



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

SECOND APPEAL NO.417 OF 2018

APPELLANTS

(Org. Def. No.2)

:- 1) Vrushali W/o Anil Khedikar,
Aged 61 years, Occ: Business, R/o
Ramkrishna Niwas, Gandhi Chowk, Ward
No.3, Lakhni, Tah. Lakhni, Distt.
Bhandara (M.S.) 441804.

(Org. Def. No.1)

2) Shri Anil S/o Ramkrushnabapu Khedikar,
Aged about 66 years, Occ: Business, R/o
Gandhi Chowk, Ward No.3, Lakhani, Tah.
Lakhani, Dist. Bhandara – 441804.

(Org. Def. No.5)

3) Rekha W/o Diliprao Palandurkar, Aged
about 61 years, Occ: Household, R/o Near
the house of Govind Shinde, Marar Toli,
Gondia, Distt. Gondia.

..VERSUS..

RESPONDENTS

(Org. Plaintiff)

:- 1) Jyoti w/o Subhash Motdhare, Aged about
64 years, Occ: Household, R/o
Rooskamba, Near Bus Stop, Sunderkunj,
Tahsil Khalapur, Dist-Raigarh, Through
her constituted Power of Attorney holder,
Shri Subhash s/o Laxman Motdhare, aged
about 67 years, Occ: Retired, R/o
Rooskamba, Near Bus Stop, Sunderkunj,
Tahsil Khalapur, Dist. Raigarh.

(Org. Def. No.4)

- 2) Smt. Shalini wd/o Raosaheb Dahikar, Aged about 71 years, Occ: retired, R/o. Plot No.300, Gandhi Nagar, Nagpur.

(Org. Def. No.3)

- 3) Shri Kishor s/o Ramkrushnabapu Khedikar, Aged about 69 years, Occ: Business, R/o C/o Amar Talkies Lakhani, Ward No.3, Gandhi Chowk, Lakhani, Tah-Lakhani, Dist. Bhandara – 441804.

(Org. Def. No.6)

- 4) Smt. Pramilabai wd/o Ramkrushnabapu Khedikar (Dead) Through her legal heirs (Resp.No.1 to 3, Appellant No.2 & 3).

Mr.S.P. Dharmadhikari, Senior Adv. a/b Mr. S.P. Bodalkar, Abhishek Shukla, Nishchay Jadhav and Aditya Chaudhari, Advocates for Appellants.
Mr. P.V. Mishra, with Mr. A.P. Mishra, Advocates for Respondent No.1.
Mr. Ulhas M. Aurangabadkar, Advocate for the Respondent Nos.2 and 3.

CORAM : ROHIT W. JOSHI, JJ.

DATE OF RESERVING THE JUDGMENT: 30.09.2025

DATE OF PRONOUNCING THE JUDGMENT: 09.10.2025

1. The appellant Nos.2 and 3 and respondent Nos.1 to 3 are related to each other as brothers and sisters. Appellant No.1 is the wife of appellant No.2. Respondent No.4 is the mother of appellant Nos.2 and 3 and respondent Nos.1 to 3. She has left for heavenly abode on 25.06.2008. All her legal representatives are on record.

2. The respondent No.1 had filed a suit for partition and separate possession of the suit properties and in order to challenge Will dated 15.04.2005, stated to be executed by late Ramkrushna, the father of the appellant Nos.2 and 3 and respondent Nos.1 to 3 in favour of appellant No.1, the wife of the appellant No.2. Relief is also sought for a declaration that the appellant Nos.1 and 2 had no right to create third party interest over the suit properties covered under the said Will and also for perpetual injunction restraining them from creating third party interest over the same.

3. The said suit was partly decreed by the learned trial Court. The suit for partition with respect to properties that were not covered under the Will was decreed. However, since the learned trial Court held that the Will was duly proved, the suit was dismissed in respect of the properties which form subject matter of the Will. Being aggrieved by the dismissal of the suit with respect to suit properties covered under the Will, the respondent No.1/original plaintiff had filed an appeal which came to be allowed by the learned First Appellate Court. The present appeal is preferred by the original defendant Nos.1, 2 and 5. Notice in the present second

appeal was issued on the following substantial questions of law vide order dated 10.08.2018 :-

“(1) In the light of the avernments in paragraphs 3 and 7 of the written statement, whether it could be said that there were no pleadings with regard to attestation of the Will ?

(2) Whether the pleadings with regard to execution of will at Exhibit-136 were sufficient for warranting its due consideration ?”

4. Vide order dated 23.09.2019, the appeal was ordered to be heard finally at the stage of admission with the consent of the parties. Record and proceedings were called in order to facilitate final hearing of the appeal. The appeal is now heard finally at the admission stage with consent of the parties.

5. The appellants are original defendant Nos.1, 2 and 5 and the respondents/original plaintiff are the defendant Nos.3 and 6 respectively. The parties will be referred according to their status before the learned trial Court hereinafter.

6. As stated above, the plaintiff filed a suit for partition and separate possession and also to challenge Will dated 15.04.2005 said to be executed by her father Ramkrushna in favour of his

daughter in law, the defendant No.2. Perusal of the plaint averments will demonstrate that according to the plaintiff, the suit properties were ancestral properties of her father Ramkrushna. The plaintiff has averred that, on 29.12.1987, a partition deed was executed between her father Ramkrushna and her brothers viz. the defendant Nos.1 and 3. She has stated that her husband was an attesting witness to the said documents. It is stated that the said document although titled as "Partition Deed", it was in the nature of a family settlement. According to her, the father had assured all his children that the property falling in his share in the partition would, after his demise, be distributed equally amongst them, since they were all his Class-I legal representatives. It is further averred that all the legal representatives had agreed to such distribution after the demise of their father. As regards the Will, it was alleged that the father was seriously indisposed for a period of around two to three years prior to his demise and as such, as on the date of execution of the Will, he was not in mentally or physically fit to execute the same. It is stated that he was suffering from paralysis and was completely confined to bed. It is also stated that because of his ailment, his understanding was also compromised and he was also

suffering from memory loss. It is averred that the father was taking treatment at Lakhani where he lived and also at the hospital of Dr. Jay Deshmukh at Nagpur. Apart from the aforesaid, it is alleged that the Will was bearing alleged thumb impression of the father. The plaintiff has stated that perusal of the Will indicated that some pages were bearing thumb impression of left hand while some pages were bearing thumb impression of right hand.

7. The defendant Nos.1, 2, 5 and 6 i.e. the present appellants and their mother filed a joint written statement supporting the Will. The written statement makes a reference to the Will dated 15.04.2005 executed by the deceased Ramkrushna in favour of his daughter in law, the defendant No.2. All the adverse contentions with respect to the Will raised by the plaintiff are denied. It is stated that, the Will was validly executed after completing all the necessary formalities including pasting of photographs of the witnesses and the testator. It was stated that the Will was duly registered in accordance with law. The said defendants also denied the contention that the testator Ramkrushna was physically and mentally unfit while executing the Will or that he had lost his understanding while he had executed the Will.

8. As against this, original defendant Nos.3 and 4 supported the case of the plaintiff.

9. On the basis of rival pleadings, the learned trial Court framed issues in the matter. The husband of the plaintiff entered the witness box on behalf of the plaintiff. The plaintiff examined four other witnesses. The defendant Nos.1, 2 and 5 (present appellants) examined the defendant Nos.1 and 2. As also one Sitaprasad Dube (Attesting witness), Dr. Jay Deshmukh, a Junior Clerk, Office of the Sub-Registrar as their witnesses and advocate Sachin Tripathi, scribe of the Will as their witnesses. The defendant No.3 also entered the witness box.

10. After recording the evidence and hearing rival arguments, the learned trial Court had passed a decree for partition and separate possession in favour of the plaintiffs with respect to suit properties which did not form subject matter of the will. The learned trial Court had held that, the Will was duly proved and that the plaintiff had failed to prove that it was obtained by misrepresentation. In view of such finding, the learned trial Court has dismissed the suit, being Special Civil Suit No. 57 of 2005, vide judgment and decree

dated 21.09.2012, with respect to suit properties which formed subject matter of the Will.

11. Being aggrieved by the dismissal of the suit with respect to the suit properties covered under the Will, the plaintiff preferred first appeal being Regular Civil Appeal No.165 of 2012. The said appeal came to be allowed vide judgment and decree dated 04.07.2018. The learned First Appellate Court has considered the evidence on record and has arrived at satisfaction that the plaintiff had failed to prove the allegations of fraud or misrepresentation. However, the learned First Appellate Court has allowed the appeal on the ground that in the written statement filed by the defendant Nos.1, 2 and 5 there was no pleading with respect to due attestation of the Will. The learned Court has observed that although there were averments with respect to due execution of the Will, such averments were lacking with respect to attestation. In light of the such findings, the learned First Appellate Court allowed the appeal.

12. The defendant Nos.1, 2, and 5 have challenged the judgment and decree in which question of law pertaining to pleadings have been framed vide order dated 10.08.2018.

13. Mr. S.P. Dharmadhikari, learned Senior Advocate for the appellant/defendant Nos.1, 3 and 5 draws attention to the written statement filed by the said defendants at Exh.41. He has particularly drawn attention to the paragraphs 3 and 7 of the written statement. It is stated in para-3 of the written statement that late Ramkrushna has during his lifetime, executed a Will which is duly registered with the office of Sub-Registrar, Nagpur. It is stated that in terms of the said Will, the property which was subject matter of the Will stood bequeathed with the defendant No.2. Likewise, in para-7 of the written statement, the said defendants have again averred about execution and registration of the Will. It is stated that the Will was validly executed after completion of all necessary formalities including pasting of photographs of witnesses and the testator. It is stated that the Will was also signed by the Sub-Registrar, Nagpur.

14. It will be pertinent to mention that while dealing with the allegations with respect to the Will made in the plaint, the said defendants have denied all the allegations. The allegations are basically with respect to physical and mental condition of the testator. It is contended by the plaintiff that the testator was not in a

fit physical and mental state to execute the Will. The said contentions are also denied.

15. It will be pertinent to state that on appreciation of the evidence, the learned First Appellate Court has recorded findings that the evidence on record was sufficient to establish due execution and attestation of the Will. The learned First Appellate Court has elaborately dealt with the evidence while arriving at such finding. The learned First Appellate Court has also recorded clear and categorical findings that the defendant No.1, 2 and 5 have cleared the air around all alleged suspicious circumstances. However, the learned First Appellate Court found that there was no pleadings in the written statement of defendant Nos.1, 2 and 5 as regards due attestation of the Will. The learned First Appellate Court has allowed the appeal only on this ground. It is observed that although one of the attesting witnesses was examined along with the scribe, the said evidence was of no avail in view of the fact that the appropriate pleadings with respect to attestation of the Will were absent in the written statement. It would be appropriate to refer to para-79 (iv), (v) and (vi) of the judgment of the learned First Appellate Court which reads as under :-

“(iv) Respondent Nos.1 and 2 further proved that the deceased while he was in sound mental condition, executed a Will (Exh.136) of his properties, on 15/04/2005 and got it registered from the office of Sub-Registrar, Nagpur and bequeathed his properties in favour of respondent-Mrs. Vrushali w/o Anil Khedikar.

(v) Respondent Nos.1 and 2 further proved the due execution of the Will in question.

(vi) Respondent Nos.1 and 2 further successfully removed all clouds around the Will in question.”

However, having held so, the learned First Appellate

Court has recorded in Para-79 (vii) which reads as under:-

“(vii) Respondent No.2 though, pleaded regarding proper execution of the Will (Exh.136), failed to aver due attestation thereof and that it was a last Will of the testator – late Ramkrushna Bapu. Therefore, the entire evidence regarding due attestation of the Will is without any foundation and thus, inadmissible. Thus, the claim of the propounder/respondent No.2 based on the Will is bound to fail on the said ground alone”

16. In spite of clear findings, that the Will was duly executed and attested and as such was duly proved and all the suspicious circumstances were properly explained to clear all doubts surrounding the Will, the learned First Appellate Court as noticed above, has discarded the Will only for want of pleadings with respect to attestation of the Will. The relevant pleadings in the written statement are extracted above. It needs to be mentioned that the plaintiff who has challenged the Will has not specifically

questioned the Will for want of valid attestation. It must however be stated that even if the Will is not challenged on the ground of valid attestation, it is primary responsibility of the propounder of the Will to prove due and valid execution and attestation of the Will and also to clear all suspicious circumstances surrounding it.

17. In view of the above legal position, the law with respect to pleadings needs to be considered to answer the substantial question of law. It is well settled that the purpose of pleadings is to put the other side on notice of the case that it has to meet during the course of the trial of the suit. The purpose of pleadings is that, the rival party should not be taken by surprise when the suit proceeds for the trial. It is equally well settled that there cannot be set format with respect to pleadings and further that the pleadings are required to be interpreted meaningfully with flexibility and not with rigidity. It is also well settled that, parties are required to plead the facts and not the evidence on the basis of such facts are to be proved.

18. It will be pertinent to mention that it is now well settled that pleadings of parties are required to be read along with the

documents filed by the said parties on record. The Will on which, the defendant Nos.1, 2 and 5 placed reliance was already on record. The appellants/defendants Nos.1, 2 and 5 have examined one of the attesting witnesses who were cross-examined by the plaintiff. Thus, in the considered opinion of this Court, the learned First Appellate Court has erred in discarding the Will only on the ground of want of pleadings with respect to attestation of the Will despite recording a clear and express finding that the Will was properly executed and duly attested in accordance with law and that the appellants/defendant Nos.1, 2, and 5 have duly proved the same. The learned First Appellate Court has also erred in law in not applying the 'test of prejudice' as laid down by the Hon'ble Supreme Court of India in the matter of *Bhagwati Prasad Agarwal Vs Chandramaul*, reported in **AIR 1966 SC 735**, wherein is held as under :-

"10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot override the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the

issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and had had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another”.

19. The learned First Appellate Court has placed reliance on the judgment of this Court in the matter of *Rangu Vithoba and Ors. vs.. Rambha Dina and Ors*, reported in **AIR 1967 Bom 382**. The said judgment pertains to pleadings relating to attestation of the Will. In the said case, the plaintiff was propounder of the Will. The plaintiff had not pleaded that the Will was duly attested. The plaintiff did not examine any attesting witness. The plaintiff relied on Section 90 of the Evidence Act, 1872 to contend that there was presumption regarding due execution and attestation of the Will. A contention was raised on behalf of the plaintiff that it must be assumed that the defendant proceeded with the trial on the basis that the Will was duly attested. A contention was also advanced on behalf of the plaintiff that the defendant had also not disputed due

attestation of the Will. In this context, this Court has held that, it was not necessary for the defendant to dispute the attestation, since due and proper attestation was not even pleaded in the plaint. It is held that, it was necessary for the plaintiff to plead that the Will was last Will of the testator and that was duly attested.

20. In the present case, the propounder of the Will are the defendants. The plaintiff had a copy of the Will prior to filing of the suit. The plaintiff has challenged the Will on grounds which are set-up in the plaint. The plaintiff did not contend that the Will was not attested as per Section 63 of the Indian Succession Act, 1925. The defendant Nos.1, 2 and 5 filed their written statement in response to the challenge raised in the plaint. However, while making averments with respect to the Will, it is stated that the Will was validly executed after completing all necessary formalities. In the considered opinion of this Court, the judgment of this Court in the matter of *Rangu Vithoba* (Supra) cannot be pressed into service to discard the Will in the present case. Certain distinguishable features are required to be noticed between the facts of the said case and the present case. In the said case, the propounder was the plaintiff. As against that the propounder in the present case are the

defendants. In the said, the plaintiff had invoked Section 90 of the Evidence Act, 1872 to establish due attestation of the Will. As against this, in the present case, one attesting witness is examined and both the learned Courts have concurrently held that his evidence was sufficient to prove due execution and attestation of the Will. The evidence of the attesting witness has stood the test of cross-examination, in the opinion of both the learned Courts who have found his evidence to be reliable. It is also necessary to state that the predominant ground of challenge in the plaint is mental and physical condition of the testator. The defendants have filed their written statement in response to challenge raised in the plaint.

21. In view of the aforesaid, in the considered opinion of this Court, the judgment in the matter of *Rangu* (Supra) is distinguishable on facts. It will be appropriate to refer the judgment of the Hon'ble Supreme Court in the matter of *Haryana Financial Corporation and another ..vs.. Jagdamba Oil Mills and another*, reported in (2002) 3 SCC 496, wherein it is held that while applying ratio of a judgment, Court should always keep in mind that, a single distinct fact can make a world of difference and therefore, while applying ratio of a judgment to the facts of a

particular case, facts of both the cases shall be taken into consideration minutely.

22. The “test of prejudice” laid down in the matter of *Bhagawati Prasad* (Supra) also needs to be considered. In view of the aforesaid, in the considered opinion of this Court, the ratio of the said judgment cannot be applied to the facts of the present case.

23. For the reasons recorded above, in the considered opinion of this Court, the pleadings in the written statement are sufficient to suggest due execution and attestation of the Will. In any case, the respondents/plaintiff and defendant No.3 who were seriously disputing the Will have not suffered any prejudice at the time of trial of the suit for want of pleadings in that regard. The learned First Appellate Court has also not found that any prejudice was caused to them due to pleadings in the plaint. The plaintiff also did not raise any specific ground in the appeal as regards prejudice caused to her at the time of trial of the suit for want of averment regarding attestation of Will in the Written Statement of Defendant No.1, 2 and 4. The principle that evidence without pleading is not admissible will not be applicable because proper reading of written

statement indicates that pleadings of due attestation of Will is implicate in para-7 of written statement where it is stated that Will was executed after following of all formalities. The learned First Appellate Court has erred in not taking into consideration the principle laid down in the matter of *Bhagwati Prasad* (Supra).

24. In view of the above, in the considered opinion of this Court, the substantial question of law framed deserves to be answered in favour of the appellants and against the respondents.

25. The learned Advocates for the respondents / plaintiff and defendant No.3, had drawn attention to the evidence of the Dr. Jay Deshmukh to contend that the testator was not in a fit disposing state of mind at the time of execution of the Will. The learned First Appellate Court has elaborately considered evidence of the attesting witness, the scribe and also the doctor. This Court has also perused the deposition of the doctor with able assistance of the learned Advocates. Doctor has in clear terms stated that the testator was in a fit disposing state of mind while executing the Will. It will be pertinent to mention that the deposition of the doctor indicates that the testator was under his treatment for some time.

The evidence of the doctor inspires confidence and is rightly accepted by the learned First Appellate Court. This Courts sees no reason to take a different view of the matter with respect to the evidence of the doctor as regards physical and mental condition of the testator at the time of execution of the Will.

26. The learned advocate for the plaintiff contends that admittedly, the suit properties were properties of joint Hindu family properties and that by virtue of section 6 of the Hindu Succession Act, 1956 as amended by the Hindu Succession (Amendment) Act, 2005, the plaintiff who is a daughter has share in the suit property since birth as a coparcener. He further contends that the partition deed dated 29.12.1987 will have to be discarded in view of the fact that it is not a registered partition. He therefore contends that the will executed by the father have to be discarded since he did not have exclusive title over the properties bequeathed. The learned advocate, therefore, contends that the Will shall be effective only with respect to 1/8th share of the father. The contention of the learned advocate is liable to be rejected since there is express pleading with respect to the partition deed executed in the year 1987. The plaintiff has stated that her husband was an attesting

witness to the said partition deed. The Hon'ble Supreme Court has in the matter of *Vinita Sharma ..vs.. Rakesh Sharma*, reported in (2020) 9 SCC 1, has held that although a partition within the meaning of Section 6 of the Hindu Succession Act must be a partition effected by a registered partition deed or partition effected by decree of court, in certain exceptional cases where the partition is beyond pale of any doubt, partition effected otherwise than by a registered deed or decree of Court can also be taken into consideration. In the case at hand the admission with respect to partition of the year 1987 is in the pleadings of the plaintiff and therefore there cannot be any doubt with respect to the said partition. In the facts of the present case, the plaintiff cannot claim any share in the suit properties as a coparcener under section 6 of the Hindu Succession Act in view of the undisputed partition deed dated 29.12.1987.

27. For the reasons recorded above, the second appeal deserves to be allowed and is allowed on the following terms :-

- i) The Second Appeal is **allowed**.

ii) The judgment and decree dated 04.07.2018 in Regular Civil Appeal No.165 of 2012, passed by the learned District Judge-2, Bhandara, is quashed and set aside.

iii) The judgment and decree dated 21.09.2012 in Special Civil Suit No.57 of 2005, passed by the learned Civil Judge Senior Division, Bhandara, is confirmed.

No order as to costs.

All civil application(s), if any, are **disposed of** accordingly.

(ROHIT W. JOSHI, J.)

C.L. Dhakate