



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Second Appeal No. 299 of 2001

(1) Bhaiyya S/o Maroti Bawankar (Dead)
Aged about 49 years,
Occ. Cultivation
Through his L.Rs.

Amendment
carried out
as per
Court's
order dtd.
5-6-2023

(1a) Suresh S/o Bhaiyya Bawankar
Aged 46 years, Occ : Agriculturist

(1b) Ganpat S/o Bhaiyya Bawankar
Aged 44 years, Occ : Agriculturist
Both R/o Kotewada, Post Gumgaon
Tahsil Hingna, District Nagpur.

(1c) Sangita W/o Dilip Dhobhale
Aged 40 years, Occu : Household
R/o Chamat Hall, Chandrabhaga
Society, Plot No. 7, Kharbi, Nagpur.

(1d) Sushma W/o Arun Fating
Aged 38 years, Occu : Household
At Chimnazari, Post Matkazari
Tal. Umred, District Nagpur.

(2) Suresh S/o Bhaiyya Bawankar
Aged Major, Occu. Business/Agriculturist

(3) Ganpat S/o Bhaiyya Bawankar
Aged : Major,
Occu. Business/Agriculturist
All R/o Kotewada, Post Gamgaon
Taluke Hingna, Distt. Nagpur.

... Appellants

- Versus -

Wachhalabai W/o Rambhau Sawarkar
Aged about 66 years, Occu. : Cultivator
R/o. : Khapri (Moreswar), Tq. Hingna,
Distt. Nagpur.

L.Rs of respondent brought on record.

(1) Tikaram S/o Rambhau Sawarkar,
R/o Moreshwar Khapri, Tah. Hingna,
Distt. Nagpur.

Amended as
per Court
order dtd.
7-10-2010

(2) Sakharam S/o Rambhau Sawarkar,
R/o Moreshwar Khapri, Tah. Hingna,
Distt. Nagpur.

(3) Dilip S/o Rambhau Sawarkar,
R/o Moreshwar Khapri, Tah. Hingna,
Distt. Nagpur.

Amendment
carried out
as per
Court
order dtd.
5-6-2023

(4) "M/s. Mahalaxmi Infracon,
Registered Partnership Firm,
Having its Office at N-103,
Laxmi Viahar Apartment,
behind Hotel Airport Centrepont,
Wardha Road, Nagpur, through its
Partners, Avinash Bhawrilal Chhajed
and Rahul Jagdish Bondre."

... Respondents

Mr. M. R. Joharapurkar, Advocate for the appellants

Mr. C. V. Kale, Advocate for respondent nos. 1 to 3/L.Rs of respondent

Mr. Firdos Mirza, Advocate for the respondent no. 4

CORAM : ANIL L. PANSARE, J.

Date of reserving judgment : 12-03-2024

Date of pronouncing judgment : 20-03-2024

JUDGMENT

Vide order dated 5-11-2001, the appeal has been admitted
on substantial questions of law mentioned at Sr. Nos. 2 and 4 in the
appeal memo, which read thus :

- (2) Whether in view of the fact that, Govinda Sadu Bawankar died on 19-9-1988 and thereafter even without issuing the notice, within 9 days, of his death, the respondent/plaintiff managed to get her name mutated in the records which clearly demonstrates that the mutation was taken in concilled way and unnatural haste by the daughter of said deceased Govinda i.e. respondent herein, which further demonstrates that, she had already knowledge of the Will executed by the said Govinda in favour of the appellants Nos. 2 and 3 herein on 19-8-1988, and therefore, only she had managed to get her name mutated ? The undue haste shown by the plaintiff/respondent herein clearly shown that, she did not come before the trial court with clean hands so as to claim relief of injunction. The judgments and the orders of the courts below are, therefore, illegal without considering the pleadings on behalf of the appellants and came to the conclusion wrongly that, the plaintiff had proved her title over the suit land.
- (4) Whether the Courts below failed to take into consideration that, in view of the provisions of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act, once the Will executed by deceased Govindrao Sadu Bawankar on 19-8-88 wherein the reason for exclusion of respondent was specifically given by the propounder, is proved and is admitted in evidence, and is accepted by the existing owner, it cannot be said that, it was obtained by way of fraud by the defendants with undue influence on the deceased Govinda, without giving knowledge of the contents of the Will to the Daughter of the said deceased Govinda, i.e. the plaintiff/respondent herein and as such, the Judgments

and the Decrees of the Courts below based on the irrelevant reliance of suspicion as the testator died within one month after the execution of Will and the erroneous conclusion that, there are suspicious circumstances only because the relatives of testators were present at the time of execution of Will and it is the natural practice that the desier has to be brought before the relatives only, are vitiated.

2. The first substantial question of law so formulated indicates that the respondent-plaintiff has shown undue haste to get her name mutated in the revenue record, which suggest that she had knowledge of Will executed by her father Govindrao Sadu Bawankar, which fact having been suppressed by the respondent – plaintiff, the relief of injunction could not have been granted because she did not come clean before the trial Court.

3. Having gone through the record, there appears evidence on the point that respondent – plaintiff had knowledge of execution of Will prior to she lodging the suit. The respondent, however, led evidence through power of attorney to which the appellants object. The respondent had lodged a suit not only for permanent injunction but for declaration of ownership as well. She sought declaration that she is absolute owner of suit field bearing Survey No. 53/1 admeasuring 2.85 H situated at Mouza Kotewada, Tahsil Hingna, District Nagpur.

4. Thus, the main relief was as regards declaration of ownership. The trial Court vide judgment and order dated 19-8-2000 was pleased to decree the suit in following terms.

- “(1) The suit is decreed with costs.*
 - (2) It is hereby declared that the plaintiff is owner of the field bearing Survey No. 53/1, Araj 2.86 Hectors, P.H.No. 72, situated at Mouza Kotewada, Taluka Hingna, District Nagpur.*
 - (3) The defendants are permanently restrained from disturbing the possession of the plaintiff, through themselves, their servants or claiming through them.*
 - (4) The defendants are hereby directed to deliver the possession of 0.12 Hectors of piece of land out of field Survey No. 53/1 within period of one month from passing of this order.*
 - (5) As the defendants have committed breach of the order of injunction passed on 3-7-1991, therefore, their Gat Field No. 53/3 of Mouza Kotewada, Taluka Hingna, District Nagpur is hereby attached for period of three months from passing of this order.*
 - (6) Decree be drawn accordingly.*
- Pronounced in an open Court.”*

5. Thus, the respondent has been declared owner of the suit field. The appellants/defendants have been permanently restrained from disturbing the possession of the respondent. In addition, the appellants were directed to deliver the possession of 0.12 H of land out of field property to the respondent. It further appears that the appellants carried the blame of breach of order of injunction and,

therefore, the trial Court attached the property of the appellants for a period of three months.

6. The first appellate Court, vide judgment and decree dated 13-6-2001, dismissed the appeal and thus maintained the findings rendered by the trial Court.

7. The appellants are before the Court against the concurrent finding of facts given by both the Courts below. The scope of the appeal under Section 100 of the Civil Procedure Code is well settled. The concurrent finding of facts cannot be upset merely because the Courts below have committed certain error in arriving at such findings or that, a different view is possible. The concurrent findings can, however, be set aside, if the findings suffer from perversity. The substantial question of law will have to be answered, keeping in mind the aforesaid principles of law.

8. Learned counsel for the appellants submits that the respondent, despite knowing the fact of execution of Will (Exhibit 113) by her father bequeathing the suit property in favour of the appellant nos. 2 and 3, who are sons of appellant no. 1 has conceded the said fact and has thus not come clean before the trial Court and, therefore, was not entitled for the relief of injunction.

9. The argument, if considered in the light of the first substantial question of law, does not go to the root of the matter. The first substantial question of law relates to granting relief of injunction and not the relief of declaration of ownership. As stated earlier, the prime controversy is as regards ownership over the suit property. The relief of injunction would naturally follow in favour of owner unless extra ordinary case is made out to the contrary. In that sense, the answer to first substantial question of law will have no significant impact on the outcome of the proceedings. Thus, the concealment of execution of Will at the hands of respondent will have to be considered in relation to the relief of ownership. Consequently, the question is whether the concealment of execution of Will by the respondent can be said to be so material to deny the relief of ownership, followed by injunction in favour of the respondent.

10. The respondent is claiming ownership by inheritance. Her father Govindrao expired on 19-9-1988. The respondent got her name mutated in the revenue record. The respondent then filed suit on 28-9-1990 i.e. two years subsequent to death of Govindrao. Appellant no. 1 (original defendant no. 1) in defence has come up with a theory of execution of Will. Thus, propounder of the Will is/was appellant no. 1. It is well settled that the onus of proving the Will is on the propounder,

the appellants herein. In that view of the matter, the respondent - plaintiff has been put to no advantage by not disclosing her knowledge of execution of Will. As such she ought to have disclosed the same and, having not done so, will carry the blame of not coming before the Court with clean hands, the consequences, however, in the peculiar facts and circumstances of the case, will not disentitle her from seeking relief of ownership with the consequential relief of injunction. End of the day, if the propounder of the Will fails to remove all legitimate suspicions in execution of Will, his defence/challenge to the relief of ownership over the suit property sought by the plaintiff will fail. The argument does not have significant impact on the former part of the first question, which relates to granting injunction.

11. The later part of the first substantial question of law can be answered along with the second substantial question of law which relates to the proof of execution of Will. The contention is that the Will executed by deceased Govindrao has been proved in terms of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act. According to the appellants, they have discharged the burden and, therefore, the Courts below have committed error in not relying upon and admitting the Will and consequently denying the legitimate benefit in favour of the appellants.

12. The Courts below have catered suspicion in execution of Will assigning following reasons :

- (1) Deceased Govindrao/testator was about 75 years old and expired within one month of execution of Will.
- (2) The appellants failed to prove that Govindrao was in a sound state of mind.
- (3) There is a serious doubt about signature of the testator on the Will. It has come in the evidence that he used to sign as “G.S. Bawankar” whereas the signature on the Will indicates full name of Govindrao.
- (4) The persons present at the time of execution of Will including the scribe of the Will are all relatives of appellants.
- (5) The appellants have not claimed ownership over the suit property, even the mutation made by the respondent has been not challenged by the appellants and
- (6) the compelling circumstances before Govindrao to exclude sole daughter of her legitimate share in the suit property is not satisfactorily explained.

13. This finding has been rendered by the Courts below and particularly by the trial Court which had opportunity to see the

demeanor of the witnesses and, therefore, will have to be respected unless the findings suffers from perversity.

14. Learned counsel for the appellants made an attempt to show that the Courts below have committed serious error in rendering said finding. He submits that the respondent did not enter witness box but has led evidence through power of attorney holder and, therefore, the evidence is inadmissible. He has relied upon the judgment in the case of *Mohinder Kaur Vs. Sant Paul Singh [(2019) 9 SCC 358]* wherein the Supreme Court held that the power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. The Court further held that the power of attorney cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined.

15. If the argument is to be accepted, the evidence of power of attorney holder will have to be ignored. The argument, however, goes against the appellants because they are relying upon cross-examination of this witness to show that respondent had knowledge of execution of Will. There is no other evidence except testimony of this witness to

prove that respondent had knowledge of execution of Will prior to lodging the suit. The foundation of the first substantial question of law is thus shaken by this argument of the appellants. Consequently, the argument that respondent had knowledge of execution of Will becomes devoid of merit. The theory of concealment of fact weakens.

16. Even otherwise, the crux of the matter is genuineness of Will. The question is whether the propounder has removed the legitimate suspicions.

17. To answer this question the relevant facts and the evidence of witnesses, particularly, defence witnesses, will have to be gone through. According to the appellants, Govindrao executed Will on 19-8-1988 in favour of appellant nos. 2 and 3. Further, the appellant no. 1 was cultivating the suit property even prior to death of Govindrao and was in possession since long. According to them, Govindrao was residing with them in a joint house. The appellants have claimed ownership by virtue of said Will.

18. The second witness of the respondent has deposed that Govindrao was his brother-in-law. Respondent is the only legal heir of Govindrao. He (witness) was residing at a distance of 2-3 house from Govindrao's house. He then deposed that subsequent to death of

Govindrao's wife, respondent used to provide medical aid to Govindrao. He then deposed that Govindrao was working at the shop run by this witness. He is acquainted with Govindrao's signature. He deposed that signature on the Will is not of Govindrao. He then deposed that attesting witness of Will, namely, Gangaram Fulkar and Anandrao Fulkar are cousin brothers of appellant. Other witness, Balriam Sathawane is also relative of appellant no. 1. The scribe of Will, namely, Prabhu Vaidya is also relative of appellant. The witness has then deposed that Govindrao never disclosed to him of his desire to execute Will. He has then deposed that, post death of Govindrao, respondent was cultivating the suit property. Lastly, he deposed that prior to death, Govindrao was not keeping good health and used to take treatment from private doctor (Vaidya).

19. In the cross-examination, he admitted that Govindrao and appellant no. 1 used to reside in the same house but separately. He denied the suggestion that the signature on Will is of Govindrao. It is then brought on record in the cross-examination that Govindrao used to sign only as “गो. स. बावनकर” (G. S. Bawankar). The appellants have then put up a suggestion which is admitted by the witness that Govindrao used to sign as “गो. स. बावनकर” on the invoices and on that

basis, the witness is saying that the signature on the Will is not of Govindrao.

20. Thus, the testimony of second witness of respondent has supported the respondent's case, more importantly in the cross-examination, the doubt as regards signature of Govindrao has been ratified.

21. So far as the evidence of appellants is concerned, appellant no. 1 has examined himself as first witness. He has deposed that at times, Govindrao was not keeping good health. Rest of the chief examination is in tune with the defence. In the cross-examination, he deposed that at the time of executing Will, he (appellant no. 1), the plaintiff (respondent) and appellant nos. 2 and 3 were present. He has then deposed that Govindrao has informed him to not take respondent's signature on the Will and, therefore, her signature was not taken. Govindrao did not disclose any reason for such stand. Thereafter suggestion is given which has been denied that respondent was not present at the time of execution of Will. Specific question was put to the witness, why did not he register the Will. The witness answered saying that he intended to register the Will but somehow could not. He has then deposed that he did not register because Rambhau had lodged report for not giving possession of the property. He then deposed that he

did not approach the revenue officials for mutating the names of beneficiary. He has also stated that he did not issue notice to the respondent as regards execution of Will by Govindrao and that he cannot assign any reason for the same. He has then deposed that he cannot assign any reason as to why the fact of his possession over the suit property is not recorded in 7/12 extract, despite his claim in written statement that he was in possession of the disputed land for years together. It is then brought on record that the witness has not given any letter/notice to the *Patwari* that he is cultivating the suit property. Lastly, he deposed that he has not filed any document to show that Govindrao's mental health was satisfactory at the relevant time.

22. The second witness on behalf of the appellants is the attesting witness. He has deposed in favour of the appellants. He stated that he was present at the time of execution of Will. According to him, along with him, Rajeram Patil, Baliram Sathavane and Gangaram Fulkar were present. His evidence is silent on presence of the respondent. He deposed that Will was written as per instructions of Govindrao. He has then stated that because of old age, Govindrao was at times not keeping well, however, his mental condition was sound. Nothing material has come in cross-examination to disbelieve this witness.

23. The question, however, is whether the appellants have discharged their burden to remove all legitimate suspicious circumstances. The answer would be in the negative for the following reasons.

24. The evidence of second witness of respondent indicates that the signature of Govindrao is doubtful rather it is not his signature. Instead, the appellants have cemented this doubt in the cross-examination of this witness when they brought on record that Govindrao used to sign only as “गो. स. बावनकर”. The appellants have not taken any steps to put forth a cogent evidence on this point. The case of the appellants is that Govindrao was residing with them. If that be so, they could have placed on record a document showing Govindrao’s signature for comparison and also for expert’s opinion. The signature ought to have been proved in terms of Sections 45 and 47 of the Evidence Act. Secondly and considering the time gap between the execution of Will and the death of Govindrao, which is one month, the suspicion as regards his sound state of mind ought to have been satisfactorily answered, which the appellants have not done.

25. Learned counsel for the appellants has relied upon the judgment in the case *of Smt. Indu Bala Bose and others Vs. Manindra*

Chandra Bose and anr. [(1982) 1 SCC 20] to contend that there were no suspicious circumstances as regards the unsound state of mind of Govindrao. He has further contended that the presence of relatives is normal. The Hon'ble Supreme Court in the aforesaid case held that normally a known or reliable person, a friend or a relative will be called for such purpose. As regards medical evidence, it appears that in the said case, the doctor was examined. The testator expired immediately after execution of Will. However, the doctor stated that patient (testator) had talks with him (witness) few days subsequent to execution of Will. The Court found that there was no evidence that the testator did not have the mental capacity to execute the Will.

26. The aforesaid judgment may not be relevant in as much as the evidence as regards the health of Govindrao, the witnesses of both sides have deposed that at times, he was not keeping well. The death has occurred within one month of execution of Will. There is no evidence either to formulate opinion that Govindrao was in a sound state of mind or was not. Nonetheless, both the Court below have taken a consistent view that he was not. In the circumstances and as stated above, merely because a different view is possible, the concurrent finding ought not to be set aside. I would reiterate that the trial Court had opportunity and is in advantageous position to see the demeanor of

witnesses, which fact is vital to assess the evidence and therefore, the findings will have to be respected unless grave error is shown. In the present case, I do not find that the Courts below have committed such error.

27. In addition, there is no satisfactory answer coming forth from the appellants as to why did not they approach the revenue authorities to get their names mutated on the basis of Will or why did not they put up their claim of ownership immediately after the death of Govindrao. Thus, the two circumstances, one as regards signature of Govindrao and second, the conduct of appellants is such that makes it unsafe to treat the Will as genuine. The overall evidence would substantiate the suspicious circumstances and, therefore, I am not inclined to disturb the findings rendered by the Courts below.

28. Learned counsel for the appellants has relied upon the judgment in the case of *N. Kamalam (dead) and anr. Vs. Ayyasamy and anr. [(2001) 7 SCC 503]* to contend that attesting witness having been examined, the appellants have discharged their burden. The Supreme Court held that the signature of attesting witness is the requirement of statute and he should be present and see the document signed by the executant as he could then alone vouch for execution of document.

29. Mr. M. R. Joharapurkar, learned counsel for the appellants contends that the attesting witness herein has proved the execution of Will and, therefore, there is no reason to ignore the same. True it is that the attesting witness has supported the appellants version. The issue involved, however, cannot be answered by referring to his testimony alone. Evidence of plaintiff's second witness raised a serious doubt about execution of the Will. The conduct of the appellants also raised doubt as regards genuineness of the Will. Exclusion of the respondent, the sole legal heir of Govindrao is not satisfactorily explained. The only statement in the Will on this point is that the respondent is happily married and Govindrao has given her gold and cash. This statement, to my mind, indicates the factual aspect as to what Govindrao has done for his daughter in his lifetime. Govindrao, however, does not say that for this reason, he is not willing to give share in the suit property nor is there any covenant/recital disclosing reason for exclusion of his daughter. These circumstances cannot be ignored. In other words, the testimony of attesting witness will not supersede these circumstances. Thus, overall evidence is in favour of the respondent.

30. There is one more difficulty to grant relief in favour of the appellants. Pending second appeal, the respondent on 27-6-2008 has sold the suit property to one Mohammad Akram Sheikh. The appeal

thereafter was on 1-3-2016 dismissed for want of prosecution. The appeal was restored on 12-9-2017 but was again dismissed on 5-10-2017. It was again restored on 9-12-2021. In the meantime i.e. on 2-12-2020, Mohammad Akram Sheikh sold the suit property to respondent no. 4 – M/s. Mahalaxmi Infracon. This transaction was done when the appeal was not pending. The respondent no. 4 is taking a plea of *bona fide* purchaser.

31. Learned counsel for respondent no. 4 has further stated that the suit land has been converted into non-agricultural use. The plots have been carved out and sold to 126 persons. Out of 126 plots, 104 plots were sold even prior to receiving notice from this Court. The respondent no. 4 has placed on record, by way of affidavit, the details of the sale transaction which includes plot size, the sale consideration, the date of sale deed, the registration number of sale deed etc. Thus, the suit property is not in existence. This development has occurred because of lapses committed by the appellants. They were not diligent in prosecuting the appeal.

32. On this point, learned counsel for the appellants has placed reliance on the judgment in the case of ***Vareed Jacob Vs. Sosamma Geevarghese and others [(2004) 6 SCC 378]*** and submits that with the restoration of suit, interlocutory order would revive. I have gone

through the said judgment. The Hon'ble Supreme Court has elaborately dealt with the issue as to whether all the supplementary or interlocutory orders would revive on restoration of the suit. The Supreme Court answered that all orders will not revive. The Supreme Court has held that interlocutory orders which have been passed before dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored, unless the court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration or during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party. Thus, the Supreme Court has held that if there occurred alienation in favour of third party during the period between dismissal of suit and its restoration, the interlocutory order will not revive.

33. Put all together, the appellants failed to make out a case in their favour. The substantial questions of law are answered accordingly. The appeal is accordingly dismissed.

(Anil L. Pansare, J.)