No. 129/A at Village Dhokawade, Talula Alibaug, District Raigad are 'Suit Properties'.

4. Narayan's family consisted of his wife Narmadabai and daughter Neerabai (Plaintiff). Narayan Mhatre died intestate on 06 March 1986 leaving behind his wife Narmadabai and daughter Neerabai. After Narayan's death, Mutation Entry No. 2490 was recorded on 30 August 1986 under which, name of Narmadabai Narayan Mhatre was recorded in respect of all the suit properties, whereas the name of daughter Neerabai was recorded only in respect of two properties bearing old Survey Nos. 200A+2A/2 and 151A/3A. There is dispute among parties about the nature of Mutation Entry. While Plaintiff claims that the said mutation entry is effected only for the purpose of recording names of legal heirs of Narayan Mhatre, it is contention of Defendants that Mutation Entry No.2490 was certified with a view to give effect to the partition which Narayan effected during his lifetime. It is Defendants' case that Narmadabai became sole owner of the suit properties by virtue of Mutation Entry No.2490.

5. On 10 April 1987, Narmadabai alleged executed a registered Will bequeathing the suit properties amongst Plaintiff-Neerabai and Defendants. Defendants are the grandchildren of Krishna Hiru Mhatre (Narayan's brother). Narmadabai passed away on 28 July 1994 leaving behind her daughter-Neerabai (Plaintiff). On 18 April 1998 Mutation Entry No.452 was certified mutating sole name of Neerabai in revenue records of all properties of Narayan and Narmadabai. Shortly, thereafter on 5

May 1998, another Mutation Entry No. 453 was certified mutating the names of Defendants on the basis of Will dated 10 April 1987.

6. In the above factual background, Plaintiff addressed Notice through her Advocate to Defendants for deletion of Mutation Entry No.453 and for possession of suit properties. Defendants replied the Notice on 9 April 2002 and refused to act as per notice. Plaintiff-Neerabai therefore instituted Regular Civil Suit No. 170 of 2005 in the Court of Civil Judge, Junior Division, Alibaug seeking a declaration that Plaintiff is the sole owner of suit properties and seeking possession thereof from Defendants. She also sought relief of permanent injunction against Defendants not to obstruct her possession of suit properties in future. Defendant Nos. 1,2,4 and 5 filed Written Statement resisting the suit. Plaintiff examined herself as witness. Defendants examined Dattatray Mhatre (D1), Suresh Mhatre (D2), Bapu Jamdade, Anil Salavkar (Identifier of thumb impression of Narmadabai on Will) and Dinanath Malvi (attesting witness). After considering the evidence on record, the Trial Court partly decreed the suit by declaring that Plaintiff is the sole owner of suit properties and directing Defendants to handover vacant and peaceful possession of suit properties to the Plaintiff. Plaintiff's prayer for permanent injunction to restrain Defendants from obstructing her possession was however rejected.

7. Aggrieved by the Decree of Trial Court, Defendants filed Regular Civil Appeal No. 64 of 2010 before District Court,

Alibaug. By Judgment and Order dated 7 December 2022 the first Appellate Court has dismissed the Appeal. Only Original Defendant No.1 Dattatray Gopal Mhatre has filed present Second Appeal challenging the decisions of the Trial Court and the first Appellate Court.

8. By Order dated 3 January 2024, this Court admitted the Second Appeal on following substantial question of law:

“Whether there is any perversity in findings of the Trial Court and First Appellate Court in holding that there is no partition between Narmadabai and Neerabai and that the Will executed in favour of the Defendants is not valid.”

9. In view of urgency expressed by the learned counsel appearing for rival parties and as per their consent, the hearing of appeal was expedited and same has been taken up for final hearing. The learned counsel appearing for Appellant has prepared and submitted before this Court private paper book as well as the relevant documents. None has appeared on behalf of Respondent Nos. 2 to 5, who are original Defendant Nos.2 to 5 and who are actually formal Respondents to the present appeal as they were defending the Suit alongwith Appellant herein-Dattatray Gopal Mhatre. Since Respondent Nos. 2 to 5 are not aggrieved by the Judgment and Decree of first Appellate Court, the appeal is taken up for hearing without awaiting appearance on behalf of Respondent Nos. 2 to 5.

10. Mr. Joshi the learned counsel appearing for the Appellant would submit that both the Trial Court and the first Appellate Court have erred in not appreciating the issue of limitation. That the suit for possession was required to be filed within 12 years under Article 65 of the Limitation Act, 1963. That the Plaintiff herself has admitted in her cross-examination that suit properties are in possession of Defendants since the lifetime of her mother-Narmadabai. That suit filed in the year 2005 was clearly barred by limitation. That the Trial and first Appellate Court ought to have framed and answered the issue of limitation and on that ground, the impugned Judgments are liable to be set aside.

11. That the Trial Court and the first Appellate Court erred in not appreciating that suit properties were indeed partitioned which was recorded by Mutation Entry No. 2490 certified on 12 July 1986. That if there was no partition and the intention was to merely record names of heirs of Narayan, there was no necessity of recording names of Narmadabai and Neerabai separately in respect of distinct properties. Mr. Joshi would take me through cross-examination of Plaintiff containing admissions about separate 7/12 Extracts in the names of Plaintiff and Narmadabai, failure to make any efforts to get Plaintiff's name mutated to mother's properties, that the properties were divided equally between Plaintiff-Neerabai and her mother-Narmadabai after father-Narayan's death and most importantly the admission that

such equal distribution was by way of partition and heirship. That Mutation Entry No.2490 certified on 12 July 1986 was never challenged by Plaintiff by which her name was not mutated to suit properties after her father's death. That thus Narmadabai became sole owner of the lands recorded against her name and was fully competent to bequeath the same by executing a Will. That therefore, the findings of the Trial Court and the first Appellate Court about absence of partition are perverse and are liable to be set aside.

12. Mr. Joshi would further submit that Narmadabai's registered Will is valid and was proved before the Trial Court by marking the same as Exhibit-80. That she expired seven and half years after execution of the Will and never revoked the same during long gap of seven and half years, thereby making her intention clear that she desired disposition of her estate as per the Will. That execution of Will seven and half years before death clearly proves physical and mental fitness of the testator. That registration of Will *prima facie* establishes its authenticity. That as Plaintiff doubted thumb impression of Narmadabai on the Will, the burden to prove such allegation rested on the Plaintiff especially because the Will is registered. That both the Courts have erroneously discarded the Will on technical defects without appreciating the fact that the Will is registered and attesting witness gave evidence before the Trial Court. That no evidence is produced on record to prove that Narmadabai was not mentally or physically fit to execute the Will.

That except bare words of Narmadabai suffering from high blood pressure, diabetes or spinal cord injury, no material documentary evidence was produced by Plaintiff to prove such medical condition or that alleged medical condition rendered Narmadabai physically or mentally unfit to execute the Will. Mr. Joshi would further submit that Defendants have examined witnesses to prove the Will. The doubts raised about age are totally baseless as every adult person is capable of executing the Will and therefore mere surmises of age cannot cast doubt on the Will. That findings of the Trial Court about physical and mental unfitness to execute a Will for the reason of non-cultivation of land by Narmadabai is totally perverse. That mere non-cultivation of land does not render a person unfit to understand the consequences of making a Will. That doubts expressed by the Trial Court about Narmadabai's Will not being last will are based purely on surmises and conjectures as Plaintiff did not plead or prove that any other Will was executed by her. Non-examination of Adv. Raut, who drafted the Will, does not render the Will doubtful as long as the person identifying the thumb impression of Narmadabai and attesting witness are examined before the Trial Court. That Witness Summons were issued to Adv. Raut at the instance of the Defendants and therefore no adverse inference can be drawn on account of failure of Adv. Raut to turn up before the Trial Court for deposition. The doubts expressed by the Trial Court about signature of attesting witness-Dinanath Malvi are totally baseless as the said witness identified his signature on the Will. Relying on the Judgment of

this Court in *P. D. Navghare*<sup>1</sup>, Mr. Joshi would contend that mere noticing of some difference in signature does not render the Will invalid.

13. Mr. Joshi would further submit that the authenticity of Will is also required to be presumed on the basis non-bequeath of entire suit properties in favour of Defendants. That some portion of the properties of Narayan were already given in the share of Neerabai by way of Mutation Entry No.2490 and additionally some more properties are bequeathed by Will of Narmadabai to the Plaintiff. That if Defendants had any ill intention to grab properties of Narayan and Narmadabai, they would not have waited till 1998 to mutate their names in respect of properties bequeathed to them. That Defendants always possessed the properties which was the reason why they did not make any attempts to mutate their names in revenue records immediately after Narmadabai's death. That there is admission by Plaintiff that her relationship with Defendants was always cordial and that last rites of Narayan were performed by father of Defendant No.1. That Defendant No.1 and his wife always performed puja in temple after Narayan. That Trial Court therefore ought to have drawn an inference of Defendant No.1 taking care of Narayan and Narmadabai in the light of Plaintiff residing at Mumbai. As per the Indian Evidence, Act, 1872, admission given by parties is the best evidence in the eyes of law and in support of this contention, Mr.

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<sup>1</sup> P. D. Navghare and another Vs. S. D. Chachad and others 2011 (1) Mh.L.J. 509

Joshi would rely upon the judgment of the Apex Court in ***United India Insurance Co. Ltd.***<sup>2</sup>

14. Mr. Joshi therefore pray for setting aside the decisions of the Trial Court and the first Appellate Court and would seek dismissal of Plaintiff's suit.

15. *Per contra*, Mr. Patil, the learned counsel appearing for Respondent No.1/Plaintiff would oppose the appeal and support the Orders passed by the Trial Court and the first Appellate Court. He would submit that, both the Courts below have recorded findings of fact after appreciating the evidence on record and that no interference at the instance of this Court is warranted in exercise of its jurisdiction under Section 100 of Code of Civil Procedure, 1908. He would take me through the findings recorded by the Trial Court and would submit that the Trial Court has conducted a detailed inquiry for purpose of arriving at findings that no partition was effected by Mutation Entry No. 2490 and the Will relied upon by Defendants is not valid.

16. Mr. Patil would submit that Defendant Nos. 1 and 2 are propounders of alleged Will as they claim title over the suit properties on the basis of the alleged Will. That therefore the burden rested on them to explain all the suspicious circumstances in respect of the Will. He would rely upon Judgments of Apex

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<sup>2</sup> United India Insurance Co. Ltd. And another Vs. Samir Chandra Chaudhary (2005) 5 SCC 784

Court in **Surendra Pal<sup>3</sup>, Smt. Jaswant Kaur<sup>4</sup>, Kavita Kanwar<sup>5</sup> and Rajkumari<sup>6</sup>**.

17. That there are several suspicious circumstances in respect of the alleged Will which were pleaded by the Plaintiff in plaint. That suspicious circumstances are (i) to (vii) :

- i. Narmadabai had 1/2 share in suit lands. Thus, she had no authority to bequeath the entire suit lands.
- ii. Will is completely unnatural. From out of all lands totally admeasuring around 1 H. 06 R, only small portion admeasuring 900 Sq. Ft (30 x 30 ) was given to Plaintiff.
- iii. In March-April, 1987, Narmada was bedridden and seriously ill.
- iv. Narmada was not having such cordial relations with Defendants to make the bequest.
- v. Narmada was completely illiterate having no knowledge of the concept of Will.
- vi. Till death i.e., 20.7.1994, Narmada never informed the Plaintiff (Daughter) about the alleged Will, though she was residing in the

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<sup>3</sup> Surender Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and another (1974) 2 SCC 600.

<sup>4</sup> Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and others (1997) 1 SCC 369.

<sup>5</sup> Kavita Kanwar Vs. Pamela Mehta and others (2021) 11 SCC 209.

<sup>6</sup> Rajkumari and others Vs. Surinder Pal Sharma (2021) 14 SCC 500.

house constructed by Plaintiff herself at native place.

vii. Attesting witness was not known to Narmada.

18. That additionally the evidence disclosed following suspicious circumstances:

- i. Dattatraya (Defendant No.1) played active role in getting Will drafted, attested and registered.
- ii. There was no special reason to exclude Plaintiff from bequeath in respect of Agricultural lands.
- iii. Doctor's certificate/ Medical certificate was not annexed to the Will.
- iv. There is no endorsement on the Will, stating that contents of will were not explained to Narmada.
- v. Defendant No.1 did not disclose the Will from 1984 to 1998.
- vi. After death of Narayan in the year 1986, from 1987, Plaintiff started cultivating lands on her own; she constructed new house.
- vii. Will was drafted by Adv. Raut, who was advocate of father of Defendants.
- viii. Adv. Raut was not examined.

19. That Trial Court has correctly appreciated all the above suspicious circumstances for arriving at a finding of fact that the Will has not been validly executed. That there are several

admissions given by witnesses of the Defendants establishing that the Will was surrounded by suspicious circumstances. He would take me through various admissions given by Defendant Nos.1 and 2 as well as their witnesses Anil Salavkar and Dinanath Malvi. That Anil Salavkar admitted that he did not take thumb impression of Narmadabai and therefore his evidence did not prove that Narmadabai executed the Will. That the attesting witness-Dinanath Malvi has not signed the Will as his name is mentioned without his signature. That the Trial Court has correctly appreciated that Dinanath Malvi usually signs in a different way which does not appear on the Will.

20. Lastly and alternatively, Mr. Patil would submit that even if the Will is held to be genuine document, Narmadabai could have, at the highest bequeathed only her half share in properties of Narayan and the Will cannot be binding on the remaining half share of Plaintiff-Neerabai. He would pray for dismissal of the Appeal.

21. Rival contentions of the parties now fall for my consideration.

22. There were two principal issues involved before the Trial and the first Appellate Court and which again arise before

this Court in the light of question of law framed at time of admission of the appeal. The two principle issues are:

- I. Whether Mutation Entry No. 2490 effected partition between Plaintiff-Neerabai and her mother-Narmadabai ?
- II. Whether Narmadabai's Will is a valid document ?

23. Mr. Joshi has sought to canvass submissions on additional issue of limitation, which was neither framed by the Trial and the first Appellate Court nor the appeal is admitted on the question of limitation. However, since extensive submissions are canvassed by both the learned counsel, I proceed to formulate the following additional substantial question of law to be decided in the present Appeal:

“Whether Plaintiff's suit can be said to be barred by limitation ?”

24. It is Mr. Joshi's contention that Plaintiff's prayer for recovery of possession of the suit properties is barred by limitation. Reliance is placed on Article 65 of the Limitation Act, under which suit for possession is required to be filed within 12 years from the date of possession becoming adverse. However, in the present case, it is Defendants' own case that a partition was effected between Narmadabai and Neerabai by Mutation Entry No. 2490 certified on 30 August 1986 which would mean that

Narmadabai started possessing the properties recorded against her name after 30 August 1986. In fact Mutation Entry No. 2490 is premised on position of possession and it specifically records that the lands recorded against Narmadabai's name were possessed by her. Narmadabai passed away on 20 July 1994. Therefore even if Defendants' case that Plaintiff never possessed suit properties is to be accepted, Defendants cannot run away from the fact that Narmadabai continued to possess the suit properties till the date of her death on 20 July 1994. There is no document on record to evidence that Narmadabai handed over actual or physical possession of land in favour of Defendants at any point of time before her death. Therefore, it will have to be presumed that Narmadabai continued to possess the suit properties till her death on 20 July 1994. Defendants claim title in respect of suit properties on the strength of alleged Will executed by Narmadabai. Therefore, possession, based on title could, at best, enure to the Defendants only after Narmadabai's death on 20 April 1994. Mere help extended by Defendants in cultivation of lands by Narayan or Narmadabai would not make them exclusive possessors thereof. Such joint cultivation would be cultivation at behest of Narayan or Narmadabai and the same would not amount to possession adverse to that of the Plaintiff. I therefore, find that Narmadabai remained in possession of suit properties till she passed away on 20 April 1994. The suit is instituted on 12 December 2005 i.e. before 12 years of death of Narmadabai. I therefore find that the objection of limitation sought to be raised

for the first time before this Court deserves to be repelled. It is accordingly rejected and the additional question of law is answered accordingly.

25. Now I turn back to the principal issues of partition and validity of Will. As a matter of fact, the second issue of validity of Will hinges upon first issue of partition between Narmadabai and Neerabai. If partition is not proved, Narmadabai does not become exclusive owner of the suit properties and could not have executed the Will in respect of any properties coming to the share of Plaintiff. Therefore, it is important for the Defendants to prove both partition as well as Will in the present case to claim title in respect of the suit properties.

26. The first issue is about effecting partition between Narmadabai and Neerabai by virtue of Mutation Entry No. 2490 certified on 30 August 1986. I have gone through said Mutation Entry No. 2490 placed on record. The mutation entry is effected shortly after Narayan's death on 6 March 1986. The mutation entry records thus:

| Mutation Entry No. | Nature of Right                                         | Mutated S.No./ H.No./ G.No. | Remark and Signature of Inspecting Officer |
|--------------------|---------------------------------------------------------|-----------------------------|--------------------------------------------|
| 2490               | Date: 12.07.86<br>Shree. Narayan Hiru Mhatre has passed | 113/10A<br>143/8            | Examined as per                            |

|  |                                                                                                                                                                                     |         |        |            |                                                                                    |                                                                                              |
|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|--------|------------|------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
|  | away on 6.3.86. He does not have son as heir. He has Daughter- 1) Neerabai Tukaram Mhatre. Wife- 2) Narmadabai Narayan Mhatre. The actual physical possession of lands is as under: |         |        |            | 145/0<br>148/2<br>151/2<br>154/4<br>154/5<br>200A/2B<br>200A/<br>1A+2A/2<br>151/3A | Wardi statement. Notice issued. Entry certified. Signed xxx Circle Officer, Shirad. 30.8.86. |
|  | S.No.                                                                                                                                                                               | H.No.   | Area   | Assessment |                                                                                    |                                                                                              |
|  | 113                                                                                                                                                                                 | 10B     | 0-14-1 | 4-06       | } Narmadabai Narayan Mhatre                                                        | Total 10                                                                                     |
|  | 143A                                                                                                                                                                                | 8       | 0-03-0 | 00-08      |                                                                                    |                                                                                              |
|  | 145                                                                                                                                                                                 | 0       | 0-58-2 | 16-00      |                                                                                    |                                                                                              |
|  | 148                                                                                                                                                                                 | 2       | 0-10-4 | 2-81       |                                                                                    |                                                                                              |
|  | 151                                                                                                                                                                                 | 2       | 0-05-0 | 0-12       |                                                                                    |                                                                                              |
|  | 154                                                                                                                                                                                 | 4       | 0-02-0 | 0-05       |                                                                                    |                                                                                              |
|  | 154                                                                                                                                                                                 | 5       | 0-07-0 | 0-14       |                                                                                    |                                                                                              |
|  | 200A                                                                                                                                                                                | 2B      | 0-08-1 | 0-12       |                                                                                    |                                                                                              |
|  | 200A                                                                                                                                                                                | 1A+2A/2 | 0-16-2 | 4-75       | } Neerabai Tukaram Mhatre                                                          |                                                                                              |
|  | 151A                                                                                                                                                                                | 3A      | 0-50-0 | 15-25      |                                                                                    |                                                                                              |
|  | As per above names are recorded after recording statements and conducting panchnama as per Heir Register No. 452.                                                                   |         |        |            |                                                                                    |                                                                                              |

27. Plain reading of the Mutation Entry would indicate that the real objective behind effecting the same was merely to record the names of heirs of deceased Narayan. However, an inference of partition is sought to be raised only because different properties are recorded against the names of Narmadabai and Neerabai. However, recording of such names is on account of alleged actual possession. So, Mutation Entry No. 2490 can at best be relied upon to evidence recording of names of heirs of Narayan and actual possession of different lands by Narmadabai and Neerabai. Plain language of the Mutation Entry does not indicate that any partition has taken place between Narmadabai and Neerabai. It is Defendants' case that, Narayan had effected the partition during his lifetime and the same was merely recorded by Mutation Entry No. 2490. However, the mutation entry does not

state so. Infact the mutation entry does not even use the word 'partition'.

28. Mr. Joshi has highlighted one stray statement of Neerabai in her cross-examination for drawl of inference of partition. She has stated in her cross-examination that *"it is true that after my father's death, me and my mother each took half of the property out of the ancestral properties. It is also true that after father's death half properties came to my mother and me by partition and succession."* Mr. Joshi has harped on use of the word "partition" by Plaintiff in her cross-examination. In my view, this cannot be treated as clear admission of effecting any partition. In addition to partition, Plaintiff has also used the word "succession". When the above statement of Plaintiff is read in context of contents of Mutation Entry No. 2490, it becomes abundantly clear that no partition took place between Neerabai and Narmadabai. Therefore, the above deposition cannot be construed as a clear admission of partition by Plaintiff. Therefore, reliance of Mr. Joshi on judgment of the Apex Court in ***United India Insurance Co. Ltd.*** (supra) would have no application to the facts and circumstances of the present case which holds that admitted fact must be taken to be established until presumption raised by admission is rebutted. Here, even if Plaintiff's above deposition is treated as an admission of partition, the presumption on account of such admission is clearly rebutted by contents of Mutation Entry No. 2490.

29. Perusal of findings recorded by the Trial Court would indicate that it has accepted the factual position of Mutation Entry No. 2490 being effected for the purpose of mutating the names of heirs of Narayan. Another factor taken into consideration by the Trial Court is certification of further Mutation Entry No. 452 after Narmadabai's death, by which, name of Neerabai was mutated in respect of all properties of Narayan. This is yet another factor which demolishes the theory that there was any partition between Narmadabai and Neerabai. The first Appellate Court has upheld the said findings of the Trial Court. The first Appellate Court has held that definite and unequivocal indication of intention by member of joint family to separate herself from the family and to enjoy the share in severality is not established. It has held that the mutation entry is not certified on the basis of any actual partition and that therefore no inference can be drawn about such partition. The first Appellate Court has further held that effecting of partition within 5 months of Narayan's death is otherwise not probable. The first Appellate Court has also refused to believe the theory of partition on account of allotment of less share to the Plaintiff-Neerabai than that of the mother-Narmadabai.

30. After going through the findings of the Trial Court and the first Appellate Court and on perusal of records, I do not find any serious infirmity in the said finding that Mutation Entry No.

2490 did not effect partition between Narmadabai and Neerabai. Accordingly, the first issue is answered in negative by holding that no partition took place between Narmadabai and Neerabai.

31. As partition is not held to be proved, Neerabai becomes entitled to half share of all properties of Narayan. In that view, the alleged Will relied upon by Defendants can, at best, be used for claiming title to the lands falling in only half share of Narmadabai. Keeping this in mind, I proceed to examine the next issue of validity of Will dated 10 April 1987 executed by Narmadabai. Plaintiff's suit is for declaration of title and recovery of possession on the strength she being sole heir of Narayan and Narmadabai. Initially Plaintiff's name was mutated in revenue records by Mutation Entry No. 452 in respect of all properties of Narayan on 18 April 1998. However, shortly thereafter Mutation Entry No.453 was certified on 5 May 1998 mutating names of Defendants on basis of alleged Will dated 10 April 1987 executed by Narmadabai. Since, reliance by Defendants on the Will was noticed by Plaintiff, she has raised specific pleadings in the plaint about Will being void by raising several suspicions about the same in the plaint. The Defendants on the other hand asserted in the Written Statement that the Will is validly executed.

32. Defendants are propounders of the Will and claim title in suit properties on the basis of the Will. As observed above, Plaintiff has alleged suspicious circumstances in respect of the Will

in the plaint. It therefore became incumbent for the propounders of the Will to clear the said suspicions. Thus the burden of clearing suspicious circumstances rested solely on propounders of the Will, which in the present case are the Defendants. The law in this regard is well settled that the burden of clearing suspicious circumstances surrounding the Will rests on the shoulders of the propounders of the Will. In ***Surendra Pal*** (supra), the Apex Court has held in para Nos. 4 and 7 as under:

“4. The grounds on which the Will was contested were- (i) that it was not a genuine document; (ii) that the signature of Bhim Sain Arora on the Will was not his real signature; (iii) that at the time of the execution of the Will Bhim Sain did not know the contents of the Will, nor did he give any instructions to his solicitors nor did he consult them; (iv) that the Will had not been read over or explained to Bhim Sain nor did he read it himself before it was executed, as such he was not aware of the nature and effect of the Will; (v) that even if the Will had been written and executed by Bhim Sain such execution of the Will had been obtained by fraud, coercion and undue influence or importunity of his wife in collusion with her brother-in-law Col. Vijn; (vi) and that after making the Will, Bhim Sain was prevented by force and threats from executing a further Will prepared by and under his instructions by which inter alia the property would have been equitably divided and provisions made particularly for the aged mother and the minor child.

7. The propounder has to show that the Will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the Will itself is surrounded by suspicious

circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the Will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the Will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the Will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain. (See *H. Venkatachala Iyengar v. B. N. Thimmajamma*<sup>1</sup>, and *Rani Purnima Devi v. Kumar Khagendra Narayan Dev*<sup>2</sup>.) In the latter case this Court, after referring to the principles stated in the former case emphasised that where there are suspicious circumstances the onus will be on the propounder to explain them to the satisfaction of the court before the Will could be accepted as genuine; and where the caveator alleges undue influence, fraud and coercion the onus is on him to prove same. It has been further pointed out that the suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will which may be unnatural or unfair or improbable when considered in the light of the relevant circumstances. If the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the Will had been obtained by fraud or undue influence, a probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind. The observations of the Privy Council in *Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga* support the above proposition. Mr. Ammer Ali observed at p. 33:

It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the Will on the ground that it was obtained by

the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that case.

In the light of what has been stated if the various requirements of a valid Will are established, then as observed by the Privy Council in *Motibai Hormusjee Kanga's* case at p. 33:

A man may act foolishly and heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition.”

33. In ***Smt. Jaswant Kaur*** (supra) the Apex Court has held that the normal rule which governs any legal proceedings is that burden of proving a fact in issue lies on him who asserts it and not on him who denies it. In case before the Apex Court, Defendant was the principal legatee and also the propounder of the Will who relied upon Will in answer to Plaintiff's claim for one-half share in suit properties. The Apex Court therefore held that, the burden of proving the Will rested solely on the Defendant therein. The Apex Court has held in para Nos. 8 and 9 as under:

“8. The defendant who is the principal legatee and for all practical purposes the sole legatee under the and found will. It is he who set up the will in answer to the plaintiff's claim in the suit for a one-half share in her husband's estate. Leaving aside the rules as to the burden of proof which are peculiar to the proof of testamentary instruments, the normal rule which governs any legal proceeding is that the burden of proving a fact in Issue lies on him who asserts it, not on him who denies it. In other words, the burden lies on the party which fail in the suit if no evidence were led on the fact alleged by him. Accordingly, the defendant ought to have led satisfactory evidence to prove the due execution of the will by his grandfather Sardar Gobinder Singh.

9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.”

34. In **Kavita Kanvar** (supra), the Apex Court has reiterated the principles concerning execution of Will, its proof and acceptance by the Court and referring to its previous decision in ***Shivakumar Vs. Sharanabasappa*** (2021) 11 SCC 277, the Apex Court has held in para 24.8 as under:

24.8. We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in ***Shivakumar v. Sharanabasappa***<sup>39</sup>, this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a will as follows: (SCC pp. 309-10, para 12)

“12..... 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 the same can be taken to have been primarily discharged on proof of the essential facts 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 et cetera 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 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 et cetera 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 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."

35. In *Kavita Kanvar* (supra) in para No. 27 of the judgment, the Apex Court took note of suspicious circumstances of beneficiary playing active role in execution of Will, absence of plausible reason for exclusion of only son and other daughter in

process of execution of will and excluding them from major part of the estate, etc. The Apex Court held that the Will was surrounded by various suspicious circumstances which were held to be material in nature and which remain unexplained. The Apex Court took note of cumulative effect of the suspicious circumstances and held in para 31 as under:

31. In the ultimate analysis, we are satisfied that the will in question is surrounded by various suspicious circumstances which are material in nature and which have gone unexplained. The cumulative effect of these suspicious circumstances is that it cannot be said that the testatrix was aware of and the meaning, purport and effect of the contents of the will in question. The appellant, while seeking probate, has not only failed to remove and clear the aforesaid suspicious circumstances but has even contributed her own part in lending more weight to each and every suspicious circumstance. The will in question cannot be probated from any standpoint.

36. In *Rajkumari* (supra), the Will was registered but was surrounded by various suspicious circumstances casting doubts thereon. The testator was illiterate lady, the propounder of the Will was not able to repel and remove the substantial and good reasons to legitimately suspect and question the execution of the Will. The Apex Court therefore held that the Will was not validly proved.

37. Applying ratio of the above Judgments to the facts and circumstances of the present case, it is seen that several suspicious circumstances exist surrounding the Will in the present case. Some

of them are already reproduced above while recording submissions of Mr. Patil. Defendants are the propounders of the Will. They are the major beneficiaries. Testatrix was an illiterate lady. Defendant No.1 has admitted in evidence that Neerabai has 4 sons and 1 daughter. There was no valid reason for Narmadabai to exclude her only daughter and grandchildren from major portion of the estate. Perusal of the Will would indicate that Defendant No.1 Dattatray is given total 33 Ares land in addition to a house whereas Defendant Nos. 2 to 5 who are brothers of Defendant No.1-Dattatray are together given 65 Ares land. As against this, Plaintiff is given one house admeasuring 30x30. It is therefore difficult to believe as to why Narmadabai would exclude her daughter and grandchildren from her estate and bequeath the suit properties in favour of her nephews. It has also come in evidence that Defendant No.1's father independently had 7/8 acres land. Thus, it becomes difficult to believe that the Defendants who were to succeed to 7/8 acres land from their own family, could be granted additional land of 33 Ares and 65 Ares = 98 Ares (roughly 2.5 Acres) by Narmadabai by excluding her daughter and 5 grandchildren.

38. Another suspicion surrounding the Will is about Narmadabai not informing no taking help of her only daughter in execution of registered Will though the daughter and the grandchildren used to regularly visit her. That a typed Will was already kept ready in the Advocate's office where Narmadabai is shown to have directly approached for execution of the Will. There

is inconsistency in recording Narmadabai's age in the Will which is shown as 75 years in the year 1987 when Defendants witness has deposed that Narmadabai died at the age of 90 years in 1994.

39. Two most glaring suspicions are about the Identifier admitting Narmadabai not putting thumb impression in his presence and signature of attesting witness differing on the Will. I have also gone through the copy of Will placed on record and I find that names of two attesting witnesses are mentioned in the Will without any signatures against such names. The first Appellate Court has doubted presence of Dinanath Malvi at time of execution of the Will. The evidence of attesting witness-Dinanath Malvi does not record that he personally saw Narmadabai putting her thumb impression on the Will. There is inconsistency in evidence of Dinanath Malvi and Anil Salavkar. While Dinanath Malvi claims that all events of reading of contents of will by Sub-Registrar to Narmadabai, she putting her thumb impression on that, Anil Salavkar signing as Identifier and Dinanath Malvi signing as attesting witness took place in presence of all parties (Narmadabai, Anil Salavkar, Dinanath Malvi and Sub-Registrar). As against this Anil Salavkar deposed that he did not see Narmadabai putting thumb impression on the Will. Therefore, there is clear contradiction between the evidence of Dinanath Malvi and Anil Salavkar.

40. The evidence on record clearly indicates that Defendant No.1 has played active role in execution of alleged Will. Adv. Raut who allegedly prepared the Will was known to Defendant No.1. It is admitted by Defendant No.1 that he availed services of both the attesting witnesses. The Identifier of thumb impression is also from the office of Adv. Raut and is again linked to Defendant No.1. Thus, active role played by beneficiary in preparation of Will creates strong suspicion about its authenticity.

41. Another relevant factor taken into consideration by the Trial Court is about the source of custody of Will. Original Will is not produced on ground that original Will is kept with Adv. Raut. In the evidence Defendant No.1 has stated that he did not make any efforts to procure the original Will from Adv. Raut. In cross-examination he has stated that Adv. Raut addressed some Notice to Defendant No. 1 in 1998 and informed him about custody of Will is with him. However Defendant No.1 has neither produced the said Notice alleged addressed by Adv. Raut nor was able to explain the exact purpose why such Notice was addressed.

42. After taking into consideration the above suspicious circumstances, the broad findings on which the Trial Court has proceeded to discard the Will can be summarized as under:

- I. Suspicion created on account of inconsistency in the age of Narmadabai reflected in the Will.

- II. Non-examination of Adv. Raut, who alleged prepared the Will as per Narmadabai's instructions and who was practicing Advocate in the same Court and could easily be made available for examination before Trial Court.
- III. Identifier of thumb impression of Narmadabai on the Will (Anil Salavkar) admitting that he did not see Narmadabai putting her thumb impression.
- IV. Non-examination of any neighbours to prove physical and mental condition of Narmadabai and examination of only beneficiaries as witnesses.
- V. Evidence on record suggesting that one Smt. Shantabai Thale was taking care of Narmadabai belying the defence of execution of Will by Narmadabai on account of Defendants looking after her.
- VI. Presence of temple within the suit premises and Narmadabai not making any arrangement for looking after temple in the Will.

43. Mr. Joshi has sought to brand the above factors as merely technical defects for which, according to him, Will cannot be discarded. He has placed reliance on Judgment of Single Judge of this Court in ***P.D. Navghare*** (supra) in which this Court has held in para 36 as under:

36. The Caveatrices contend that the Will was fabricated by the plaintiffs. The deceased has signed the Will in English. The deceased has initialled all the 4 pages of the Will at various places in the margins. The 2 attesting witnesses who have signed the Will have also initials against the initials of the deceased. The property which has been bequeathed to the plaintiffs was purchased by

the deceased under a conveyance. That conveyance is an admitted document showing the admitted signature of the deceased. It has been marked as exhibit in evidence and relied upon by both the parties. The Advocate of the Caveatrices has called upon the Court to compare the 2 signatures of the deceased. The signature of the deceased on the conveyance is in the same slant and is distinctly the signature identical to the signature on the Will except for the fact that in the conveyance the deceased has put his complete signature showing his name, his father's name and his surname and in the Will the deceased put his initials followed by his surname. Merely on such difference, the Will cannot be stated to be fabricated.

44. In my view, the judgment in *P.D.Navghare* (supra), does not assist the case of Appellant. In that case as well, this Court undertook the exercise of comparing the signature of the deceased which is undertaken by the Trial Court in the present case in respect of the attesting witness-Mr. Dinanth Malvi.

45. In my view, the above suspicious circumstances cannot be treated as technical defects for being ignored altogether. If the above factors are ignored, the same would mean relieving the Defendants of their burden to dispel the suspicious circumstances without offering any valid justification for the same.

46. The Trial Court has conducted detailed inquiry and has examined each and every aspect of evidence on record. It has examined each and every suspicious factor which are multiple in

number, and has thereafter taken into consideration cumulative effect thereof for the purpose of holding that the Defendants are unable to prove that Narmadabai executed a Will on 10 April 1987. There could be couple of aberrations in the findings recorded by the Trial Court, especially about raising a surmise that the Will is not the last will executed by Narmadabai (which ought to have been avoided in absence of production of any other will by any of the parties). Similarly even if Defendants are to be given benefit of deposition of Dinanath Malvi confirming his signature on Will (which actually differs), the same would not change the position that he has not deposed about Narmadabai putting her thumb impression in his presence. The other suspicious circumstances taken into consideration by Trial Court justifies its ultimate conclusion that execution of the Will by Narmadabai is not proved. I do not find any valid reason to interfere in said findings recorded by the Trial Court. The first Appellate Court has considered the objections raised by Appellant to the view taken by the Trial Court and has held that execution of Will is not proved either on the basis of evidence of the Identifier of thumb impression or on the basis of evidence of attesting witness-Dinanath Malvi.

47. After going through the findings of the Trial Court and the first Appellate Court and on perusal of evidence on record, I proceed to answer the second issue in negative by holding that the alleged Will is not validly executed.

48. After considering overall conspectus of the case, I do not find any concrete reason to interfere in concurrent findings recorded by the Trial Court and the first Appellate Court. The decree of the Trial Court results in a situation where daughter receives all properties of her father, whereas Defendants receive properties through their own branch.

49. The Second Appeal must fail. The Second Appeal is accordingly **dismissed**. Parties shall bear their own costs.

**SANDEEP V. MARNE, J.**

50. After the judgment is pronounced, Mr. Joshi, the learned counsel appearing for the Appellant would pray for extension of interim relief granted by this Court on 3 January 2024. The request is opposed by the learned counsel appearing for Respondent No.1. The interim order granted by this Court on 3 January 2024, shall remain in operation for a period of six weeks from today.

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**SANDEEP V. MARNE, J.**