

**(2001) 09 BOM CK 0036**

**In the Bombay High Court**

**Case No :** Second Appeal No's. 308 of 1976 and 63 of 1977

Raghupati Janardhan Kathale (since deceased, through his L.Rs.) and Others APPELLANT

Vs

Pundlik Balaji Upadhye (since deceased, through L.Rs.) and Others RESPONDENT

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**Date of Decision :** 21-09-2001

**Acts Referred:**

Evidence Act, 1872 — Section 6, 68  
Succession Act, 1925 — Section 63

**Citation :** (2002) 1 ALLMR 248 : (2002) 3 BomCR 281

**Hon'ble Judges :** D.G. Deshpande, J

**Bench :** Single Bench

**Advocate :** P.Y. Deshpande, in Second Appeal No. 308/1976, M.V. Masodkar, in Second Appeal No. 63/1977, for the Appellant; P.Y. Deshpande in Second Appeal No. 63/1977, for the Respondent

**Final Decision :** Dismissed

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## Judgement

D.G. Deshpande, J.—The appellants in Appeal No. 63/1977 are the original plaintiffs and appellants in Appeal No. 308/76 are the original defendants.

2. The plaintiffs filed the suit on the basis of Will dated 19-3-1949 (Exhibit 36), whereas the defendants set up will dated 7th February, 1958 (Exhibit 66). The trial Court decreed the suit of the plaintiffs in toto whereas the Appellate Court partly allowed. The appeal and modified the decree. Therefore, against the Appellate Court's judgment, both the appeals have been filed by the plaintiffs and the defendants.

3. The suit property was originally owned by one Pralhad Ramkrushna Upadhye of Taroda. Respondent Pundlik is his brother. Pralhad had no issue and he owned the suit property i.e. he had half share in that property. Pralhad died on 7-5-1958 and Pundlik died in 1956. Pralhad lost his sight five years prior to 1949. He and his wife used to keep always ailing and were not keeping good

health. Pralhad executed Will dated 19-3-1949, got it duly attested and handed it over to Pundlik only. It is in this background that the suit was for possession of the land, was filed on the basis of the aforesaid Will of 1949.

4. The defendants came up with a second Will of Pralhad dated 7th February, 1958. According to them, the scribe of the document i.e. of the second Will, was helping Pralhad during the lifetime, but taking advantage of the trust or faith, blank signatures of Pralhad were used to be obtained and one of such document was used for preparing a second Will.

5. The defendants resisted the claim of the plaintiffs. They denied the execution of the second Will dated 7th February, 1958 and they contended that during the lifetime of Pralhad, defendant No. 3 was living with him along with his wife for about two months and it was out of affection that Pralhad executed second Will dated 7th February, 1958.

6. The defendant Nos. 2 and 3 separately filed the written statement. They denied that Survey No. 37/5A, Survey No. 11 and half part of Tiroda belonged to Pralhad. They submitted that half share in Survey No. 37/5A belonged to Pralhad and half was owned by the fathers of defendants Nos. 2 and 3. They also denied the will of 1949 and its execution. The trial Court decreed the suit of the plaintiffs. Thereafter appeals came to be filed before the District Judge and the District Judge partly allowed the appeal. Hence Appeal No. 308/1976 is filed by Raghupati who was original defendant No. 1 and Appeal No. 63/1977 is filed by Arun and others, who are the legal heirs of original plaintiff No. 1.

7. While admitting the second appeal, at the time of argument, Ground No. 4 and 4-A in the Memo of Appeal No. 308/1976 were taken as substantial questions of law, which are as under: "4. Both the courts below ought to have held that the execution and attestation of Exh. 66, the subsequent will, dated 7th February, 1958, is duly proved as required by section 63 of the Indian Succession Act and section 68 of the Evidence Act and as such the genuineness of the same cannot be legally challenged. 4A. That Exh. 36 on which the respondents have relied for basing their claim in suit, nor being a will and the document not being registered the respondents have no right to the property covered by the said document consequently disentitling them for maintaining the suit."

8. In Appeal No. 63/1977, it is noted that substantial questions of law not stated u/s 104 of the Civil Procedure Code, the Court will have to formulate the substantial questions of law in this appeal. Therefore, the aforesaid substantial questions of law will be for both the appeals.

9. So far as the substantial question of law is concerned, it was contended by the Counsel for the appellant that the first will of 1949 cannot be construed as a will because, it is a disposition of property. The beneficiaries being placed on possession on it itself and consequently document to be treated as conveyance and since the document is not a registered document as required by Indian Registration Act, the plaintiffs were liable to be non-suited. Reliance was placed

by Mr. Deshpande, Counsel for the appellants in the case of Pradeep Kantilal Shroff Vs. Khorshed Kersap Aga and Another, , wherein it was held that a document intended to be operate immediately on its execution could never be construed as a Will. A document providing for disposition of assets in present would operate as a non testamentary document. Similar other judgments were cited, but since there cannot be any quarrel about the aforesaid proposition, I am not considering those other judgments. The question is whether the Will executed by Pralhad in 1949 cannot be termed as a Will and can be termed as a conveyance because of the wording of the Will and my answer to the said questions is in the negative. No doubt, that property was placed in possession of the beneficiaries under the said Will. That does not affect the essential character of the Will, wherein the testator Pralhad has repeatedly clarified that the Will was to take effect after his death. The criteria between the Will and a conveyance is that the Will is to take effect after death and conveyance is to take effect immediately. Therefore, in the instant case, the Will of 1949 clearly shows that it is to take effect after the death of Pralhad. Mere putting the beneficiaries in possession does not change the nature of the Will nor does it take a conveyance as urged by the Counsel for the appellant. Therefore the second question of substantial question of law has to be answered in the negative i.e. the document Exhibit 36 has to be taken as a Will and not a conveyance. Consequently, the requirement of registration does not apply.

10. Therefore, what remains is now whether the defendants succeeded in proving Will dated 7th February, 1958. Admittedly, the plaintiffs have not denied the execution of the Will by Pralhad. However, the Appellate Court has rejected the said Will on the ground that it was surrounded by suspicious circumstances. The Appellate Court in that regard framed Issue No. 9-A as under:-

"9-A) Whether the Will, dated 7th February, 1958 is genuine? No.

B) Whether by that Will, the Will dated 19th March, 1949 is revoked? No.

The Counsel for the appellants contended that if the plaintiffs themselves did not challenge or dispute the genuineness of the Will namely that it be signed and executed by Pralhad, it was incumbent upon the Court to accept the Will as it is without considering any circumstances attending the execution of the Will and the approach of the Appellate Court is totally wrong in this regard. Reliance was placed by Mr. Deshpande on the judgment of this Court in the case of Kalavati Dinkar Adsule and Others Vs. Rajaram Shidu Ghatge, , wherein it was held that a Will is a solemn statement of the testator or testatrix, as the case may be, and if the execution of the Will is duly proved in accordance with law and does not suffer from any suspicious circumstances, the Court must always act in accordance with the desire of the testator or testatrix. Further, in para 18, it has been held by this Court that the ultimate test whether the Will is genuine or valid or not and the suspicious circumstances have been dispelled or not would be the usual test of the satisfaction of the prudent mind in such matters. If there is no justifiable reason to hold otherwise the wish and desire of the testator should be

upheld once the execution of the Will has been proved in accordance with law and there were no suspicious circumstances.

11. The aforesaid judgment is very clear which nowhere lays down that the Court cannot consider whether there are suspicious circumstances surmountable in the Court as to accept the Will as it is only on proving its execution. The judgment referred to above is absolutely clear and it makes it incumbent upon the propounders of the Will to remove all the deeds and suspicious circumstances. So a prudent man can act upon the Will. It therefore cannot be permitted to be argued that the Court should not look into the circumstances around the Will and should declare a Will valid as soon as its execution is legally proved. Such an approach would not be a provision of law but would have disastrous consequences.

12. This aspect of the matter, i.e. the circumstances around the second Will has been considered by the lower Appellate Court at length. In para 19, the Court observed that the evidence to prove the lawful last Will i.e. of 7th February, 1958 which has the effect of revoking the earlier must be such that it must satisfy the conscience of the Court that the Will has necessary testamentary character. That means the testator had retained the degree of understanding to comprehend, what he was doing, had volition, so that what he really did was his own doing, and not the doing of anybody else. Thereafter the lower Appellate Court, from the following circumstances, as suspicious around second Will.

i) That Pralhad made Will in 1949, he was blind and old and therefore he made the second Will in 1958, he must have become very feeble and debilitated by old age.

ii) That Pralhad did not think of making another for 9 years to revoke his earlier Will.

iii) That there was no evidence that Pralhad's affection for the plaintiff had waned or ebbed out.

iv) That there were letters from Exhibit 42 to Exhibit 50 written by Pralhad to plaintiffs which shows that Pralhad had affection for the plaintiffs and these letters are spread over the period between the two Wills.

v) Will Exhibit 66, i.e. the second Will states that as the earlier will was made for the sake of marriage (of plaintiff Nos. 1 and 2) only, it is now revoked.

If this is so, why Pralhad waited for 9 years to revoke the Will and why he revoked the same just a month before his death. Even though the Will Exhibit 66 states that the defendant Nos. 1 to 4 had taken great care of Pralhad during his illness before his death, there is no evidence not that effect.

13. Then something very important has turned out in the evidence of the witnesses of the defendants, which is contrary to the facts because admittedly Pralhad was blind when the first will was executed in 1949. However, D.W. 1

Rajaram, the restating witness and D.W. 3 Manikrao, the scribe has stated before the Court that Pralhad could see with his eyes. The Appellate Court came to the conclusion that Rajaram was not honest and not a straight-forward person. Then there is admission that Manikrao used to write letters on behalf of Pralhad, which shows that Pralhad had confidence in him. It will therefore be clear that the appellant when has appreciated, and every circumstance surrounding the second Will, and has come to the conclusion that the circumstances are sufficient to hold that the second Will is suspicious and, therefore, and only thereafter the Appellate Court has rejected the second Will. Even though its execution was not disputed or denied by the plaintiff.

14. Since the judgment of this Court referred to above and relied upon by the Counsel for the appellant permits and allows the Court to reject a Will if suspicious circumstances are not removed and since in the instant case, the lower Appellate Court rightly found that there were strong suspicious circumstances around the second Will, it has to be held so far as the first substantial question of law is concerned that the second Will of 7th February, 1958 cannot be held to have been duly proved and at any rate since the suspicious circumstances are there around the second Will, the Appellate Court's judgment is required to be upheld.

15. Even though initially the aforesaid substantial question of law were formulated, the Counsel for the appellants pointed out that this appeal is filed prior to 1-2-1977 and, therefore, only question of law was required to be argued. My attention was therefore drawn to all the evidence and all the contentions raised by the appellants before the lower Appellate Court. However, the entire issue sent around the two Will and when therefore, the first Will has to be accepted as genuine and has rightly accepted to be genuine and the second Will is required to be rejected on the ground of suspicious, the Appellate Court's judgment is required to be confirmed.

16. Counsel for the appellants contended that delay in the second Will and the findings thereupon by the lower Appellate Court and the disposing state of mind of Pralhad and the suspicious circumstances taken into consideration by the lower Appellate Court are all trifle, not material, and they were not sufficient to discard the second Will. I am unable to agree with these submissions.

17. So far as Appeal No. 63/77 is concerned, it was filed by the plaintiffs to challenge that part of the decree of the lower Appellate Court which protected the interest of the tenant because according to the plaintiff, Pralhad was blind and therefore he was a person under disability and therefore, no tenancy could be claimed in respect of his agricultural land. Consequently, according to the plaintiff, that part of the order of the Assistant Judge, Amravati in para 29(iv) is wrong and liable to be set aside. However, the Counsel for the tenants contended that on this issue, the matter was referred to the Tenancy Court and the Tenancy Court gave a finding in favour of the tenant rejecting thereby the contention that Pralhad was blind and was a person under disability. Since the Court of

competent jurisdiction over this aspect has given a finding in favour of the tenants, the same can not be interfered with and there is no necessity to go into that aspect as to whether Pralhad was blind and was a person under disability. Therefore, Appeal No. 63/77 so far as it relates to that part of matter is required to be dismissed.

18. In Appeal No. 308/1976, filed by the original defendants, it is their main contention that Pralhad had only one half share in Kotha at Taroda by virtue of Govt. Deed dated 9-4-1942 executed in favour of Kashinath and Vishwanath and also one half share in Survey No. 34/1 and Survey No. 37/1/5-A and therefore, he could not execute the will in respect of the entire property. So far as Kotha at Taroda is concerned, the Appellate Court has directed the defendant Nos. 1 to 4 to deliver possession of half portion of Kotha at Taroda as described in para No. 10-F of the plaint. However, the lower Appellate Court has ordered the defendants to deliver full area of Survey No. 11-1-A/11-G. Survey No. 37 is not included here. Therefore, to that extent the appeal is required to be modified.

19. Appeal No. 63/1977 is dismissed. Appeal No. 308/76 is partly allowed i.e. the Appellate Court's judgment and decree dated 26th July, 1976 is modified to the extent that defendants will have to deliver possession of half of field Survey No. 34/1-A to the plaintiffs. Rest of the decree of the lower Appellate Court to remain as it is. In the circumstances, there will be no order as to cost.