



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

SECOND APPEAL NO. 268 OF 2023

APPELLANTS :

(Ori. Plntf.)

On R.A.

Gokulsingh Heerasingh Goutam

(Rajpoot)

(Deceased) through his legal heirs:-

1. Narayansingh Gokulsingh Goutam,
Age about 76 years, Occ. Agriculturist,
Mobile No. 9975325082
2. Govindsingh Gokulsingh Goutam,
Aged about 72 yrs, Occu: Agriculturist,
3. Ramsingh Gokulsingh Goutam,
Aged about 68 yrs, Occu: Agriculturist,
4. Mohansingh Gokulsingh Goutam,
Aged about 60 yrs, Occu: Agriculturist,

Appellant nos. 1 to 4 are R/o. Belora,
Tah. Chandur Bazar, Dist. Amravati.

5. Kantabai D/o Gokulsingh Gautam
Rajpoot, after marriage Sau. Kantabai
W/o Kishorsingh alias Kishorilal
Chouhan Dangi,
Aged about 70 years, Occu:household,
R/o. Ward no.13, Dangyana Mohalla,
Niwadi, Tah. Niwadi, Dist. Tikamgad
(M.P.) - 472442.
6. Sau. Nimabai Ranjeetsingh Chouhan
(Died on 18/10/2008) through
her legal heirs
- 6-a. Ranjeetsingh Surjusingh Chouhan,
Aged about 66 yrs, Occu: Agriculturist,
- 6-b. Jyoti D/o Ranjeetsingh Chouhan,
now Jyoti W/o Shankarsingh Senger,
Aged about 38 years, Occu: Household,
R/o. Kelapur, Tah. and Dist. Wardha.
- 6-c. Summersingh S/o Ranjeetsingh Chouhan,
Aged about 34 yrs, Occu: Agriculturist,
R/o. At Post Chikhaldara, Infront of
Masjid, Tah. Chikhaldara,
Dist. Amravati – 444807.

6-d. Deepa D/o Ranjeetsingh Chouhan,
now Deepa W/o Rajesh Meshram
Aged about 30 years, Occu: Household,
R/o. Deshmukh Plots, Near Hanuman
Mandir, Paratwada, Tah. Achalpur,
Dist. Amravati – 444805.

VERSUS

RESPONDENT :

(Ori. Def.)
On R.A.

1. Head Master,
Shri Shivaji Higher Secondary School,
Morshi, Tah. Morshi, Dist. Amravati.
2. Secretary / President,
Shri Shivaji Education Society,
Regd. Public Trust F-89, Amravati
Camp, Amravati.

Smt. S. W. Deshpande, Advocate for appellants.
Shri M. A. Sable, Advocate for respondent Nos.1 and 2.

CORAM: ROHIT W. JOSHI, J.

DATED : 22/04/2025.

ORAL JUDGMENT :

1. The present appeal is filed by the legal representatives of original plaintiff, who had filed a suit claiming ownership over the suit property by way of adverse possession. It is a case of the plaintiff that he was in occupation of the suit properties which are agricultural lands as tenant of two brothers namely; Govind Dattaji Kanfade and Tulshiram Dattaji Kanfade. Initially, after making pleadings with respect to tenancy and ownership over the suit properties by virtue of provisions of the Maharashtra Tenancy and Agricultural Lands Act (Vidarbha Region Act), the plaintiff pleaded that he is the owner of the suit property by way of adverse

possession. The plaintiff contended that the defendant, an educational society claimed ownership over the suit property by virtue of Will dated 20/12/1969 executed in its favour by Late Govind Kanfode. Apart from the declaration of ownership by adverse possession, the plaintiff also sought decree for perpetual injunction against forcible dispossession. In the said suit, the defendant – society filed a counter claim seeking possession of the suit fields. The learned Trial Court vide Judgment and decree dated 29/11/2010 has dismissed the civil suit as also the counter claim filed by the defendants.

2. Aggrieved by the dismissal of the counter claim, the defendants filed appeal bearing Regular Civil Appeal No.12/2011. The original plaintiff had expired while the civil suit was pending. The legal representatives of original plaintiff did not choose to challenge the decree dismissing their suit. The learned Ad-hoc District Judge-2, Achalpur has allowed the appeal filed by the original plaintiff vide Judgment and Decree dated 24/03/2023.

3. The learned First Appellate Court has granted a decree of possession in favour of the defendants holding that it has become the owner of the suit field on the basis of Will dated 20/12/1969 executed in its favour by Govind Kanfode.

4. Aggrieved by the Judgment and Decree passed by the learned First Appellate Court, the legal representatives of original plaintiff have filed the second appeal. Vide order dated 05/03/2025, the following substantial question of law was framed:-

“Whether the finding of the First Appellate Court that Will is proved while overturning the findings of the Trial Court is perverse ?”

5. The learned Trial Court has held that the defendants have failed to prove due execution of the Will. The learned Trial Court has also held that the defendants had not produced any documentary evidence to demonstrate that the testator Govind Kanfade was the absolute owner of the suit fields so as to bequeath the same in favour of the defendants.

6. The learned Trial Court has also observed that the defendants had not produced any original Will on record and certified copy from the office of the concerned Registrar was alone placed on record. The learned Trial Court has further observed that the attesting witness to the Will could not confirm as to whether the last statement in the Will with respect to loss of eye-

sight of the testator was correct or not and on this basis, it has recorded a finding that the Will was not executed in the presence of attesting witness. The learned Trial Court has also disbelieved the testimony of the attesting witness stating that he was not aware about the contents of the Will.

7. The learned First Appellate Court has held that the Will was duly proved by examining attesting witness. The learned First Appellate Court has considered the evidence of attesting witness and has considered other surrounding circumstances, such as mutation of the suit properties in the name of the defendants, pursuant to the execution of the Will and also the fact that the Will being a 30 years old document there is a statutory presumption under Section 90 of the Indian Evidence Act, 1872 with respect to due execution and attestation of the same.

8. The learned advocate for the appellants contends that the learned First Appellate Court has erred in placing reliance on the Will, firstly on the ground that the original Will is not produced on record. She contends that there is no application for seeking permission to lead secondary evidence and likewise, foundational evidence is also not led in order to make secondary

evidence with respect to the Will admissible. She contends that only because the Will is marked as Exhibit will not dispense with the requirement of law to adduce foundational evidence for admissibility of secondary evidence.

9. I have perused the deposition of the attesting witness in whose examination-in-chief the Will is marked as Exhibit. Perusal of the deposition would indicate that while the document was marked as Exhibit, no objection was raised from the side of the plaintiff for marking the document. Had any objection being raised, at the relevant time, the defendants would be put to notice that the plaintiff was raising objection to the admissibility of document and then it could have considered bringing appropriate evidence in the matter to lay foundation for admissibility of secondary evidence. Since the document is marked as Exhibit after examination of the attesting witness without any objection from the side of the plaintiffs, I am of the opinion that this contention cannot be raised for the first time in second appeal. The contention with respect to the admissibility of secondary evidence is therefore, rejected.

10. It will be appropriate to refer to the Judgments of the Hon'ble Supreme Court in the matter of Dayamathi Bai (Smt) Vrs.

K. M. Shaffi, reported in (2004) 7 SCC 107, as also Full Bench decision of this Court in the matter of Hemendra Rasiklal Ghia Vrs. Subodh Mody, reported in 2008(6) Mh.L.J. 886. In both these Judgments, it is held that when a document is *per se* inadmissible, objection to its inadmissibility can be taken at any stage. However, when objection to admissibility of a document in evidence pertains to the mode of proof in order to make it admissible and not to admissibility of the document *per se*, the party objecting to the document being read in evidence must raise an objection at the stage when the Court intends to mark the document as exhibit. In such cases, if a document is exhibited without any objection, then at a subsequent stage, it cannot be contended that the document is not properly proved. In the case before the Hon'ble Supreme Court in the matter of Dayamathi Bai (supra), a registered sale deed was marked as exhibit without any objection. However, subsequently, an objection was raised that since the sale deed was not the original, but only a certified copy which is a secondary evidence and foundational facts to make the secondary evidence admissible were not proved and therefore, the certified copy of sale deed could not be read in evidence. The Hon'ble Supreme Court turned down the objection stating that had such objection been raised at the time when the document was marked, the party relying on the

document could have considered leading appropriate evidence in order to make the secondary evidence admissible. In Full Bench decision in the matter of Hemendra Rasiklal Ghia (supra), this Court has taken into consideration almost all the decisions on the point and has concluded that when objection pertains to admissibility of the document *per se*, such objection that the document cannot be read in evidence, can be raised at any stage, however, if the objection is in relation to the method of proof of document then, objection to the mode of proof cannot be raised after the document is marked.

11. The learned counsel for the appellants contends that the attesting witness could not stand the test of cross-examination. She has referred to the findings recorded by the learned Trial Court which are extracted above to contend that the said findings are just and proper and sufficient to disbelieve due execution of the Will.

12. I have perused the findings recorded by the learned Trial Court. It needs to be mentioned that the Will is dated 20/12/1969. The suit is filed in the year 2001. The deposition of the attesting witness is recorded in the month of September, 2009. It cannot be expected that any person shall have photographic

memory with respect to event which had unfolded approximately four decades before. Having perused the deposition of attesting witness and the findings recorded by both the learned Courts, I do not find that the minor inconsistencies in the evidence of the attesting witness are glaring enough to disbelieve the Will. The learned Trial Court has given undue importance and weightage to trivial aspects in the deposition of the attesting witness to hold that the defendants have failed to prove due execution of the Will. It must also be mentioned that the Will is more than 30 years old. The evidence on record is not sufficient to dislodge the presumption under Section 90 of the Indian Evidence Act regarding due execution and attestation of the document. The learned Trial Court has not considered Section 90 of the Evidence Act. It also needs to be mentioned that the Will is duly registered although registration of the Will by itself may not dispel with the requirement of proof of the Will in accordance with Section 68 of the Indian Evidence Act.

13. The evidence led by the parties is required to be appreciated in the backdrop of the pleadings. It is the case of the plaintiff that he had become owner of the property by virtue of adverse possession. It is obvious that the adverse possession can be

claimed only against the owner of the property. The plaintiff having come up with the case of adverse possession against the defendants, must admit the title of the defendants over the suit properties since he has come up with a case of perfecting his title over the suit properties by adverse possession.

14. In my considered opinion, the learned First Appellate Court has rightly appreciated the controversy in the matter and has recorded just and proper findings with respect to execution of the Will. The substantial question of law framed by order dated 05/03/2025 is answered against the appellants and in favour of the defendants.

15. The second appeal is dismissed, as such.

16. The civil applications, pending if any, are disposed of accordingly.

[ROHIT W. JOSHI, J.]