



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.435 OF 1997
WITH
CIVIL APPLICATION NO.6151 OF 1997
(For Stay)**

Shantabai W/o Balkrushna Rade.

Deceased-Through her legal representatives:-

- 1) Shri. Sudhiranjan Balkrushna Rade
Age 63 years, Occu. Retired Teacher,
R/o: 97/1,4 Bhagwan Nagar, Jalgaon-425 002.
- 2) Shri. Shashikant Balkrushna Rade
Age 61 years, Occu. Teacher,
R/o: Tukaram Apartment, Wadali Section,
Block No.6, Ambarnath (East),
Dist. Thane.421 501.
- 3) Shri. Sanjiv Balkrushna Rade
Age 58 years, Occu. Service,
R/o: Swami Samarth Colony,
Block No.13/14/1, Bhusawal,
Tq. Bhusawal-425 201. Dist. Jalgaon.
- 4) Jaydeep Balkrushna Rade
Age 53 years, Occu. Business,
R/o 34/2, "Shraddha Colony" Jalgaon-425 002. ..Applicants
(Orig. Appellants/Defendants)

Versus

Smt. Dwarakabai w/o Kashiram Chaudhary,
Died per heirs and legal representatives:.

- 1-A) Govinda s/o Kashiram Chaudhary,
Age 55 years, Occu: Service,
R/o. 166, Hari Oam Nagar,
Near Chirayas Society, Danteshwar,
Baroda (Gujrat).
- 1-B) Ankush s/o Kashiram Chaudhary,
Age 53 years, Occu: Service,
R/o. C/o. Govinda Kashinath Chaudhary,
166, Hari Oam Nagar,
Near Chiralyas Society, Dhanteshwar Society,
Baroda, (Gujrat).

1-C) Hiranman s/o Kashinam Chaudhary,
Age 51 years, Occu: Service,
R/o. C/o R.C. Bafna Firm,
Near Bhawani Temple, Bhavani Peth,
Jalgaon, Taluka and Dist: Jalgaon.

1-D) Sau. Mandabai Galu Kawale,
Age 49 years, Occu: Household,
R/o. C/o. Galuk Dagdu Kkawale,
West to S.T. Stand, Kadgaon,
Taluka and District Jalgaon.

1-E) Sau. Meerabai Nathu Kawale,
Age 47 years, Occu: Household,
R/o. Nathu Namdeo Kawale,
West to S. T. Stand, Near Timber Saw Mill,
Asoda, Taluka and District Jalgaon.

..Respondents
(Orig. L.R. of Plaintiff)

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Mr. Sanket S. Kulkarni, Advocate for the Appellants.
Mr. Girish Rane, Advocate for the Respondents.

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CORAM : S. G. CHAPALGAONKAR, J.
DATE : 27th FEBRUARY, 2025.

JUDGMENT:-

1. The appellants/original defendants impugn judgment and decree dated 17.04.1997 passed by the Additional District Judge, Jalgaon in Regular Civil Appeal No.311/1988, thereby upholding judgment and decree dated 17.10.1988 passed by VIth Civil Judge, Junior Division, Jalgaon in Regular Civil Suit No.179/1986. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondent/plaintiff filed Regular Civil Suit No.179/1986 seeking decree of possession in respect of suit land bearing Gut No.332, admeasuring 1H 48R, situated at Jalgaon contending that

one Kisan Tanu Mahajan was original owner of suit land. He was Gopabai's second husband. During subsistence of marriage of Gopabai and Kisan, suit property was given to her for maintenance. Later on, Gopabai acquired title by statutory implication under Section 14(1) of the Hindu Succession Act. The plaintiff is sister of Gopabai. Gopabai resided with her during her last days. She bequeathed suit property to plaintiff under Will dated 20.10.1981 in presence of two witnesses. On 03.01.1982 Gopabai died. Eventually, plaintiff acquired ownership and possession of the property. The defendant is daughter of Gopabai from first husband. She forcibly took possession of the suit property sometimes in the year 1984. Eventually, plaintiff instituted present suit for reliefs as claimed.

3. The defendant refuted the plaintiff's claim contending that Late Gopabai was cultivating suit land with the help of defendant. After death of Gopabai, she continued in the possession. She being daughter of Gopabai, her name is mutated in record of rights as owner. The alleged Will dated 20.10.1981 is bogus and false document. The defendant further pleads that, since Gopabai was residing with the plaintiff during her last days, the Will is obtained exercising coercion, fraud, or misrepresentation. Hence, it is invalid. The plaintiff cannot assert any right over the suit property relying upon alleged Will.

4. The Trial Court framed the issues. The plaintiff in her evidence reiterated contents of plaint. She relied upon testimony of witness Baliram Avasu Savdekar, attesting witness on document of Will, whereas defendant relied upon her own evidence and four other witnesses in support of her defence. Finally, Trial Court accepted plaintiff's case and decreed the suit.

5. Aggrieved defendant filed Regular Civil Appeal No.311/1988 before the District Judge, Jalgaon, which came to be dismissed upholding judgment and decree of the Trial Court. Both Courts concurrently held that plaintiff proved execution of Will dated 20.10.1981 by deceased Gopabai bequeathing suit property to the plaintiff. The defence as raised in the written statement has been negated by both the Courts.

6. The present Second Appeal was placed before this Court for admission on 22.01.1998 and same has been admitted without framing substantial questions of law. When it was posted for final hearing on 06.02.2025, learned Advocates appearing for respective parties advanced their submissions on substantial questions of law to be framed. After considering submissions, following substantial questions of law have been framed and parties were put to the notice that Appeal would be heard on 12.02.2025 on following substantial questions of law:

- (I) When earlier suit i.e. R.C.S. No.594 of 1982 filed by plaintiff was dismissed in default, whether R.C.S. No.179 of 1986 is maintainable in view of Order 9 Rule 9 of CPC?
- (II) When in RTS Appeal No.14 of 1982 the will has been held illegal, whether in view of explanation VIII to Section 11 of CPC would attract in the present proceeding?
- (III) Whether suit filed by plaintiff was just and proper in view of the fact that no prayer was made in respect of declaration of will to be valid, when no probate was sought by plaintiff within three years?
- (IV) Whether the plaintiffs have proved the will as per requirement of law?

7. In pursuance to the aforesaid order, the learned Advocates appearing for the respective parties advanced their submissions on substantial questions of law as framed.

8. Mr. Kulkarni, learned Advocate appearing for the appellants submits that plaintiff has miserably failed to prove Will dated 20.10.1981. He submits that Gopabai died within a period of two and half months after execution of so called Will. She was residing with plaintiff in pursuance to the medical treatment. No evidence is brought on record to show that she was physically and mentally fit to execute the Will. Gopabai was taken to Baroda under the

pretext of eye surgery. Her eye sight was already weak. Therefore, it was obligatory on the part of the plaintiff to remove clouds of doubts as regards to the voluntary execution of Will by Gopabai. Even, signature appearing on alleged Will is doubtful.

9. Per contra, Mr. Rane, learned Advocate appearing for the respondents submits that execution of Will has been duly proved through evidence of attesting witness. Nothing has been brought on record by the defendants to show that Gopabai was incapable of executing the Will. PW-2-Baliram and plaintiff both have testified about sound mental and physical condition of Gopabai. The deposition of witnesses would show that statutory requirements for proof of Will are complied with. Mr. Rane would further submit that both the Courts have concurrently recorded findings of fact accepting valid execution of Will.

10. It appears that, Trial Court had specifically framed an issues on the point of execution of Will. The Trial Court observed that Gopabai was residing with plaintiff for few years before her death. Gopabai died when she was taken to Gujrat State by plaintiff's son Govinda for medical treatment. The Will has been executed at plaintiff's house in presence of two witnesses namely Baliram and Govinda. The scribe of Will is one Mr. K. L. Lokhande of Jalgaon. The evidence of attesting witness supports plaintiff's case that Gopabai executed Will after going through its contents. The

witness has also signed the said Will alongwith other attesting witnesses. The Trial Court further observed that non-examination of second attesting witness Govinda or scribe Mr. Lokhande is not fatal to the case of plaintiff. As per Section 68 of the Indian Evidence Act, one attesting witness can prove execution of document. Issue of non-registration of Will is also appropriately dealt with by the Trial Court. The Appellate Court, upon re-appreciation of the evidence on record, concurred with findings of the Trial Court and observed that merely because Gopabai died within two and a half months, execution and genuineness of the Will cannot be doubted in view of attending circumstances and evidence on record. The Appellate Court also observed that absence of probate would not be a ground to discord Will in light of Section 56 of the Indian Evidence Act, particularly when property is situated in village track. Eventually, Appellate Court held that plaintiff acquired valid title over the suit land on the basis of Will.

11. It is trite that, concurrent findings of facts cannot be set aside unless perversity in appreciation of evidence is brought to the notice of the Court. As rightly pointed out by Mr. Rane, learned Advocate appearing for the respondents, while interpreting Will, the Courts does not sit in Appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the

deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the Court looks into the nature of the bequest. The Court does not substitute its own opinion for what was the testator's Will or intention as manifested from a reading of the written instrument. In that view of the matter, although in the present case Gopabai has bequeathed the suit property in favor of plaintiff (sister) instead of following natural succession in favor of defendant (daughter), once the validity of the Will is accepted, this Court need not delve into the reasons for the course adopted by the testator.

12. The Supreme Court of India in case of ***Gurdev Kaur and Ors. Vs. Kaki and Ors.***¹, observed in paragraph no.69 as under:

“Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble".”

¹ AIR 2006 SC 1975.

13. In light of the aforesaid observations, this Court does not find any reason to interfere with the findings of fact regarding the validity of the execution of the Will and the conscious disposal of the suit property by Gopabai in favor of the plaintiff under the Will.

14. Mr. Kulkarni, learned Advocate appearing for the appellants submits that in the proceedings of mutation in the record of rights, a finding has been arrived against execution of Will, and such a finding would operate as *res-judicata* in view of Explanation VIII to Section 11 of the Code of Civil Procedure. This Court cannot countenance this submissions. First of all plaintiff failed to place on record any order passed by revenue authority, particularly order in RTS No.14/1982, in which issue as to the validity of Will has been dealt with. It appears that, along with Civil Application No.1502/2025, a copy of the order in RTS Appeal Nos.14/1982 and 30/1984 has been filed. However, no grounds have been made out to permit leading of additional evidence within the parameters of Order XLI Rule 27 of the Code of Civil Procedure. Even otherwise, a bare perusal of the order passed by the revenue authorities suggests that they have not dealt with the issue of the validity of the Will but have merely observed that their decision in the mutation proceedings would be subservient to the decision of the Civil Court. Therefore, even by taking into account additional

evidence as sought to be brought on record alongwith Civil Application No.1502/2025, the appellants cannot derive any advantage.

15. It is trite that revenue authorities, while holding an inquiry in record of rights proceedings under the Maharashtra Land Revenue Code, have no jurisdiction to decide the validity of an instrument creating title. All such questions requires decision by competent Civil Court. Therefore, if in given case cursory observations are made by the revenue authority as regards to validity of “title document” that shall be subservient to the decision of the Civil Court. Even assuming that revenue authority recorded a finding in clear terms on validity of document, such findings cannot be given status of final adjudication between the parties, so as to frustrate subsequent proceeding before Civil Court by applying principles of *res-judicata* under Section 11 of the Code of Civil Procedure. In result, appellants' contention that, in light of the decision rendered by the revenue authority in mutation proceeding, jurisdiction of the Civil Court is barred to rule over issue of validity of Will cannot be countenanced.

16. Mr. Kulkarni would further submit that plaintiff failed to to seek declaration as to validity of Will, particularly when there was no probate, hence suit in present form is not tenable. As observed in earlier paragraphs, probate is not a mandate of law, in case

parties are resident of rural areas. The absence of probate does not preclude parties from relying upon Will. Further, in this case plaintiff is seeking recovery of possession of suit property received by her under Will. The suit has been instituted after plaintiff lost possession. It is true that, Courts below recorded finding that plaintiff could not prove that she was put into possession on the basis of Will, however, Trial Court specifically framed an issues as to whether plaintiff proved that Gopabai executed Will dated 20.10.1981. The issue has been answered in affirmative, consequently, decree for possession has been passed. In that view of the matter, although relief of declaration is not sought, suit cannot be dismissed on that count. The suit for possession has been instituted when right of plaintiff to enjoy suit property was obstructed by defendant. Therefore, there is no consequence of absence of claim as to the declaration of Will. No prejudice is caused to the defendant.

17. Mr. Kulkarni lastly submits that plaintiff had previously instituted Regular Civil Suit No.179/1986 seeking relief of perpetual injunction in respect of same property, that suit has been dismissed for want of prosecution. Therefore, present suit is barred in view of Order IX Rule 9 of Code of Civil Procedure. To counter aforesaid contention Mr. Rane, learned Advocate appearing for respondents submits that suit for perpetual injunction was filed

taking cause of action as to the obstruction to the possession of the plaintiff. Later on, plaintiff lost possession and suit has been instituted seeking relief of recovery of possession based on independent cause of action. According to him, bar under Order IX Rule 9 or Order II Rule 2 of the Code of Civil Procedure would operate only when subsequent suit is instituted on same cause of action. In support of his contentions he relies upon judgment of the Supreme Court of India in case of ***Inacio Martins (Deceased Through LRs.) Vs. Narayan Hari Naik and Others***².

18. In the aforesaid case Supreme Court observed that when subsequent suit was based on distinct cause of action not found in former suit, bar under provision of Order II Rule 2 of Code of Civil Procedure would not attract. Similarly, in case of ***Ganesh Prasad Vs. Rejeshwar Prasad and Ors.***³, the Supreme Court observed in paragraph no.52 as under:

“52. Order IX Rule 9 bars fresh suit in respect of the same cause of action in case the earlier suit was dismissed as indicated in Order IX Rule 8 of the CPC. The term “same cause of action” assumes significance in as much as the bar under Order IX Rule 8 of the CPC applies to a later suit only in respect of the very same cause of action. In case the cause of action in the later suit was altogether different, which has nothing to do with the cause of action in the earlier suit, the statutory bar has no application to such later suits. It was only with a view to curb the tendency of filing multiple suits, on the basis of the very same cause of action, successively even after the dismissal of the earlier suit that such a provision has been introduced. It was not the intention of the Legislature to bar the subsequent suits between the parties and the same was evident by the

² (1993) 3 SCC 123.

³ AIR Online 2023 SC 180.

qualifying words, “same cause of action”. Therefore, everything depends upon the cause of action and in case the subsequent cause of action arose from a totally different bunch of facts, such suit cannot be axed by taking shelter to the provision of Order IX Rule 9 of CPC.”

19. The aforesaid exposition of law clearly depicts that bar under Order IX Rule 9 of the Code of Civil Procedure for institution of fresh suit would operate, when same cause of action has been carried forward in fresh suit on the basis of which earlier suit was filed. In present case, earlier suit was filed simplicitor claiming relief of perpetual injunction giving cause of action as to the obstruction in her possession. The present suit is instituted later on with specific contention that defendant has forcibly taken over possession from plaintiff. Therefore, nature of relief in both the suits and cause of action is totally independent. At the time of the institution of the previous suit seeking relief of perpetual injunction, the cause of action pleaded in the present suit could not be found. It is clearly based on subsequent event. Therefore, when later suit is instituted on altogether different cause of action, which has nothing to do with cause of action in earlier suit, the bar contemplated under Order IX Rule 9 of the Code of Civil Procedure would not unsuit the plaintiff.

20. In that view of the matter, Second Appeal sans merit and accordingly dismissed.

21. In view of dismissal of Second Appeal, nothing survives in Civil Application for stay and same is accordingly disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/February-2025