



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.335 OF 2006

1. Ramrao s/o Tulshiram Mansute
Aged about 58 years, Occ: Cultivator
2. Suresh Tulshiram Mansute,
Aged about 48 years, Occ: Cultivator,

Both R/o Baliram Chowk, Akot,
Tq. Akot, Dist. Akola.

....APPELLANTS

...V E R S U S...

Omprakash Tulshiram Mansute,
Aged about 50 years, Occ: Cultivator,
R/o Akot, Tq. Akot, Distt. Akola.

...RESPONDENTS

Shri S.O. Ahmed, Advocate for appellants.
Shri Nitin Vyawahre, Advocate for respondent.

CORAM:- M.W. CHANDWANI, J.
DATED :- 26.02.2025

ORAL JUDGMENT:

. This appeal challenges the judgment and decree of the learned Additional District Judge, Akot passed in Regular Civil Appeal No.177 of 2005, whereby the first appellate Court overturned the decree of dismissal and allowed the appeal of the respondent declaring him as the owner of the suit property on the basis of will-deed dated 03.05.1996.

2. By the order dated 18.08.2006, the following substantial questions of law came to be framed :

“(A) That considering the various suspicious circumstances on record as regards execution of the will dated 30.05.1996 (Exh.86) such as :

- a) Age of the testator being 80 years,*
- b) Physical condition of the testator not being good,*
- c) Signatures of the testator were differing from each other on Exh.86,*
- d) Exclusion of all other sons/relatives from the bequest especially when the testator had executed a will previously in the year 1993 and*
- f) Material discrepancies in the evidence of the attesting witnesses as regards execution and registration of the will, was the lower Appellate Court correct in holding that the will at Exh.86 had been duly proved by the plaintiff is the substantial question of law that arises in the present Second Appeal.*

(B) That in absence of any specific pleadings by the plaintiff as regards execution of the will by the testator – Tulshiram as well as regarding cancellation of the earlier will, could the lower Appellate Court have relied upon the evidence of the attesting witnesses so as to hold that a will (Exh.86) had been duly proved is another substantial question of law that arises in the present Second Appeal,

(C) That whether it could be said that the will (Exh.86) had been proved as required by the provisions of Section 68 of the Indian Evidence Act is another substantial question of law that arises in the present Second Appeal.”

3. Mr. Ahmed, learned counsel appearing on behalf of the appellants vehemently submitted that the Will has been discarded by

the trial Court on the ground that it is surrounded by suspicious circumstances which have not been explained by propounder of the Will i.e. the respondent. However, the first appellate Court without giving any reason, has set aside the finding of the trial Court by holding that the Will has been duly proved by the propounder by examining one of the attesting witnesses.

4. Learned counsel appearing on behalf of the appellants further submitted that the testator was 80 years old and there is nothing on record suggest that his physical and mental condition was good. No doctor has been examined to prove this fact and there are various discrepancies in the evidence of the attesting witness. It is also contended that there is no specific pleading with regard to execution of the Will by deceased Tulshiram, the testator and the Will has not been duly proved as per the provisions of Section 68 of the Indian Evidence Act.

5. Mr. Ahmed took me to the deposition of the attesting witnesses to show that there are two signatures on the will and there are discrepancies in both the signatures which also creates a doubt on the execution of the will by the testator. According to him, the trial Court has also recorded the difference of the signatures of

testator on the will-deed and partition-deed. According to him, it is for the propounder of the Will to remove all suspicious circumstances. To buttress his submission, he seeks to rely upon the case of ***K. Laxmanan Vs. Thekkayil Padmini and others***¹, wherein the Supreme Court has held in para 20 which reads thus:

“20.Strong reliance was placed on this provision also by the learned counsel appearing for the parties. A bare reading of the aforesaid provision will make it crystal clear that so far as a Deed of Will is concerned, the position in law is no longer in doubt for the onus of proving the Will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the said Will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus.”

A reliance is also placed on the decision of the Supreme Court in the case of ***H. Venkatachala Iyengar Vs. H.N. Thimmajamma and others***² wherein, the Supreme Court has held that due and valid execution of the will has to be proved by the proponder of the Will.

6. Conversely, Mr. Vyawhare, learned counsel appearing on behalf of the respondent vehemently submitted that in second appeal, facts cannot be re-appreciated unless it is shown that the

1 2009 (3) MhLJ 510 : 2009 (1) SCC 354

2 1959 AIR SC 43 : 1958 SCC Online SC 31

finding recorded by the Courts below are perverse. According to him, there is nothing on record to suggest that the facts appreciated by the first appellate Court are against the settled principle of law. According to him, the respondent examined one of the attesting witnesses who happens to be a doctor who deposed about the condition of the testator. More so, the will is a registered one and is signed by the testator–Tulshiram in presence of the Sub-Registrar; therefore, a presumption arises in favour of the respondent and it is for the appellant to rebut the said presumption. According to him, the difference in the signature has been very well dealt with by the first appellate Court and the judgment of the first appellate Court is well reasoned which does not require interference in second appeal. To buttress his contention, he seeks to rely on the decision of ***Balasubramanian and another Vs. M. Arockiasamy (dead) through legal representatives***¹ wherein, the Supreme Court has held in para 15, which reads thus:

“15. As against such conclusion, the first appellate court in fact has placed heavy reliance solely on the kist would indicate that the plaintiff was also in possession of the property. When such divergent findings on fact available before the High Court in an appeal under Section 100 of the Civil Procedure Code though reappreciation of the evidence was not permissible, except when it is perverse, but it was certainly open for the High Court to take note of the case

1 (2021) 12 SCC 529

pleaded, evidence tendered, as also the findings rendered by the two courts which was at variance with each other and one of the views taken by the courts below was required to be approved.”

7. Having heard the learned counsel for the appellants as well as learned counsel for the respondent and having gone through the judgment impugned and deposition of the witness apart from the material documents i.e. the will, it transpires that respondent filed a suit before the trial Court for declaring him as the owner of the suit property on the basis of will-deed dated 30.05.1996. Needless to mention that, the father of the appellants and the respondent executed the Will in favour of the respondent wherein he bequeathed his property which he got in partition between him and the parties to the proceedings. The appellants came-up with the defence of existence of another Will in favour of the son of appellant no.2 prior to the impugned Will. The earlier Will dated 20.01.1993 executed by their father in favour of the son of appellant no.2 has been mentioned in the subsequent Will dated 30.05.1996. Thus, the Will dated 30.05.1996 is subsequent; rather, the last Will of the testator. Be that as it may, the fact remains that appellant no.2 waived his right on the basis of the earlier Will which was in favour

of his son. Even the son of appellant no.2 applied for intervention. Later on, the said application came to be withdrawn.

8. Perusal of impugned judgment of the trial Court reveals that the trial Court found some contradictions in the evidence of the attesting witness and the respondent as well as difference in the two signatures of the testator as well as signature on the Will and on the partition of the testator and came to the conclusion that these are suspicious circumstances which ought to have been removed by the respondent. Since, he failed to remove the suspicious circumstances, the suit of the respondent came to be dismissed.

9. It is to be noted here that attesting witness PW2-Balabhau a medical practitioner himself and in his examination-in-chief he has deposed that the medical condition of the testator was good but he was suffering from Asthama. The version of his evidence goes to show that the deceased signed twice in his presence. The only fact remains that the blood pressure of the deceased was on the higher side. When the attesting witness who himself was a medical practitioner has been examined them, there is no need for the respondent to file the medical fitness certificate of the deceased on record. That apart, just because the deceased was suffering from high blood pressure, it cannot be said that the testator was not

mentally fit to execute the will-deed. So far as the difference in the signature on the partition-deed and the will-deed is concerned, the first appellate Court has very well dealt with this aspect and has held that there is a significant difference of time in signing the partition-deed and the will-deed and by passage of time the signature of a person changes. Stretching on the fact of the signature being done in presence of the attesting witness and the Sub-Registrar, the first appellate Court has held that the signature cannot be disputed. No doubt, it is for the propounder of the will to remove all suspicious circumstances but considering the reasons given by the first appellate Court with which I concur, I do not see any reason to disturb the finding of facts recorded by the first appellate Court.

10. With regard to absence of pleading that the testator has executed Will by signing on the Will is concerned, the respondent was already pleaded that deceased Tulshiram has executed Will and the attesting witness examined by the respondent has categorically deposed about putting signature by Tulshiram in Will and therefore, no substantial question of law framed at serial Nos.(B) and (C) arises in this appeal. Consequently, the appeal fails and is dismissed.

Wagh

(JUDGE)