

**(1995) 07 BOM CK 0026**  
**In the Bombay High Court**  
**Case No : First Appeal No. 684 of 1975**

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|------------------------------------|------------|
| Bandopant Sitaram Bapat and Others | APPELLANT  |
| Vs                                 |            |
| Sankar Sitaram Bapat and Others    | RESPONDENT |

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**Date of Decision :** 20-07-1995

**Acts Referred:**

Succession Act, 1925 — Section 58, 60, 63, 67, 74

**Citation :** AIR 1996 Bom 56 : (1996) 1 BomCR 304 : (1995) 97 BOMLR 552 : (1996) 2 CivCC 81 : (1996) 1 MhLj 815

**Hon'ble Judges :** S. M. Jhunjhunwala, J

**Bench :** Single Bench

**Advocate :** G.S. Godbole, for the Appellant; B.P. Apte and Narendra Walavalkar, for the Respondent

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## Judgement

S. M. Jhunjhunwala, J.—This appeal is directed against the judgment and decree dated 21st August, 1975 passed by the Civil Judge (Senior Division), Sangli at Sangli in Special Civil Suit No. 39 of 1973 by which the suit filed by the appellants herein has been dismissed with costs.

2. The suit giving rise to this appeal was filed by the appellants herein claiming partition of the properties owned by one Sitaram Sadashiv Bapat who expired at Audumbar on 24th December, 1944. The parties to the suit are closely related to each other, the 1st appellant herein being the elder brother of respondents 1 and 2 and the appellant 2 to 6 and the 3rd respondent being the sons of the 1st appellant. The deceased Sitaram Sadashiv Bapat (for short, "the deceased") during his life-time was in possession of self-acquired properties. He had executed his last Will and Testament on 2nd December, 1944 (for short, "the said Will"). Smt. Bhagirathibai was the wife of the deceased who died on 12th July, 1970.

3. In clause 2 of the said Will, it is recorded that the ornaments mentioned therein constituted "Streedhan" of the said - Bhagirathibai and as such, exclusively belonged to her and she could dispose of the same as per her wish.

In clause 5 of the said Will, it is recorded that the said Bhagirathibai should enjoy all the immovable properties, house and lands belonging to the deceased as the owner thereof and the 1st appellant as also the respondents 1 and 2 herein should enjoy the same on behalf of the said - Bhagirathibai by winning over her affection and after her death, the three should live together and if that is not feasible, then the 1st respondent should be separately given the land R.S. No. 2013 having area admeasuring 1 acre, 5-6 gunthas assessed at Rs. 23.24 and situate at Satara, Sub-Division Ashte. It is this clause in the said Will which has been differently interpreted by the parties to the suit. According to the appellants, only life interest was created in favour of the said Bhagirathibai in respect of the immovable properties mentioned therein whereas according to the respondents 1 and 2, the absolute ownership was created in respect thereof in favour of the said Bhagirathibai. It may also be mentioned here that the said Bhagirathibai had also made her last Will and Testament on 8th May, 1970. It is the case of the appellants that the respondents 1 and 2 got the said Will dated 8th May, 1970 executed from the said Bhagirathibai by exercise of pressure upon her and it having been not voluntarily executed, is not valid. The right of the said Bhagirathibai to Will away the properties mentioned in the said Will of the deceased has also been challenged by the appellants on the ground that the said Bhagirathibai having been granted only the life interest had no legal authority to Will away the said properties as her limited interest therein was extinguishable on her death and in fact extinguishable on her demise and whatever rights that accrued to the appellants under the said Will of the deceased got revived entitling the 1st appellant to seek partition thereof. Since the 1st appellant had witnessed the execution of said Will by the deceased, considering that an objection might be raised as to right of the 1st appellant to challenge the same in view of the provisions contained in S. 67 of the Indian Succession Act, the plaint filed in the said suit was amended to contend that right of the appellants 2 to 6 and the validity of the said Will of the deceased could not be denied.

4. The respondents filed their written statement inter alia contending that the allegations of the appellants made in the plaint filed were incorrect and that the interpretation on the clauses contained in the said Will sought to be put by the appellants was not correct. The respondents further contended that the deceased had bequeathed his entire properties in favour of the said Bhagirathibai as absolute owner thereof and having done so, the deceased was not within his rights to make any arrangement for distribution thereof amongst his heirs after his death. It was also contended by the respondents that the Will dated 8th May, 1970 was got executed from the said Bhagirathibai by putting pressure on her was categorically denied by the respondents that on the day when the said Bhagirathibai made her Will, she was in a disposing state of mind and that she voluntarily made her Will. After the amendment of the plaint, supplemental written statement was filed and it was contended that neither of the appellants could claim any share in the said properties and that only the legatees under the Will of the said Bhagirathibai could possess the same.

5. On the basis of evidence on record, the trial Court held that under the said Will when the deceased had executed the said Will in favour of the said Bhagirathibai, the deceased had intended to bequeath full proprietary rights in the properties to her and in view of execution of the Will dated 8th May, 1970 by the said Bhagirathibai, there was no question of partition of the said properties as claimed by the appellants. The appellants had no right in the said properties as claimed by the appellants. The appellants had no right in the said properties since admittedly the properties bequeathed were self-acquired properties of the deceased and as such, could be unrestrictedly disposed of by the deceased by executing the said Will. The trial Court further held that the Will dated 8th May, 1970 executed by the said Bhagirathibai was proved and that the same was executed by her voluntarily and while she was in the disposing state of mind. In the facts and circumstances of the case, the suit of the appellants was dismissed by the trial Court.

6. Mr. Godbole, learned advocate for the appellants, has submitted that under the said Will of the deceased the said Bhagirathibai got only life interest in respect of the properties mentioned in clause 5 of the said Will and as such, in law could not dispose of the same by her Will dated 8th May, 1970 as purported to have been done by her. Mr. Godbole has further submitted that in view of Ss. 75, 82, 84, 85, 87 and 88 of the Indian Succession Act, 1925 (for short, "the Act") and the language used in clause 5 of the said Will of the deceased the only possible interpretation of the said clause 5 was to the effect that the said Bhagirathibai was bequeathed only life interest in the said properties and as such, the appellants are entitled for partition thereof as claimed by them. Mr. Godbole has also submitted that since the respondents have propounded the said Will dated 8th May, 1970 of the said Bhagirathibai, the onus lay on the respondents to prove the validity thereof and as the respondents have failed to discharge the onus, the appellants are entitled to the reliefs claimed in the suit.

7. In support of his submission that the onus of proving the said Will of Bhagirathibai was on the respondents, Mr. Godbole has put reliance on the case of Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, , wherein the Supreme Court has held that the mode of proving a Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a Will by S. 63 of the Act. It is further held by the Supreme Court that the onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Mr. Godbole has submitted that there has been suspicious circumstances surrounding the execution of the said Will of Bhagirathibai and as such, the onus of proving the same lay heavily on the respondents. The suspicious circumstances surrounding the execution of the said Will of Bhagirathibai, according to Mr. Godbole, were not leading evidence of Mr. Limaye, one of the attesting witnesses to the said Will of Bhagirathibai, non-examination of the scribe thereof as witness of the

respondents, prolonged illness of Bhagirathibai prior to her death, sufferance of Bhagirathibai was unable to move being bed ridden and that the other attesting witness, who has been examined by the respondents as their witness, being a close friend of the 1st respondent, was an interest witness and as such, no reliance could be placed on the evidence given by him.

8. It is correct that Mr. Limaye, the other attesting witness to the said Will of Bhagirathibai has not been examined. However, S. 63 of the Act required the respondents to prove the said Will of Bhagirathibai by examination of one of the attesting witnesses thereof which the respondents did. It was not incumbent upon the respondents to adduce additional evidence of Mr. Limaye so long as the respondents considered the examination of one witness as sufficient. Moreover, in his evidence, the 1st appellant has admitted that the signatures of the said Bhagirathibai appearing at three places on the Will were of Bhagirathibai. The said Will of Bhagirathibai has been registered with Sub-Registrar and she herself had gone to the Sub-Registrar's Office for the purpose of presenting the Will and when the Will bears the endorsement in that respect, the respondents are entitled to the presumption as regards the proper execution thereof as warranted by S. 58 read with S. 60 of the Indian Registration Act. Though it is alleged that on the day when the Will of Bhagirathibai was executed on 8th May, 1970, the said Mr. Limaye was at Sangli, there is nothing to show that Mr. Limaye was not present at Ashta when he attested the execution thereof by the said Bhagirathibai. The 1st appellant himself was admittedly not present at the time of execution of the said Will by Bhagirathibai and as such cannot have personal knowledge as to whether Mr. Limaye was or (was) not present at the time of execution of the said Will by Bhagirathibai and attestation thereof by witness Mr. Kore. Though the respondents did not examine Mr. Limaye, yet nothing prevented the appellants to examine Mr. Limaye if the appellants so desired. There is nothing to show that Mr. Kore was interested witness. The scribe was not examined by the respondents since it was not obligatory for the respondents to examine him as their witness to prove the Will in facts of the case. Merely because Bhagirathibai was said to be not keeping good health prior to her death, it cannot be concluded that at the time when she executed her Will on 8th May, 1970 she was not having disposing state of mind. There is no evidence on record to show that the said Bhagirathibai was not having disposing state of mind at that time when she had executed her Will on 8th May, 1970. Some doubt was sought to be created by reason of similarity of contents in the said Will of the deceased and that of the said Bhagirathibai. It is an admitted position that Bhagirathibai was a literate lady. If at the time of dictating her Will, Bhagirathibai had with her the said Will of the deceased, surely nothing prevented her from adopting the contents of the said Will of deceased for getting the same incorporated in her said Will. The similarity of contents do not prove that the Will of Bhagirathibai was not valid. In my view, the evidence on record do not show existence of any suspicious circumstances surrounding execution of the said Will by Bhagirathibai. As held by trial Court, the Will of Bhagirathibai as propounded

by the respondents was properly and validly executed by Bhagirathibai and respondents have discharged the onus of proving the same.

9. The other question that requires consideration is as to whether the deceased had bequeathed only life interest in respect of the said properties in favour of said Bhagirathibai or whether the said Bhagirathibai acquired absolute ownership in respect of the said properties under the said Will of the deceased. Mr. Godbole has submitted that for construing the said Will of the deceased and to find out the real intention of the deceased, reliance should be placed on the conduct of parties in respect of the said properties after the death of the deceased. It is correct that the 1st appellant being eldest son of the deceased was looking after the said properties after the demise of the deceased but that itself cannot establish that the bequeath made by the deceased in favour of the said Bhagirathibai was only by way of life interest in her favour. As per clauses 2 and 3 of the said Will, Bhagirathibai was to receive all the ornaments on her person as her Stridhan and she was to be absolute owner thereof and the silver and brass utensils and other properties were intended to be distributed with the consent of Bhagirathibai. By clause 4 of the said Will, the 1st appellant has been directed to manage the property on the advice of Bhagirathibai. The relevant portion of clause 5 of the said Will reads as under :

As per this clause, Bhagirathibai was to enjoy all the immovable properties, house and lands of the deceased as absolute owner thereof and the 1st appellant and the respondents 1 and 2 were to enjoy the same by winning over affection of the said Bhagirathibai and after her death, it was intended that the three should live together. According to the appellants, as per this clause, the Bhagirathibai was to get not the absolute ownership of the properties mentioned therein but only limited life interest therein. According to the respondents, Bhagirathibai got absolute ownership in respect of the said properties and not only life interest therein. While putting reliance on S. 82 of the Act, Mr. Godbole has submitted that the meaning of any clause in Will is to be collected from the entire instrument and all its parts are to be construed with reference to each other. Mr. Godbole has further submitted that clauses 6, 7 and 8 of the said Will of the deceased were required to be given effect and on being properly interpreted, if absolute ownership is conferred in favour of Bhagirathibai by the reason of clause 5 thereof, it would make them redundant. While putting reliance of S. 85 of the Act, Mr. Godbole submitted that no part of a Will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it. So also while putting reliance on S. 86 of the Act, Mr. Godbole submitted that same words occurring in different parts of the said Will are to be taken to have been used everywhere in the same sense, unless a contrary intention appeared and since, in the submission of Mr. Godbole, contrary intention appeared by reason of later portion of clause 5 read with clauses 6, 7 and 8 of the said Will of the deceased, merely because the words conferring absolute ownership have been used in clauses 3 and 5, it cannot be held that bequeath by the deceased in favour of the said Bhagirathibai was by way of creation of absolute ownership in her favour of

the said Bhagirathibai was by way of creation of absolute ownership in her favour in respect of the said properties since there is nothing to show that clauses 5, 6, 7 and 8 of the said Will are capable of being reconciled. In support of his submissions, Mr. Godbole has put reliance on the cases of Ramachandra Shenoy and Another Vs. Mrs. Hilda Brite and Others, ; Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and Others, and Navneet Lal alias Rangi Vs. Gokul and Others, . The Supreme Court, in the case of Ramchandra Shenoy (supra), while concerned with a Will of Roman Catholic widow has held (at p. 1328) :

"It is one of the cardinal principles of construction of Wills that to the extent that it is legally possible effect should be given to every disposition contained in the Will unless the law prevents effect being give to it. Of course if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the father extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will."

The Supreme court in the case of Smt. Pramod Kumari Bhatia (supra) has held:

"Where it is clear on the face of a Will that the testator has not accurately or completely expressed his meaning by the words he has used and it is also clear what are the words which he has omitted those words may be supplied in order to effectuate the intention, as collected from the context."

In the case of Navneet a Lal alias Rangi (supra) the supreme court has stated established principles of construction of a Will from its earlier decisions.

10. Mr. Apte, learned counsel appearing for respondents, has supported the judgment of the trail Court and has put reliance on the case AIR 1952 327 (Nagpur) and on the case of Ram Gopal Vs. Nand Lal and Others, as also on the case of Bai Kevli Vs. Dalsukhram Sakarchand, . In the case of Paikabai v. Anyabai (supra) the testator had done the Will and conferred full and absolute ownership of the property in his wife by declaring her as the "Malik" and then subsequently made provision in the same Will providing for disposition of the same property in some other manner. It was held that the testator had intended that his wife should become the "Malik" of his estate after his death conferring upon her full proprietary rights and the subsequent direction conferring the mode of devolution after her death being inconsistent with the absolute estate conferred on the wife should be treated as void. The principles laid down in this judgment and the ration thereof apply to the facts in the instant case. The deceased having conferred full and absolute ownership of the said properties on his wife, the said Bhagirathibai by declaring her "Malik", the subsequent provisions made in the Will providing for disposition of the same properties in some other manner being inconsistent with the absolute estate conferred on her are to be treated as void. As held by the Supreme Court in the case of Ram Gopal v. Nand Lal (supra), the words "Malik" is of very common use in many parts of India and it cannot certainly be regarded as a technical term of convincing. When used in a Will or

other documents as descriptive of the position which a devisee or donee is intended to hold, it has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. The dominant words "Sarve Puran Malkine Vahivatavayat" in the Will clearly indicated the dominant intention of the deceased to constitute the said Bhagirathibai the full and absolute owner of his said properties after his death. The mere fact that he made a direction in the Will regarding 1st Appellant and Respondents 1 and 2 to enjoy the same on her behalf, by winning over her affection and after he death the three should live together would not make the direction operative because being repugnant to the dominant or paramount intention of the deceased-testator is void. In this view, I am supported by the judgment of our Court in the case of Bai Kevli w/o Popatlal Sakhalchand (supra) on which reliance has been placed by Mr. Apte.

11. In construing a Will whether in English or in Vernacular the fundamental rule is to ascertain the intention of the testator from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed. There is not and cannot be any dispute with the established principles of construction of a Will as stated by the Supreme Court in the case of Navneet Lal alias Rangi. However, in the matter of the construction of a Will authorities or precedents are of no help as each Will has to be construed in its own terms and in the setting in which the clauses occur. The question here is as to whether reading with clause 5 of the Will of the deceased along with subsequent clauses 6, 7 and 8 thereof, can it be said that bequeath by the deceased in favour of Bhagirathibai was only by way of life interest. As aforesaid, in the facts of the case, merely because the 1st Appellant and Respondents 1 and 2 have been permitted to enjoy the said properties on behalf of the said Bhagirathibai by winning over her affection and after her death, the desire has been expressed for them to live together, the bequeath in favour of Bhagirathibai cannot be construed for her life only and not absolute in her favour. It is correct that the deceased did express his desire that his sons should live together but that itself cannot divest the said Bhagirathibai of her absolute ownership in respect of the said properties under the Will of the deceased. Construing the provisions of the Will of the deceased. Construing the provisions of the Will of the deceased as per requirements of law, in my view the deceased had bequeathed the said properties in favour of Bhagirathibai as absolute owner thereof and as such, the findings and conclusions arrived at by the trial Court being correct are upheld and confirmed.

12. In the result, the appeal is dismissed with no order as to costs.

13. Appeal dismissed.