

(2018) 05 BOM CK 0002

In the Bombay High Court

Case No : SECOND APPEAL (SA) NO. 477 OF 2015

ANIL S/O DIGAMBER DHUMAL

APPELLANT

Vs

SUNIL S/O DIGAMBER DHUMAL AND OTHERS S.

RESPONDENT

Date of Decision : 05-05-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 99

Code of Civil Procedure, 1908 — Rule 15, 3, 27, 16, 22, (1), (4)

Citation : (2018) 05 BOM CK 0002

Hon'ble Judges : MANISH PITALE

Bench : Single Bench

**Advocate : K.H. Deshpande, Rajeev Deshpande, Rajeev Madkholkar,
Rajnish Vyas**

Final Decision : Dismissed

Judgement

MANISH PITALE, J.

1.The appellant herein has challenged dismissal of suit for possession filed by his mother (original plaintiff) and then continued by him seeking recovery

of possession of suit property, on the basis of Will Deed dated 25.07.1993 executed by the father of the appellant. The Courts below have disbelieved

the Will as being surrounded by suspicious circumstances.

2.The appellant and the respondents are siblings, being children of Digamber Dhumal and Shantabai Dhumal (the original plaintiff). The suit property

is a house called "Shanti Kutir" located on old Nazul Plot Old No. 133, New No.2 at Ramakrishna Math, Dhantoli, Nagpur. The respondent No.1

has been in possession of an area of 3.20 meters x 3.20 meters on the second floor of the suit house and he has been using an attached bathroom.

The father of the parties i.e. Digamber Dhumal was a respected person in the

society, being the proprietor of publishing house 'Nagpur

Prakashan'. It was the case of the plaintiffs in the suit for possession filed before the Court of Civil Judge, Junior Division, Nagpur (trial Court) that

said Digamber Dhumal had executed a Will Deed dated 25.07.1993 (Exh.33) wherein he had made arrangements, inter alia, for taking care of the

aforesaid publishing house, 'Nagpur Prakashan' as also steps to be taken in respect of current accounts held by him and the manner in which the

suit house property would devolve after his death. In the Will Deed, the original of which was produced before the trial Court, it was stated that

Digamber Dhumal was not happy with respondent No.1 for the manner in which he had disrespected his father and he had quarreled with other family

members. On this basis, it was specified in the Will that respondent No.1 would not be entitled to any share in the suit house property and that if he

vacated the same, he would be given a sum of Rs.25,000/-. The appellant herein was given the responsibility of repaying a loan specifically

mentioned in the Will Deed and he was given the responsibility of taking forward the business of the publishing house. The Will Deed effectively

excluded respondent No.1 from right and interest in the suit house property.

3.It is an undisputed fact that said Digamber Dhumal died on 17.04.1994. It is also an undisputed fact that when the said Will Deed was executed,

said Digamber Dhumal was suffering from paralysis. The Will Deed was executed in the presence of attesting witnesses. It was the case of the

plaintiff that despite the execution of the said Will Deed by Digamber Dhumal and even after his death, the respondent No.1 continued to occupy the

aforesaid portion of the suit house property and that he had taken electric connection from adjoining tenanted part of the suit house property, without

having a separate electric meter. The plaintiff further came with the case that there was day to day nuisance of respondent No.1 in the suit house

property and that, therefore, she was constrained to issue legal notice dated 20.07.2009, through advocate asking respondent No.1 to deliver

possession of the suit house property in his occupation. As respondent No.1 failed to vacate the said portion within a period of 15 days as required

under the aforesaid notice, the mother of the present appellant, as the original plaintiff filed Regular Civil Suit No. 1015 of 2009 being a suit for

possession on 14.12.2009, seeking specific direction against respondent No.1 to

deliver vacant possession of the aforesaid portion of the suit house property occupied by him.

4. In the said suit, the respondent No.1 was arrayed as defendant No.1 while the other siblings were arrayed as defendant Nos.2 to 9. This included

Shalini Dattatraya Deepak (defendant No.9) who was daughter of the deceased Digamber Dhumal from his first wife. The defendant Nos.2 to 4 and

6 to 8 filed a common written statement on 28.02.2012 stating that the original plaintiff had rightly filed the suit for possession, seeking eviction of

respondent No.1 on the basis of the aforesaid Will dated 25.07.1993 (Exh.33). It was contended that respondent No.1 did not even attend the funeral

and the post death ceremonies of Digamber Dhumal. It was contended that respondent No.1 was not maintaining cordial relations with his parents

and siblings. It was specifically stated that the aforesaid Will Deed was read over on 30.04.1994 when all the sons and daughters of late Digamber

Dhumal, except respondent No.1, had gathered for post death ceremonies.

5. On 25.03.2010, the respondent No.1 filed his written statement opposing the prayer made in the suit. He raised preliminary objection on the ground

that suit property was coparcenary property, that the suit was barred by limitation and that all necessary parties had not been joined in the suit. It was

specifically denied in the written statement that the deceased Digamber Dhumal was owner of the suit property or that it was his self acquired

property. It was contended that the story about the execution of Will was false and that the Will was fabricated, only with a view to grab the suit

property. It was also contended that the Will Deed was surrounded by suspicious circumstances and that it was disclosed for the first time after more

than 16 years of its alleged execution. It was also contended that Digamber Dhumal was suffering from ailments and that he was a paralytic person

under the influence of medicine and that, therefore, the said Will Deed was not a believable document.

6. On the basis of such pleadings, the trial Court struck issues and evidence of parties was recorded. It is relevant that beyond filing written statement,

defendant Nos.2 to 4 and 6 to 8 did not adduce any evidence in support of their stand. The appellant adduced evidence of one of the attesting

witnesses to prove the execution of said Will Deed. The respondent No.1 examined the Stamp Vendor from whom the stamp papers were purchased

on which the Will Deed was typed. There were other witnesses examined by the parties, including the doctor who had treated the said deceased

Digamber Dhumal.

7. On 05.12.2012, the trial Court passed its judgment and order, dismissing the suit filed by the appellant. The trial Court found that the appellant had

failed to prove execution of the said Will Deed (Exh.33). The trial Court found that although the Will Deed was said to have been executed on

25.07.1993, it was presented for the first time before the revenue authority in the year 2005, which was more than ten years later and that the original

plaintiff herself had admitted in her evidence that she had communicated about existence of the said Will Deed to respondent No.1 for the first time

when notice dated 20.07.2009 was issued to him. Along with these facts, the trial Court also found that there were suspicious circumstances

surrounding the Will Deed. This included lack of evidence that one of the stamp papers on which the Will was typed was purchased by one Nilu

Kolhe, while it was shown in the name of deceased Digamber Dhumal and it was difficult to believe that Digamber Dhumal, at the age of about 83

years, who was suffering from paralysis, could have actually gone out of the house, purchased the stamp papers and could have got the Will Deed

typed. On the basis of these factors, the trial Court found that the Will Deed was suspicious. Since the entire claim of the appellant and the original

plaintiff Shantabai was based on the aforesaid Will Deed and it was found to be suspicious and not believable, the trial Court dismissed the suit.

8. Aggrieved by the same, the appellant filed Regular Civil Appeal No. 40 of 2013, before the Court of District Judge, Nagpur (appellate Court). By

the impugned judgment and order, the appellate Court dismissed the appeal and confirmed the order passed by the trial Court. In doing so, the

appellate Court also found that the existence of the Will dated 25.07.1993 (Exh.33) was for the first time communicated to respondent No.1 by notice

dated 20.07.2009 (Exh.34). It was found that even before the revenue authorities, the said Will was produced for the first time after more than ten

years of execution of the Will and death of Digamber Dhumal. The act of keeping said Will as a secret document for a long time was held to be a

suspicious circumstance by the appellate Court. On the other aspects of the evidence of the Stamp Vendor showing that the purchase of stamp

papers by Digamber Dhumal being doubtful, the appellate Court disagreed with the trial Court and held that there could be some clerical mistake by

the Stamp Vendor in noting the serial number of the stamp paper and that it could not be said to be a suspicious circumstance. Even with regard to

the evidence of doctor pertaining to mental condition of Digamber Dhumal, the appellate Court held that there was lack of evidence to show that

Digamber Dhumal was not in a fit mental condition while executing the Will Deed. Therefore, the main reason for the appellate Court to hold that the

Will Deed was suspicious and not believable, was the fact that it was not communicated to the family members, particularly respondent No.1 within

reasonable time and that it came to light for the first time after more than ten years. On this basis, the appellate Court dismissed the appeal and

confirmed the judgment and order passed by the trial Court.

9. Aggrieved by the said impugned judgment and order, the appellant has filed the present appeal. On 16.03.2016, this appeal was admitted on the

three Substantial Questions of Law. Thereafter, on 20.04.2018, when this appeal was taken up for final hearing, further four Substantial Questions of

Law were framed by this Court and, therefore, this appeal was heard on the following seven Substantial Questions of Law.

â??(1) Whether the learned Judge of the Appellate Court was correct in law in holding that although the fact that the Will was properly executed as

per the provisions of the Indian Succession Act, 1925, it was shrouded by the suspicious circumstances, wrongly taking into account irrelevant alleged

circumstances and stating them as suspicious circumstances like â?" attesting witness ought to know the contents of the Will and required to explain

small corrections in whitener in the Will Deed, Will was produced belatedly, majority share in property given to few family members of the exclusion

of others ?

(2) Whether a stray admission on part of the original plaintiff, aged 89 years, in the witness box that the Will was first disclosed to the respondent No.1

after a gap of 15 years, would be treated as conclusive and determinative proof by ignoring vital evidences like that the contents of the Will was read

over before all the legal heirs of the testator on 13th day ritual after the death of the testator and that the office of the Nagpur Municipal Corporation

and office of the City Survey, Nagpur recorded the disposition of the property on

the basis of the Will ?

(3)Whether the learned Judge of the Appellate Court was correct in law in continuing to put the onus of proving the Will on the propounder, even after

the burden of proof to prove Will had been duly and satisfactorily discharged by the propounder. Whether the learned Judge of the Appellate Court

failed to shift the onus on the respondent No.1 to disprove the Will, who has alleged that, the Will was executed by force, under undue influence, and

taking advantage of illhealth of the testator ?

(4)Whether the suit filed by the appellant (plaintiff) in the present case was barred by limitation ?

(5)Whether the suit filed simpliciter for possession by the appellant (plaintiff) was maintainable when the defendant No.1 in the suit had denied the

claim of the appellant (plaintiff) based on Will Deed dated 25.7.1993 and a cloud was created on the title to the suit property claimed by the plaintiff, in

the light of judgment of the Hon'ble Supreme Court in the case of Anathula Sudhakar V. P. Buchi Reddy (Dead) by L.Rs. Andors. Reported in AIR

2008 SC 2033 ?

(6)Whether the plaint filed by the appellant (plaintiff) in the present case can be said to be defective as the verification appended thereto did not

satisfy the requirement of Order 6 Rule 15 of the Code of civil Procedure, 1908 ?

(7)Whether the affidavit filed in support of the plaint and the affidavits in evidence filed on behalf of the plaintiff satisfied the requirement of Order 19

Rule 3 of the Code of Civil Procedure, 1908 ?

10.Shri K.H. Deshpande, learned Senior Counsel assisted by Shri Rajeev Deshpande, Advocate appearing on behalf of the appellant submitted that

both the Courts below have committed a grave error in disbelieving the aforesaid Will Deed dated 25.07.1993. The circumstances that were held to

be suspicious by the Courts below while disbelieving the Will Deed could not be said to be suspicious circumstances at all. It was contended that a

proper appreciation of the evidence and material on record demonstrates that the findings rendered by the two Courts below on the aforesaid aspect

were perverse. It was contended that when the Will was duly proved by the evidence of attesting witness, it could not be discarded on the basis of

certain circumstances which the two Courts below had wrongly held to be suspicious circumstances. It was submitted that a stray admission made by

the original plaintiff, an 89 year old lady, about having communicated the existence of the Will Deed for the first time while issuing notice through

Advocate, could not have been the basis for the Courts below to disbelieve the Will Deed. It was contended that when the propounder of the Will had

proved the same in accordance with law, the burden had entirely shifted on the respondent No.1 who claimed that the said Will Deed was not

believable and that such burden had not been discharged by respondent No.1. It was contended that the deceased Digamber Dhumal was a reputed

person in the society and that the tenor of the Will demonstrated that he had made arrangements for the future of the business of publishing house as

also other aspects and that he had specifically stated reasons why respondent No.1 was being deprived of any right in the suit house property.

11.As regards limitation, it was submitted that when the original plaintiff Shantabai issued legal notice dated 20.07.2009, the period of limitation was

triggered because till that time the occupation of part of the suit house property by defendant No.1 was permissive in nature. It could not be said that

the limitation period started from the date of execution of the Will Deed dated 25.07.1993 or from the date of demise of Digamber Dhumal on

17.04.1994. It was submitted that since the entire claim of the appellant was based on the aforesaid Will Deed dated 25.07.1993 and the same was

contested by respondent No.1, there was no question of seeking any declaration, in order to seek relief of possession in respect of the suit property.

As regards the aspect of defective verification and defective affidavit in support of the plaint and affidavits in evidence, raised on behalf of respondent

No.1, it was submitted that even if there was some defect in the verification and affidavit, such objection ought to have been raised at the first

instance on behalf of respondent No.1. It was submitted that in any case, at worst such defects were irregularities that were curable and under

Section 99 of the Code of Civil Procedure, 1908, they did not have any impact on the merits of the case, thereby showing that the claim of the

appellant could not be thrown out on the basis of such alleged defects. The learned Senior Counsel appearing on behalf of the appellant sought to

distinguish the judgments on which the Courts below had placed reliance while holding against the appellant.

12.Learned Counsel for the appellant also submitted that there were mutation entries made in the Corporation record in the year 1994 itself and,

therefore, it could not be said that the Will Deed was brought to light for the first time after about ten years in the year 2005, when applications were made in the City Survey Office. It was contended that although the documents pertaining to such mutation entries in the Municipal Corporation could not be placed on record before the trial Court, they had been placed on record before the appellate Court with an application seeking permission to do so under Order 41 Rule 27 of the Code of Civil Procedure, which the appellate Court ought to have looked into. It was submitted that when such documents are taken into consideration, the entire force in the argument of respondent No.1 about belated revealing of the Will Deed is taken away and the very basis of the finding rendered by the Courts below is also taken away. In addition, the learned Counsel placed reliance on the following judgments :Â?

(i)Meenakshiammal (Dead) through LR's. and others .v. Chandrasekaran and another (reported in 2005(1) SCC, 280);

(ii)Arvind Bhaurao Gangashettiwar nd others .v. Smt. Indirabai w/o Balkrishna Gangashettiwar (through LR's Shobha w/o Bhaurao Yelmelwar and others (reported in 2008(5) Mh.L.J., 185);

(iii)Mathai Samuel and others .v. Eapen Eapen (dead) by LR's and others (reported in 2012(13) SCC, 80);

(iv)Mahesh Kumar (Dead) by LR's. .v. Vinod Kumar and Others (reported in 2012(4) SCC, 387);

(v)Kalyan Singh .v. Smt. Chhoti and others (reported in AIR 1990 SC 396);

(vi)Madhukar D. Shende .v. Tarabai Aba Shedage (reported in AIR 2002 SC 637); and

(vii)Mt. Biro .v. Atma Ram and others (reported AIR 1937 PC 101).

13.Per contra, Shri R.C. Madkholkar, Advocate holding for Shri P.C. Madkholkar, learned Counsel appearing on behalf of respondent No.1, submitted

that the findings rendered by two Courts below are based on appropriate appreciation of the evidence and material on record. It was submitted that

the Substantial Questions of Law initially framed by order dated 16.03.2016 were based on facts, which were not borne out from the record. It was

submitted that there was nothing on record to show that the documents pertaining to alleged mutation entries in the Corporation record could be looked

into. The belated revealing of the Will Deed and the admission given by the

original plaintiff in cross-examination were sufficient to show that the said Will Deed was a concocted document, prepared only to suit the interest of the appellant. It was submitted that the period of limitation started upon the death of Digamber Dhumal on 17.04.1994 and that the suit filed simpliciter for possession was not maintainable, as there were specific pleadings in written statement of respondent No.1 that created a cloud on the claim of title made by the appellant on the basis of Will, which required a specific prayer for declaration in respect of the Will Deed and the title of the appellant in the suit property was required in the facts and the circumstances of this case. It was submitted that the verification appended to the plaint did not satisfy the requirement of Order 6 Rule 16 of the Code of Civil Procedure and that the affidavit filed in support of the plaint and the affidavits in evidence filed on behalf of the plaintiff violated requirements of Order 19 Rule 3 of the Code of Civil Procedure and that on the basis of these defects, the suit filed by the appellant ought to have been thrown out. The learned Counsel for the respondent No.1 relied upon the following judgments :—

- (i) Ravinder Kumar Sharma .v. State of Assam and others (reported in 1999 (7) SCC, 435);
- (ii) Kalyan Singh .v. Smt. Chhoti and others (reported in AIR 1990 SC 396);
- (iii) S.R. Srinivasa and others .v. S. Padmavathamma (reported in 2010 (5) SCC, 274); and
- (iv) Anathula Sudhakar .v. P. Buchi Reddy (dead) by LRs. Andors (reported in AIR 2008 SC 2033; and
- (v) Union of India .v. Ibrahim (reported in 2012(8) SCC148).

14. Shri Rajnish Vyas, learned Counsel appearing on behalf of respondent Nos.2 to 4 and 6 to 8 submitted that in written statement filed on behalf of the said respondents, there was a specific reference made to the fact that the Will executed by Digamber Dhumal was communicated to all family members during the post death ceremonies and that, therefore, there was no substance in the argument of respondent No.1 that there was delay in revealing the existence of the Will Deed. It was submitted that although the aforesaid respondents were being deprived of their rights in the suit house property by the Will Deed dated 25.07.1993, yet they were supporting the appellant because it was a fact that such a Will Deed had been executed by

their father and that respondent No.1 was not at all entitled to any right to the suit house property.

15.The Substantial Questions of Law framed by this Court need to be decided on the basis of the aforesaid submissions made on behalf of the parties,

in the light of the pleadings as also the evidence and material on record. The first three questions pertain to suspicious circumstances surrounding the

Will dated 25.07.1993 (Exh.33), its disclosure and whether the Courts below had correctly placed the burden while analysing such suspicious

circumstances. It has been contended on behalf of the appellant that the Will Deed was dated 25.07.1993 and the father of the appellant died on

17.04.1994 and further that the Will was immediately acted upon by appropriate order passed by the Municipal Corporation on 21.09.1994 to make

mutation entries in terms of the aforesaid Will. It was further contended that the City Survey Office had also made appropriate changes in its record

in the year 2005 and that the respondent No.1 was not justified in feigning ignorance about the existence of the Will. It was submitted that the sisters

of the appellant and respondent No.1 had taken a categorical stand that the existence of Will was specifically stated during the post death ceremony

of Digamber Dhumal and that all members of the family were aware about the existence of the same. On this basis, it was contended that the

emphasis placed on a statement made in crossexamination by mother of the appellant, who was about 89 years old at the time of her examination, to

the effect that the existence of the Will was communicated to respondent No.1 for the first time when notice was issued to him in the year 2009, was

misplaced and it was being blown out of proportion.

16.It was further contended that other suspicious circumstances pertaining to the mental and physical fitness of Digamber Dhumal at the time of

execution of the said Will, the stamp papers not having been purchased by Digamber Dhumal himself and depriving respondent No.1 of his right in the

suit house property, could not be said to be suspicious circumstances at all. It was submitted that on these aspects, the appellate Court had already

held in favour of the appellant and that, therefore, the only alleged suspicious circumstance pertained to the alleged gap of about 15 years between

execution of the Will Deed and its communication to respondent No.1. It was submitted that this gap could never be a suspicious circumstance

because it was not a circumstance pertaining to the time period when the Will Deed dated 25.07.1993 was executed. It was submitted that in the facts and circumstances, as they emerged from the material on record, there was no gap, muchless a gap of about 15 years, in communication of the existence of the said Will Deed dated 25.07.1993. On this basis, it was contended that the appellate Court had erred in holding that the Will being brought into effect after a long gap of time, created doubt about its validity.

17.It was contended on behalf of respondent No.1 that there were neither pleadings nor evidence placed on record by the appellant (plaintiff) in respect of alleged mutation entries in the Municipal Corporation record, in pursuance of the aforesaid Will Deed. There was an attempt made on behalf of the appellant for the first time before the appellate Court by filing an application under Order 41 Rule 27 of the Code of Civil Procedure to place on record certain documents allegedly pertaining to Municipal Corporation record, to show that there was an order of mutation passed in terms of the aforesaid Will Deed dated 25.07.1993. It was pointed out that the appellate Court simply stated the word "filed" in respect of the said application and it was neither considered nor was any order passed on the same. As a consequence, the contention pertaining to the alleged mutation in Corporation record could not be considered at all. As regards the modifications made in City Survey Office in the year 2005, on the basis of the Will Deed dated 25.07.1993, it was contended on behalf of respondent No.1 that the documents on record demonstrated that no notice was ever issued to respondent No.1 before such modifications were made. It was submitted that in this backdrop, the admission given by the original plaintiff Shantabai in her cross-examination that she had informed respondent No.1 about existence of the aforesaid Will Deed when notice dated 20.07.1009 was issued through Advocate, assumes significance. It was submitted that when the plaintiff herself had admitted that the very existence of the Will was informed to respondent No.1 for the first time in the year 2009, it certainly created serious doubt about the validity of the Will.

18.It was further contended on behalf of respondent No.1 that the trial Court had found the material on record as showing the said Digamber Dhumal being unfit at the time of execution of Will Deed dated 25.07.1993 and it also found that the purchase of stamp papers by the said Digamber Dhumal

for execution of the Will Deed also appeared to be doubtful. These were found to be suspicious circumstances by the trial Court, but the appellate

Court disagreed with the said findings. In this regard, it was submitted that even though respondent No.1 had not filed a cross objection in the present

appeal, he could certainly attack findings of the appellate Court on the said two aspects under Order 41 Rule 22 of the Code of Civil Procedure. On

this basis, it was contended that the aforesaid circumstances along with use of white ink in certain places in the Will Deed dated 25.07.1993

demonstrated that the Will Deed was a doubtful document and that the Courts below had correctly disbelieved the same as being surrounded by

suspicious circumstances.

19. In the present case, the material on record has to be appreciated to determine as to whether the Will Deed dated 25.07.1993 was divulged to the

entire family after the death of Digamber Dhumal on 17.04.1994 or that it came up for the first time when the original plaintiff Shantabai issued notice

through Advocate on 20.07.2009 to respondent No.1 and then filed the suit on the basis of the said Will Deed. During the intervening period, as per

the contentions raised on behalf of the appellant, the Will Deed was communicated to all members of the family firstly, when it was divulged during

the post death ceremonies of Digamber Dhumal and secondly, when the Municipal Corporation passed order dated 21.09.1994 making mutation

entries in respect of the suit property in terms of the Will Deed and when modifications in the record of the City Survey Office were made in the year

2005. It was contended that when there was material on record to support the aforesaid facts, the Courts below were not justified in holding that the

Will Deed was rendered a doubtful document because of passage of about 15 years from its execution to its communication to respondent No.1 and it

being acted upon.

20. As regards the existence of the Will Deed being communicated to family members during post death ceremonies of Digamber Dhumal, there is no

such pleading on behalf of the plaintiff and no evidence has been led in that regard. It is only in the written statement filed on behalf of the sisters,

being defendants in the suit, that a reference to such fact has been made. But, no evidence has been led by the said defendants to prove such

statement made on their behalf in the written statement. It is also an admitted

position in the pleadings of the plaintiff and the said defendants that respondent No.1 did not attend the said post death ceremonies. Therefore, there is no material on record to accept the said contention of the appellant that the existence of Will Deed dated 25.07.1993 was brought to the knowledge of all family members, including respondent No.1 during the post death ceremonies of Digamber Dhumal.

21.As regards mutation in the Municipal Corporation record by order dated 21.09.1994, there is neither any pleading nor evidence placed on record by the appellant. The attempt made before the appellate Court by seeking to place on record certain documents of the Municipal Corporation along with application under Order 41 Rule 27 of the Code of Civil Procedure, was also of no avail because admittedly no order was passed by the appellate Court on the said application. The documents purportedly pertaining to Municipal Corporation records were not proved in accordance with law and, therefore, they could not be looked into. As a result, there is no material before the Court to accept the contention of the appellant that the Will Deed dated 25.07.1993 was acted upon because mutation entries were made in the Municipal Corporation record.

22.As regards the modifications made in the record of City Survey Office, it appears that in the year 2005, the appellant had approached the City Survey Office for such modifications. Even with regard to the said proceedings before the City Survey Office, there is nothing on record to show that notice was issued to respondent No.1 before making any modifications in terms of the aforesaid Will Deed dated 25.07.1993. Therefore, the statement made by the original plaintiff Shantabai in her cross-examination that the existence of the said Will was communicated to respondent No.1 for the first time by notice dated 20.07.2009 (Exh.34), becomes important. Although it is contended on behalf of the appellant that this was a stray admission made by a lady who was about 89 years when she appeared as a witness, such admission, when read in the context of the material on record points towards the fact that the existence of the Will was kept under wraps by the plaintiff till the year 2009. The appellant has not been able to place on record cogent evidence to show that the Will Deed dated 25.07.1993 was in the knowledge of all concerned and that it was not kept a secret, till it was divulged in the year 2009.

23. In this context, the entire contents of the Will become significant. By the said Will Deed, Digamber Dhumal not only provided for the manner in which the suit house property was to be dealt with, but he also specified about the manner in which the proprietary business of Nagpur Prakashan was to be carried forward. It was also provided in the Will as to how a particular loan was to be repaid and the manner in which certain current accounts were to be operated. It was incumbent on the appellant to have placed on record material to show that the Will was acted upon on all these other aspects also, so as to demonstrate that every member of the family, including respondent No.1, were aware about the existence of the Will and that it was acted upon. In the absence of any such material on record, the contentions raised on behalf of the appellant are difficult to accept. In this context, it becomes evident that the Courts below cannot be said to have committed an error by holding that when the Will Deed was sought to be acted upon after about 15 years of its existence and that too in the context of only the suit house property, there was doubt created about validity of the Will. The distinction sought to be made by the learned Counsel for the appellant from the facts of cases in which judgments have been passed by the Hon'ble Supreme Court pertaining to delay in divulgence of Will Deed in the case of Kalyan Singh .v. Smt. Chhoti and others (supra) and Mt. Biro .v. Atma Ram and others (supra) (Privy Council) is not of much assistance, because it is not just the number of years of gap between the execution of the Will Deed and its divulgence, but the fact that a substantial gap points towards the Will Deed being doubtful and thereby it becomes a suspicious circumstance which the Court can take into consideration.

24. In the present case, the material on record shows that although the Will Deed was executed on 25.07.1993, it was sought to be acted upon by the original plaintiff for the first time when notice dated 20.07.2009 (Exh.34) was issued to the respondent No.1. This itself creates serious doubt about the validity of the aforesaid Will Deed dated 25.07.1993.

25. As regards the circumstance pertaining to stamp papers not being purchased by Digamber Dhumal, the trial Court has held the same to be a suspicious circumstance while the appellate Court has disagreed and it has held that it could be said to be a mere clerical error. The appellate Court has also disagreed with the trial Court on the question of fitness of Digamber

Dhumal at the time of execution of the Will Deed. Although the findings on these aspects have been reversed by the appellate Court, the Counsel for respondent No.1 has attacked the said findings stating that even in the absence of cross objection, he was entitled to do so under Order 41 Rule 22 of the Code of Civil Procedure. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of Ravinder Kumar Sharma .v. State of Assam (supra). In the said judgment, upon analysis of the said provision, the Hon'ble Supreme Court has held that a respondent in an appeal can show that adverse finding rendered by the Court below was not sustainable even in the absence of a cross objection, when the Court below had passed a decree in his favour despite such adverse finding. In the case of Banarsi and others .v. Ram Phal (reported in 2003 (9) SCC, 606), the Hon'ble Supreme Court in this context has held as follows :¹⁰.The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:¹¹

- (i)The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
- (ii)The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
- (iii)The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in

his favour he is entitled to support without taking any crossobjection.

The law remains so postÂamendment too. In the type of cases (ii) and (iii) preÂamendment CPC did not entitle nor permit the respondent to take any

crossÂobjection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not

necessary for the respondent to take any crossobjection laying challenge to any finding adverse to him as the decree is entirely in his favour and he

may support the decree without crossÂobjection; the amendment made in the text of subÂrule (1), read with the explanation newly inserted, gives him

a right to take crossÂobjection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of

preferring such crossÂobjection is spelled out by subÂrule (4). In spite of the original appeal having been withdrawn or dismissed for default the

crossÂobjection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the

respondent under the unamended CPC. In preÂamendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent

to question the correctness or otherwise of any finding recorded against the respondent.â??

26.In the light of the aforesaid position of law, it becomes clear that the respondent No.1 herein is entitled to demonstrate that the adverse findings

rendered by the appellate Court in the impugned judgment and order regarding stamp papers and fitness of Digamber Dhumal while executing Will

Deed, could be shown to be erroneous. As regards, the question of stamp papers, the record shows that the register of the Stamp Vendor was placed

on record and that the Stamp Vendor was also examined as a witness. The Stamp Vendor stated in his deposition that according to his register, stamp

paper Nos.4372 and 4373 were sold to one Nilu Kolhe and that stamp paper Nos. 4375 and 4376 were sold to Digamber Dhumal. The Will Deed was

typed on stamp paper Nos. 4373 and 4375. The relevant page of the register of the Stamp Vendor supports the statement made by the Stamp Vendor

in his deposition and it further shows that even in respect of the stamp papers that were sold to Digamber Dhumal, there was no signature of

Digamber Dhumal. It has also come on record that Nilu Kolhe had no connection at all with Digamber Dhumal. Thus, although stamp paper No.4373

was sold to Nilu Kolhe, the first page of Will Deed has been typed on the said stamp paper. The trial Court has taken this into consideration and it has found that this has created a doubt about the stamp paper being purchased by Digamber Dhumal for execution of aforesaid Will Deed. The appellate Court has reversed the said finding in para 17 of the impugned judgment and order by merely stating that there may be some clerical error by the Stamp Vendor in noting serial number on the stamp papers. On this basis, it has been held that it does not amount to a suspicious circumstance. The said finding of the appellate Court is based on conjecture and the oral and documentary evidence in this regard has been ignored. Therefore, reversal of finding of the trial Court is not justified and such facts pertaining to stamp paper being purchased by a totally unconnected person for the Will Deed executed by Digamber Dhumal certainly creates a suspicion about the Will Deed.

27. This is to be appreciated in the context of the evidence on record pertaining to the health of Digamber Dhumal when he allegedly executed the aforesaid Will Deed. It is an admitted position on record that Digamber Dhumal had suffered from paralysis before the said Will Deed was executed. He was about 83 years of age and he required help and assistance to move around. In this situation, the stamp paper being purchased by him by travelling considerable distance from his house to the Stamp Vendor becomes doubtful, particularly when the evidence of the Stamp Vendor and the documents on record, pertaining to purchase of such stamp papers shows that the signature of Digamber Dhumal is missing on the register of the Stamp Vendor and the evidence of the Stamp Vendor about having sold one of the stamp papers to a totally unconnected person, has gone unchallenged. The fitness of Digamber Dhumal assumes significance in this context but, the appellate Court has ignored the same by merely stating that there was no material to show that Digamber Dhumal was not mentally fit when the Will Deed was executed. The evidence of the doctor shows that Digamber Dhumal was being treated by him for heart related diseases, asthma and that he had suffered from attack of paralysis. It is also stated in the cross-examination of the doctor that Digamber Dhumal was always accompanied by relatives when he visited the clinic showing that he used to move around with assistance. The totality of the circumstances emerging from such material and evidence on record, does indicate suspicion about

Digamber Dhumal having actually purchased stamp papers for execution of the Will Deed and about his fitness in that context.

28. Thus, not only the gap between the execution of the Will Deed dated 25.07.1993 creates doubt about the said Will Deed but, the aforesaid

circumstances also create suspicion about the genuineness of the Will.

29. The other circumstance regarding respondent No.1 being deprived of rights in the suit house property cannot be said to be a suspicious

circumstance, because it is possible for a father to exclude some of his children from benefits of property and other benefits on the basis of his

perception of the role played by the children in his life. But, absence of evidence being placed on record on behalf of the plaintiff to show that the Will

Deed in its entirety was indeed acted upon, reinforces the doubt about the validity of the Will Deed, particularly when it was kept under wraps for a

long period of time, until the original plaintiff issued notice dated 20.07.2009 (Exh.34) to respondent No.1 and then filed aforesaid suit for possession.

This demonstrates that the questions of law at serial Nos.1 to 3 deserve to be answered against the appellant.

30. The emphasis placed on behalf of the appellant on the fact that signature of Digamber Dhumal was admitted on the Will Deed by respondent No.1

and that the execution of the Will Deed was proved in accordance with law by producing the attesting witnesses, does not take the case of the

appellant any further because admission of signature on the Will would not necessarily mean that respondent No.1 had conceded to its genuineness.

In this case, the respondent No.1 had challenged the genuineness of the Will by pointing out suspicious circumstances. It is no doubt true that the

burden was upon the respondent No.1 to have proved such suspicious circumstances in order to create doubt about the genuineness of the Will. As

discussed above, there was sufficient material placed on record by respondent No.1 to create doubt about the genuineness of Will Deed dated

25.07.1993. Therefore, the appellant cannot succeed only on the ground that the signature of Digamber Dhumal on the Will Deed was not disputed or

that attesting witness was indeed examined to show that the Will Deed was executed. Therefore, reliance placed on behalf of respondent No.1 on the

judgment of Supreme Court in the case of S.R. Srinivasa and others .v. S. Padmavathamma (supra) is justified.

31.As regards the question pertaining to limitation, it is stated in the suit filed by the plaintiff that the possession of respondent No.1 in part of the suit house property was permissive in nature and that when respondent No.1 failed to vacate part of the suit house property, notice was issued on 20.07.2009 and then the suit was filed. On the other hand, it was contended on behalf of respondent No.1 that the period of limitation started on 25.07.1993 when the Will Deed was executed and thereafter on 17.04.1994 when Digamber Dhumal died. It was claimed that since the suit was filed in the year 2009, it was clearly barred by limitation. In the present case, the appellant and respondent No.1 have been in possession of parts of the suit house property as members of the same family. They had been living together even during the lifetime of their father Digamber Dhumal. The Will Deed was allegedly executed on 25.07.1993 while Digamber Dhumal died on 17.04.1994, but, it could not be said that immediately upon death of Digamber Dhumal, it was incumbent on the appellant or his mother (original plaintiff) to immediately file the suit for possession against respondent No.1. It could be said that the possession of respondent No.1 was tolerated by the original plaintiff and the appellant, even assuming that such Will Deed was executed, as he was also member of the family who continued in possession of part of the suit property. It was only when dispute arose between the parties, as claimed by the appellant and the plaintiff concerning payment of electricity bill that the original plaintiff was constrained to file the suit for possession. In this backdrop, it could not be said that the suit filed by the original plaintiff was barred by limitation. Therefore, the question pertaining to limitation is answered in favour of the appellant.

32.It has been contended on behalf of respondent No.1 that the suit filed simpliciter for possession by the original plaintiff was not maintainable as the Will Deed on which the plaintiff relied, was denied and challenged by respondent No.1 and title claimed by the plaintiff on the basis of the Will Deed was also challenged. It was submitted that when cloud was created on the title on the basis of pleadings by respondent No.1, it was incumbent for the plaintiff to have sought a declaration in respect thereof and that the suit filed simpliciter for possession, was not maintainable. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of Anathula Sudhakar .v. P. Buchi Reddy (Dead) by L.Rs. Andors (supra). In response, it was

contended on behalf of the appellant that only the aforesaid Will Deed dated 25.07.1993 was the subject matter of dispute and that the contesting parties were well aware about the same, having led evidence in that regard. It was submitted that there was no question of any cloud being created on the title of the appellant and that, therefore, the suit for possession was maintainable.

33.The Hon'ble Supreme Court in the aforesaid judgment of Anathula Sudhakar .v. P. Buchi Reddy (Dead) by L.Rs. Andors (supra) has held as

follows :¹⁷. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a)Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential

injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a

consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an

injunction simpliciter.

(b)As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The

prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the

basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding

thereon, it will not be possible to decide the issue of possession.

(c)But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either

specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue

relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are

necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the

remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d)Where there are necessary pleadings regarding title, and appropriate issue

relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.â??

34. Applying the aforesaid position of law to the facts of the present case, it becomes clear that respondent No.1 had indeed not only denied the aforesaid Will Deed dated 25.07.1993, but in his written statement, he had also denied that Digamber Dhumal was the owner of the suit property. It was also denied that the suit property was self acquired property of Digamber Dhumal and it was contended that the suit property was coparcenary property. There was evidence led on behalf of respondent No.1 to show that the Will Deed dated 25.07.1993 was not valid and that it could not be the basis for the original plaintiff to claim title in the suit property. The tenor of the pleadings in the written statement filed on behalf of respondent No.1 and evidence led on his behalf demonstrated that the very basis of the plaintiff seeking possession of the suit property was denied and there was certainly cloud created on the claims of the plaintiff in respect of title and ownership in the suit property. Applying the aforesaid principle laid down by the Hon'ble Supreme Court to the facts of the present case, it becomes evident that the original plaintiff and the appellant ought to have prayed for declaration and that suit filed simpliciter for possession was not maintainable. Hence, the said question is answered in favour of respondent No.1 and against the appellant.

35. As regards questions pertaining to the defective nature of verification appended to the plaint and the affidavit in support of the plaint and affidavits in evidence not satisfying the requirements of the Code of Civil Procedure, it is clear from the record that objections in that regard were not raised on behalf of respondent No.1 at any stage. In this context, learned Counsel

appearing on behalf of the appellant is justified in submitting that at worst these were irregularities that could have been cured, if objection in that regard had been raised on behalf of respondent No.1 at the earliest opportunity. It was correctly submitted that the parties having gone to trial and having led evidence to prove their respective stands, at the second appellate stage, such an objection pertaining to alleged defects in verification and affidavit ought not to be entertained.

36. Section 99 of the Code of Civil Procedure can be pressed into service in this situation, which provides that no decree should be reversed or modified for error or irregularity not affecting merits or jurisdiction. In the present case, at worst, the aforesaid alleged defective verification and affidavits can be said to be mere irregularities not affecting the merits and, therefore, only on the basis of such alleged irregularities, it cannot be said at this stage, that the suit filed by the original plaintiff or the evidence led on behalf of the original plaintiff and the appellant could not have been considered by the Courts below. Hence, the said questions are answered against respondent No.1 and in favour of the appellant.

37. But, since this Court has come to the conclusion that there were indeed suspicious circumstances surrounding the aforesaid Will Deed dated 25.07.1993, the dismissal of the suit by the Courts below does not deserve any interference. There has been reference made to a number of judgments on behalf of the contesting parties but, all the said judgments are not referred to or discussed at length because this Court has come to the conclusion, on the basis of evidence and material on record, that the findings rendered regarding suspicious circumstances surrounding the Will Deed indeed show that the suit for possession filed on behalf of the original plaintiff and continued by the appellant herein could not have been decreed.

38. Accordingly, this appeal is found to be without merits and it is dismissed. There shall be no order as to costs.