



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

WRIT PETITION NO. 4058 OF 2021

(Ratnamala Shankarrao Bargatkar & Ors. Vs. Manohar s/o Ajabrao Kose (since dead)
through LRs Smt. Nirmala wd/o Manohar Kose & Ors. & Anr.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Ms S.T. Godbole, Counsel for the petitioners.
Mr. A.R. Dhoble, Counsel for respondent no.2.

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CORAM : ANIL L. PANSARE, J.
JANUARY 29, 2025

The petitioners – original plaintiffs are aggrieved by two orders; one is passed below Exhibit 99 and another below Exhibit 100. By these applications, the petitioners requested the trial Court to call record and proceedings of Regular Civil Suit No. 226/2001. The plaintiff in the said suit was the father of the petitioners and the respondents. The suit was filed against Mr. Waman and others.

2] Before I comment further on the requirement of record and proceedings of the said suit, it will be appropriate to put forth relevant facts relating to present proceedings.

3] The petitioners filed suit for partition, separate possession and also declaration to the effect that Will dated 4/2/2010, executed by Ajabrao, father of parties, bequeathing the property in favour of respondent no.2, was false and fabricated.

4] The parties led evidence. Respondent no.2 examined attesting witness, and the Will came to be exhibited. It appears from the impugned order that the

matter was then fixed for final argument, and at that time, the applications – Exhibits 99 and 100, came to be filed. The petitioners requested the trial Court to call record and proceedings of Regular Civil Suit No. 226/2001 stating therein that their father's signatures were available in the record of the said suit and could be compared with the signature of the Will.

5] The trial Court rejected the applications, firstly because the petitioners approached belatedly, *viz.*, at the time when the suit was fixed for final argument, and secondly, the burden to prove the Will was on the propounder, i.e., respondent no.2 and, therefore, it is the respondents' duty to prove the Will. In other words, it is held that negative evidence cannot be led to disprove the Will. The Court below further noted that the handwriting expert's report on the point was also obtained in the earlier suit.

6] The petitioners' Counsel submits that the handwriting expert's report is based on secondary evidence and, therefore, is not admissible. She further submits that the petitioners filed application immediately after respondent no.2 closed his evidence and, thus, there is no delay. She submits that burden to prove that the signature on the Will is not of Ajabrao would shift on the petitioners only upon closure of evidence by respondent no.2.

7] To my mind, there is no question of shifting burden as regards proof of Will. It is well settled that the propounder of the Will has to prove the same and, therefore, burden is/was upon respondent no.2 to prove the Will.

8] The learned Counsel for respondent no.2 submits that the said burden has been discharged by examining the testator of the Will, who has seen Ajabrao signing the Will.

9] In this context, the handwriting expert's report, even if considered, may not supersede the testimony of the attesting witness unless the petitioners point out that in his evidence, there is something that would require additional evidence, even to contend that the handwriting expert's report will be relevant and significant in the facts of the case. That is not the case of the petitioners. I further do not find any reason why should the petitioners wait for nine years after filing the suit to get record and proceedings of the previous suit. The petitioners could have obtained certified copies of the relevant documents and could have taken appropriate steps well within time. Once respondent no.2 has examined the witnesses and closed evidence and once the matter is fixed for argument, the petitioners' request could have been entertained only in extraordinary circumstances, which are absent in the present case.

10] Put all together, the trial Court's finding is consistent with the facts and evidence before it. No interference is called for in supervisory jurisdiction under Article 227 of the Constitution of India. The petition is dismissed. No costs.

(ANIL L. PANSARE, J.)

Sumit