IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 224 OF 1992
WITH CA/4837/2015 IN SA/224/1992

Eknath Genu Pawar,
died his legal representatives : … **Appellant**
(Orig. Plaintiff/Respondent)

1A) Bhausaheb

1B) Balu

1C) Ashok

1D) Kusum

,

VERSUS

1) Dattu Santram Haral,
died his legal representatives :

1A) Navnath

1B) Annapurna

2) Kishan Santram Haral,

3) Sarjerao Santram Haral,

4) Ankush Santram Haral,

5) Babu Santram Haral,

... **Respondents**.
(Orig. Defendants/Appellants)

...

Advocate for the Appellants : Mrs. C. S. Deshmukh.
Advocate for the Respondent Nos. 2 to 5 : Mr. S.P. Salgar h/f Mr. N.V. Gaware.

CORAM : MANGESH S. PATIL, J.
RESERVED ON : 05.04.2022.

PRONOUNCED ON : 13.04.2022.

JUDGMENT :

This is a second appeal of the plaintiff. He had succeeded in obtaining a decree for declaration of his being the exclusive owner in possession of the suit properties on the basis of a will executed by one Laxmibai on 30.06.1956 who was his maternal aunt. But he is aggrieved by the judgment and order of the lower appellate court which allowed the respondents' (defendants) appeal, quashed and set aside the judgment and decree passed by the trial court and dismissed the suit.

2. The second appeal was admitted on 22.09.1992 without formulating substantial questions of law as is mandated by Section 100 (3) of the Code of Civil Procedure. Having noticed this fact, by the order dated 23.02.2022 I had called upon the learned advocate Mrs. Deshmukh for the appellant to formulate and tender substantial questions of law. She has submitted those on the last date and I have heard the arguments of both the sides on those substantial questions which read as under :

> "(A) Has not lower Court misdirected itself in not applying proper test of proof of execution of will required by Section 63 of Indian Succession Act and

Section 68 of Indian Evidence Act ?

(B) Has not lower court committed grave error of law in ignoring test with regard to authenticity of will as laid down by the Apex Court ?

(C) Was it not incumbent on lower court to appreciate well settled principle of law that so called omission of technical nature would not certainly discredit the will in the presence of other circumstances which overwhelmingly point to the due execution of will by the testator ?

(D) Has not the lower Appellate Court been in grave error in absolutely ignoring the fundamental tenet of law that title follows possession ?

(E) Has not lower appellate Court committed grave error in refusing to grant injunction on finding that respondents have failed to prove their possession ?

(F) Has not lower appellate Court committed serious error in not taking into account failure of respondents to prove gift deed and being not in possession of the suit land and their resistance to the suit entails injunction in favour of appellants ?"

3. These questions arise from following set of facts :

(i) The appellant with his biological mother Anjanabai filed the suit with the averrments that his maternal grand father Ganu Haral was the original owner of the suit properties. After his demise those were mutated in the name of his widow Laxmibai in the government and revenue record. Laxmibai died in the year 1958 and was survived by four daughters

Anjanabai, who was initially the plaintiff No. 1, Manjulabai, Gayabai and Sarubai. The respondents are the heirs of Manjulabai.

(ii) Anjanabai died during pendency of the suit and her name was deleted and it was thereafter prosecuted by the appellant alone. He averred that Anjanabai was maintaining her mother Laxmibai and out of love and affection the latter executed a will on 30.06.1956 with the consent of all her daughters. She bequeathed the suit properties to him and since after her demise he has been in exclusive possession of the suit properties as owner and claimed declaration to that effect.

(iii) He lastly averred that the respondents on the basis of an alleged gift got mutated some of the suit properties in their name under the pretext of Laxmibai having gifted the suit properties to Manjulabai. On that basis Manjulabai had also executed a sale-deed of one of the suit properties in favour of the respondent No. 5. But the respondent No. 5 was never in possession of any portion of the suit properties.

(iv) The respondents contested the suit by filing a joint written statement. They did not dispute the relationship nor did they dispute that Laxmibai was the original owner of the suit properties but denied that she had executed any will and bequeathed the suit properties to the appellant. They further contended that all the entries in the revenue record are false and fabricated. A bogus will has been brought into existence. They also denied that he was in exclusive possession of the suit properties. They further contended that Laxmibai had gifted the suit properties to her daughter Manjulabai on 04.03.1940 by way of a registered gift deed and on that basis Manjulabai alone had become the exclusive owner and was in possession of the suit properties. Out of one of the suit properties Manjulabai sold Survey No. 135/A/2 to the respondent No. 5 by a registered sale-deed dated 06.01.1976. The appellant was never in possession of any portion of the suit properties exclusively and prayed to dismiss the suit.

(v) The trial court framed necessary issues. The appellant apart from himself examined his maternal aunt Sarubai (P.W. 3). He also examined one Vitthal (P.W. 4) stated to be the attesting witness and the will (Exh. 74) was exhibited treating it as having been duly proved.

(vi) The respondents examined as many as five witnesses to prove their stand. The trial court decreed the suit holding that the will was duly proved and the appellant had acquired the ownership and possession of the suit properties. It further held that the respondents had failed to prove that Laxmibai gifted the suit properties to Manjulabai.

(vii) The respondents preferred the appeal before the lower appellate court which allowed it. Though it concurred with the observations and the conclusions of the trial court to the extent that the respondents had failed to prove that Laxmibai had gifted the suit properties to Manjulabai, it disagreed with the observation and conclusion of the trial court holding that the will was duly proved. It, therefore, quashed and set aside the judgment and decree of the trial court and dismissed the suit. Hence this appeal.

4. Admittedly, apart from the fact that there is concurrent finding of fact by the courts below holding that the respondents had failed to prove that Laxmibai had gifted the suit properties to Manjulabai, they having not preferred any cross objection before the lower appellate court, the issue to that extent does not survive. Consequently, the entire fate of the second appeal hinges on the proof or otherwise of the will being propounded by the appellant.

5. Learned advocate Mrs. Deshmukh for the appellant would vehemently submit that when not only Sarubai (P.W. 3) who happened to be one of the four daughters of Laxmibai had testified in favour of the appellant and when even she was divested from inheriting the suit properties, it was a strong circumstance which ought to have been borne in mind by the lower appellate court. The entire suspicion being expressed by the lower appellate

court could have been replied by this sole circumstance.

6. Mrs. Deshmukh would then submit that the lower appellate court has also erroneously concluded the will having not been duly proved by referring to Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act in spite of the fact that the requirement of examination of at least one attesting witness was duly complied with in the form of examination of witness Vitthal (P.W. 4) who was an attesting witness and had broadly narrated the circumstances in which the will was brought into existence and Anjanabai had executed it out of her free will. The lower appellate court has not given sound and convincing reasons to discard his version.

7. Mrs. Deshmukh would further submit that when all other attending circumstances were clearly indicative of the suit properties having been bequeathed to the appellant, the lower appellate court committed a gross error in ignoring those circumstances by taking a strict view regarding proof of the will. She would, therefore, submit that the observations and the conclusions of the lower appellate court in allowing the appeal of the respondents are not borne out from the facts, evidence and the law. The aforementioned substantial questions of law arise and deserve to be answered in favour of the appellants.

8. As against this, the learned advocate Mr. S.P. Salgar h/f Mr. N. V. Gaware learned advocate for the respondent Nos. 2 to 5 submitted that once the appellant was propounding a will of Laxmibai it was imperative for him to have led strict proof as is required by Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. Though he had examined Sarubai (P.W. 3) and Vitthal (P.W. 4) stated to be the attesting witnesses, their evidence was not strictly considered by the trial court and as correctly pointed out by the lower appellate court in concluding that their testimonies were not sufficient to describe them to have attested the will. He would

submit that the lower appellate court objectively scrutinized testimonies of both these witnesses to demonstrate as to how their testimonies were not sufficient to treat the will as duly proved within the four corners of aforementioned provisions. The conclusions are well reasoned and unassailable. It has taken a plausible view and this court cannot interfere in second appeal.

9. I have considered the rival submissions and perused the papers. It is quite apparent that the scope of the present enquiry is limited in ascertaining whether the observations and conclusions of the lower appellate court holding the appellant to have failed to prove the will are legally tenable or at least plausible on the basis of correct appreciation of the evidence.

10. Obviously, the appellant being the interested person, his testimony cannot be readily believed. Needless to state that in view of the provisions of Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act, examination of atleast one attesting witness is necessary for proof of a will. Section 3 of the Transfer of Property Act lays down as to what is meant by 'attestation' and it reads thus :

> *"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time,*

and no particular form of attestation shall be necessary."

As can be gathered when the law requires a will to be attested and to be proved by examining atleast one attesting witness, it is highly imperative that a person stated to be the attesting witness must have seen the executant put his/her signature on the will or atleast receives an acknowledgment from him or her about having signed the will and thereafter himself or herself signs as a witness on the will in presence of the executant. This is where the testimonies of Sarubai (P.W. 3) and Vitthal (P.W. 4) who were posed to be the attesting witnesses drearily lack. They have simply stated about Laxmibai having signed on the will and they having placed their respective thumb impression/signature but have not specifically stated about these things having happened in each others presence. It is true that the witnesses *inter se* may not sign on the will in each others presence but it is necessary that the executant places the signature on the will in their presence and *vice versa* that is, they place signature in presence of the executant. Both these witnesses have not stated about having placed their thumb impression/signature in presence of Laxmibai.

11. In addition, as is correctly noted by the lower appellate court though Sarubai (P.W. 3) was one of the daughters of Laxmibai and was being excluded from the bequest and was being divested of her possible inheritance, she did not support the appellant in material particulars. She on her own in her examination in chief expressed ignorance about any will executed by Laxmibai in favour of Anjanabai. Incidentally, she expressed ignorance about any gift of the suit properties by Laxmibai in favour of Manjulabai. In another sentence she stated about Laxmibai having executed a will in the name of Anjanabai when according to appellant the will was executed in his favour.

12. So far as the testimony of Vitthal (P.W. 4) is concerned, though he stated that the will was scribed in his presence and it was read over to

everybody and Laxmibai having put her thumb impression on it and it bears his signature and signature of Sarubai and one Devrao as also the scribe, he did not state either about Laxmibai having placed her thumb impression in his presence and he himself having signed it in her presence. Further even he failed to state that the contents of the will were explained to Laxmibai, more so when she was 90 years of age at the time of its execution. It was expected by the lower appellate court that considering the age of Laxmibai on the date of execution of the will, it was imperative that there should have been some strong and convincing evidence about the contents of a will having been read over and explained to her. The lower appellate court has correctly noticed that Sarubai (P.W. 3) even failed to state any thing about Laxmibai's disposing state of mind.

13. If in view of such a state of evidence the lower appellate court has reached a well reasoned and a plausible conclusion, in my considered view, this court in exercise of the powers under Section 100 of the Code of Civil Procedure cannot reappreciate the circumstances and evidence to reach a different conclusion. It is trite that a will has to be strictly proved. When the lower appellate court has demonstrated that the will being propounded by the appellant was not duly proved, the conclusion is, indeed, unassailable.

14. Suffice for the purpose to bear in mind that as laid down in the case of **Gurdev Kaur & Ors vs Kaki, A.I.R. 2006 Supreme Court 1975**, jurisdiction under Section 100 of the Code of Civil Procedure is so limited that even a wrong or grossly unexcusable finding of fact cannot be interfered with. After narrating the historical background and the effect of the amendment carried out in Section 100 of the Code of Civil Procedure in the year 1976 it has been observed in paragraph No. 67 to 70 as under :

> *“67. The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal*

having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law.

68. The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicted the scope of interference under Section 100, C.P.C. by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

69. 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". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

70. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100, C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly mis-appreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross mis-appreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law."

15. In view of such a position in law when the facts and circumstances and the evidence on the record are sufficient to demonstrate that the reasoning adopted by the lower appellate court is on correct appreciation of fact and law and when it has taken a plausible view about the will having not been duly proved, it would not be a correct to reappreciate the evidence and to reach another conclusion. I, therefore, conclude that none of the aforementioned substantial question of law formulated by the learned advocate for the appellant arise in this second appeal.

16. The second appeal is dismissed with costs.

17. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

18. After pronouncement of judgment the learned advocate Mrs. Deshmukh for the appellants submits that interim relief has been in operation till date and which may be extended for a further reasonable period so as to enable them to approach the Supreme Court.

19. The other side has objection.

20. Considering the nature of the dispute and the fact that the second appeal has been dismissed after more than three decades, interim relief to continue for a period of eight weeks from today.

(MANGESH S. PATIL, J.)

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