

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

**FIRST APPEAL NO. 899 OF 2023
WITH
INTERIM APPLICATION NO. 15364 OF 2023
IN
FIRST APPEAL NO. 899 OF 2023**

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SHUBHAM
ASHOKRAO

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TALLE SHUBHAM
ASHOKRAO
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Smt. Vijayalakshmi Dnyaneshwar Kamble Through ... Appellant (Org
Power Of Attorney Holder Respondent)
Shri. Dnyaneshwar D. Kamble

Vs.

Shri. Balasaheb Alias Khandu Bharat Gawli And Ors. ... Respondents
(Org Applicants)

Adv. S. C. Wakankar, for the Appellant.
Adv. Mandar Limaye, for the Respondents.

CORAM : KISHORE C. SANT, J.

DATE : 29th APRIL, 2024

P.C.:-

1. Heard the parties. Looking to the nature of the dispute the appeal is taken up for final disposal at the stage of admission with the consent of both the parties.
2. In the Appeal challenge is raised to the Judgment and Order passed by the learned Civil Judge, Senior Division, Pune, dated 20.02.2023, in Miscellaneous Civil Application No. 569 of 2015.
3. By way of impugned Judgment and Order the learned Court has allowed the Application seeking Probate of the Will of the deceased,

Late Shri. Bharat Manohar Gawli.

4. It is argued by the learned Advocate for the Appellant an Objector in the proceeding that the Will is not proved as required under Section 63 of the Indian Succession Act, 1985. Though one of the attesting witnesses viz., Santosh Tandale is examined he has not deposed in specific words that the deceased testator signed a Will in presence of this attesting witness. He has taken this Court through the evidence of witness Santosh Tandale. Admittedly the second attesting witness is not examined by the Respondent/Original Claimants. He relied upon the Judgment of the Hon'ble Supreme Court in *Civil Appeal No. 3351 of 2014, in the case of Meena Pradhan & Ors Vs. Kamla Pradhan & Anr.* The second judgment he relied upon is reported in *(2003) volume 2 Supreme Court Cases 91 in the case of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam.* In support of his submissions that the witness has to specifically stated that the testator has signed in his presence.

5. The learned Advocate for the Respondent vehemently argued that no specific form of evidence is required. It is sufficient to examine one of the witnesses he submits that witness Santosh Tandale has clearly stated that the Will was prepared in his presence he has also proved the contents of the Will. The Court need not take hyper technical approach in the matter while appreciating the evidence. He submits that the witness has clearly stated that the will was prepared in his presence he has also given other

particulars as to why the Will was prepared. His submissions is that this evidence is sufficient to prove the Will. This Court has read Section 63(c) of the Succession Act which reads as under:-

“63. Execution of unprivileged wills. - Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules -

(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 acknowledgment of his signature or mark, or of 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”.

6. Considering the section it is clear that the probate what is required to be proved firstly that the testator has signed the Will or affixed a mark or through some other person has signed in his presence as per his direction. *Secondly* the signature or mark of the testator shall be placed at such a place should appear to make his intention clear to give effect to the writing as a Will. *Thirdly* that will is attested by 2 or more witnesses and have seen the testator signing or affixing is mark on the Will or that some other person as per the direction in the presence of the testator has signed a Will. It is further required that the testator has given acknowledgment of his

signature or mark or of such other person who have signed under his direction. It is also required that each of the witnesses shall sign the Will only in the presence of the testator. Though it is not necessary for all the witnesses to sign it at the same time.

7. The Hon'ble Apex Court in the case of Meena (supra) has considered a Section 63 and deduced some of the principles which are required to prove validity and execution of the deed. The necessary extract of para 10 reads as under:-

“10. Relying on H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 Supp [1] SCR 426 (3-Judge Bench), Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 (3-Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, [2003] 2 SCC 91 (2-Judge Bench) Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, [2009] 4 SCC 780 (3-Judge Bench) and Shivakumar v. Sharanabasappa, [2021] 11 SCC 277 (3-Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

i. The Court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last will executed by him;

ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

iii. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a Will;

(b) It is mandatory to get it attested by two or more

witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

iv. For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses has signed the will in the presence of the testator;

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

viii. Whenever, there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicions circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his

own free Will;

x. One who alleges fraud, fabrication, undue influence etcetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

xi. Suspicious circumstance must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind'. Whether a particular feature would qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc."

8. It is thus clear that the Applicant has to necessarily prove the fact that the testator has signed the Will in presence of the witnesses. *Secondly* witness has to show that the testator has signed the Will in his presence in clause-vii what is placed on record that in case one witness fails to prove execution of the Will then the other attesting witness has to be called to supplement his evidence as appear from clause-vii. That in any case it is imperative to prove that the testator has signed in the presence of the witnesses and, if evidence of one of the witnesses does not sufficiently prove the fact then other attesting witnesses needs to be examined. In the case of Janki Narayan Bhoir (*supra*) para 16-c it is considered that there para 8 the Hon'ble Apex court has considered the requirements mentioned in the clause A,B,C of Section 63 are required to be proved. It is clear that

one of the requirement of due execution is its attestation by 2 or more witnesses and that is mandatory. The Court has also further considered Section 68 of the Evidence Act, providing the manner as to how the document is required by law to be attested can be proved.

9. Considering all these Judgments it is clear that in the present case though the attesting witness is examined he has not in specific words stated that the deceased Bharat Manohar Gawli, has signed the Will in his presence. Preparation of will is one thing and putting signature the person expresses his intention about the acceptance or giving finality to the contents of the Will. It may happen that before taking a signature he may change mind and change the contents of the Will at subsequent stage. It is for this reasons it is necessary to prove that he had expressed his intention to give finality to the contents of the Will in the presence of the witnesses. In this case though it is tried to be submitted that no suspicion circumstances are shown creating doubt about the execution of Will. However that itself would not be sufficient to prove the Will.

10. In this case the Court finds certainly the evidence is deficient to prove the Will. It appears that only due to technical mistake the Will is not proved so it will not be proper to set aside the Judgment and Order. In the interest of justice would be met by giving an opportunity to the probate Applicant to prove the Will by remanding the Application for fresh evidence. Hence the following Order.

ORDER

- a) The Appeal is partly allowed.
- b) The Judgment and Order passed by the learned Civil Judge, Senior Division, Pune, dated 20.02.2023 in Miscellaneous Civil Application No. 569 of 2015, is quashed and set aside.
- c) The matter is remanded back to the Trial Court for additional evidence.
- d) The parties are at liberty to lead evidence. In addition to evidence already lead before the Court. This Court has not touched to other grounds which are raised in the appeal and even in the Trial Court.
- e) First Appeal stands disposed of.
- f) Pending Applications, if any, stands disposed of.

(KISHORE C. SANT, J.)