

(1966) 12 BOM CK 0006
In the Bombay High Court
Case No : A.F.A.D. No. 165 of 1961

Rangu Vithoba and Others

APPELLANT

Vs

Rambha Dina and Another

RESPONDENT

Date of Decision : 07-12-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 6 Rule 17, Order 6 Rule 2, 107
Evidence Act, 1872 — Section 101, 101, 102, 103, 4
Succession Act, 1925 — Section 2

Citation : AIR 1967 Bom 382 : (1967) 69 BOMLR 559 : (1967) MhLj 341

Hon'ble Judges : L.M. Paranjpe, J

Bench : Single Bench

Advocate : N.S. Nandedkar, for the Appellant; V.R. Deopujari, for the Respondent

Final Decision : Allowed

Judgement

L.M. Paranjpe, J.—This is a defendants' second appeal directed against an appellate decision whereby the decree for partition and separate possession of the plaintiff's one-third share was modified by decreeing her full claim for possession of property on the basis of a Will.

2. The suit property was held by one Bondku, who was the last surviving member of the family. He died on 10-8-1957, at the age of 95, leaving behind him three daughters --the plaintiff Rambha, defendant No. 4 Rangoo, and defendant No. 1 Bangoo. One other daughter Kewna had died issueless during the lifetime of Bondku. The defendant No. 4 Rangoo has two sons--Nathu, defendant No. 5, and Dayaram, defendant No. 6. The defendant No. 1 Bangoo, who is the youngest of the daughters, has two sons--Ragho, defendant No. 2, and Sitaram, defendant No. 3, and a daughter Vithabai. This Sitaram, son of Bangoo died without any heirs and his name was struck off from the suit. Bondku had left the property in suit at the time of his death,

3. The plaintiff-respondent Rambha filed her suit on the following allegations:

Bondku got the plaintiff Rambha married to his sister's son who did not have any property. The other two daughters, Bangoo and Rangoo, were well placed. Bondku brought the plaintiff and her husband who reside with him and they looked after his property and resided with him till his death in 1957. Bondku executed a registered Will on 23-6-1926 in respect of the entire property in favour of the plaintiff and the other daughter Kewna. Bondku was in full possession of his senses and was aware of his interests at the time of the execution of his Will with regard to his personal property as detailed in the plaint. Since the other legatee Kewna had predeceased Bondku, the property which was given to her by Will would be shared by the plaintiff and the other two sisters equally. The defendants had wrongfully dispossessed her. Hence the claim for possession of the immovable property which was Willed away in favour of the plaintiff by Bondku and for partition of the property of Kewna and separate possession of the plaintiff's share herein.

4. The defendants contested the suit on the following allegations: The plaintiff and her husband forced their presence and residence on Bondku without his free consent, by taking advantage of his continuous ill health and continuous sickness. Due to the infirmity and weak health of Bondku, the plaintiff and her husband were managing Bondku's property. The execution of the Will dated 23-6-1920 was denied. It was also denied that Bondku was in full senses at the time of the execution of the Will. The plaintiff was not in possession of the property after Bondku's death either in pursuance of the Will or in any other manner. Bondku had no knowledge of the Will because during his lifetime, he had allowed his three daughters to take equal shares in cultivation. The plaintiff had no cause of action to claim the alleged relief in the suit on the strength of the Will which is denied by the defendants as it was not validly and legally executed. The plaintiff cannot derive any title in pursuance of the alleged Will. Even if it were proved that Bondku had made his thumb mark on the Will, it must have been executed without his free consent and must have been got executed fraudulently without Bondku's knowledge and consent. The plaintiff was well-placed, whereas the defendant No. 4 was not sufficiently provided for and the plaintiff was not entitled to a share in the father's property.

5. The learned trial Judge held that the execution of the Will was not proved and the plaintiff was not entitled to claim anything on the strength of that Will. He however decreed the claim of the plaintiff for possession of her one-third share in the whole property left by her father. Being aggrieved by this decision, the plaintiff appealed. The learned District Judge found fault with the learned trial Judge for not presuming u/s 90 of the Evidence Act that the Will was duly executed and attested according to law. He went on to presume the due execution, attestation, and the mental and physical capacity of Bondku to execute the Will. In that view, he modified the decree by the trial Court and decreed the full claim of Rambha as laid in, the plaint. That is how the matter has been brought before this Court.

6. The plaintiff-respondent had produced the original registered Will but she did not examine either herself or the scribe of the document or any of the attesting witnesses to prove the execution and attestation of the Will. No material was brought on record to indicate whether the scribe and the attesting witnesses were alive or dead and whether they could or could not be available for being examined as witnesses. The plaintiff only examined her son aged about 30 years, who was not even born on the date of the Will. The only other witness, Tanba (P.W. 2), made a bare statement that he knew that Bondku had executed a Will without saying how he came to know it and without indicating whether it was based on hearsay information or personal knowledge. On this evidence, the learned trial Judge had rightly held that the Will, its execution and attestation and the disposing state of the mind and body of Bondku were not proved by the plaintiff. The plaintiff's counsel was apparently relying on the provisions of Section 90 of the Evidence Act for drawing a presumption that this Will was duly executed by Bondku while in a disposing state of health and mind and that it was validly attested. The trial Court discussed this question at some length in paragraph 7 of his judgment. He considered the nature of the burden of proof on the party propounding a Will and also considered the case law which was cited before him. He indicated that the defendants had not admitted the Will and the plaintiff had not established any circumstances which made it impossible for her to examine witnesses to prove execution and attestation. He also considered the other circumstances attendant upon the Will and after taking into account all these factors, he came to the conclusion that there was sufficient justification for refusing to act u/s 90 of the Evidence Act.

7. Mr. Nandedkar, advocate for the appellants, contended that the learned District Judge had grossly erred in interfering with the exercise of discretion by the trial Judge with regard to the applicability of Section 90 of the Evidence Act. Referring to paragraphs 9 to 14 of the appellate judgment, Mr. Nandedkar submitted that the learned District Judge completely misconstrued the position of law with regard to the burden of proof and had drawn unwarranted inferences in favour of the genuineness of the Will and had wrongly assumed that the defendants/appellants had not disputed the execution of the Will when they had specifically stated in paragraphs 3 and 6 of the written statement that they were denying the execution of the will. In his opinion, the learned District Judge committed a legal error in interfering with the judicial discretion of the trial Court when the reasons given by the trial Court were correct and the assumptions made by the District Judge for exercising discretion in favour of the plaintiff were entirely unwarranted. Mr. Deopujari, advocate for the plaintiff-respondent, contested the correctness of these submissions of Mr. Nandedkar and supported the reasoning of the learned District Judge.

8. Before I consider these submissions, I would like to make one comment with regard to the learned District Judge's views about the alleged vagueness of the pleadings of the defendants. In paragraph 3 of the written statement, they had first denied that "Bondku willingly executed the will on 23.6.1923", and by an

amendment the word "willingly" was deleted. In paragraph 6, they had stated that "the plaintiff has no cause of action to claim the alleged relief in the suit on the strength of the will, which is denied by the defendants as validly and legally executed on 23-6-1926 by Bondku. The plaintiffs cannot derive any title in pursuance of the alleged will". The further descriptive clause of the will, "which Bondku did not execute willingly and which was fraudulently got executed and registered by the plaintiff during his serious illness and when he had no sense and understanding of a reasonably prudent man" was deleted, and instead the following clause was added by an amendment: "even if it will be proved that Bondku made his thumb impression on the alleged will the will must have been executed without his free consent and it must have been got executed fraudulently without Bondku's knowledge and consent." The learned Judge had characterised these pleadings as vague and as "continuing to be vague." The learned Judge seemed to have upheld the contention of the plaintiff that the amendment was wrongly allowed without giving an opportunity to the plaintiff to oppose the application for amendment or to amend the plaint in reply thereto. A perusal of the order-sheet dated 27-2-1959 on which date this application for amendment was made, shows that the counsel for both the parties were present and the defendants' application for amendment was perused, considered and allowed in the presence of the plaintiff's counsel. There is nothing to show that the plaintiff raised any objection or prayed for time to make a consequential amendment or to challenge the amendment allowed, though the next hearing was to take place almost after two months. Even on the next hearing, no grievance" was made with regard to these amendments which had been allowed in the presence of the plaintiff's counsel. In this state of affairs the plaintiff had no justification to question the amendment which was allowed, by raising a ground of appeal with regard thereto. The learned District Judge had not considered this aspect of the matter before proceeding to find fault with the order allowing the amendment. The learned Judge then went on to construe the defendants' pleadings which I have quoted above to mean that the defendants did not deny the execution of the document but only denied that it was validly and legally executed. On going through the written statement in the course of the arguments, even Mr. Deopujari Advocate for the Plaintiff-respondent was not in a position to subscribe to the view of the learned District Judge that the defendants had not denied the execution of the will. The pleadings, read as a whole leave no manner of doubt that the defendants were all along disputing the alleged execution of the will. When they also stated in addition that the will was not executed validly and legally, that would not result into an omission to deny the execution itself. Pleadings have always to be read as a whole and it is not right to pick out one or two words out of their context and draw inferences therefrom. The learned Judge was not right in assuming that the defendants had first admitted the execution of the will and had then withdrawn the admission as he purported to say in paragraph 8 of his judgment. A perusal of the pleadings would clearly show that the will was, all along being denied and disputed by the defendants, and the view of the learned District Judge on that point was not

warranted by the record.

9. The learned Judge then proceeded to make the following observations with regard to the burden of proof of a will:

"Obviously, therefore, once the execution of the will is not disputed by the opposite side, as happened in this case, the burden would shift on the respondents themselves to prove their allegations that the testator was not in a fit mental condition to execute the will and was mentally incapable. It is an established law that the capacity of the testator is so be accepted as a rule, once the execution of the will is proved, while want of capacity is an exception, which must be proved by the party who challenges the will. Reference to this position of law was made in the old decision of *Anandibai v. Harlal* (1902) 15 CPLR 1, which was referred to by the learned Judge himself. It was further observed in this decision that the natural presumption in favour of the validity of the will, after its execution is admitted or proved, will be negated only if there are circumstances to create a suspicion of falsity or fraud against the will, in which case alone, the burden of evidence shifts on the party setting up the will itself. In the present case there was no such evidence led by the Defendants to prove their allegations about the will being fraudulently secured from deceased Bondku."

10. Mr. Nandedkar strongly criticised the aforesaid observations of the learned District Judge by saying that they did not reproduce or represent the established law but were directly contrary to all the principles of proving a will Mr. Deopujari was trying to support that reasoning and was saying at one stage that there were, authorities in support of the view, but did not show any such authority.

11. The observation that the capacity of the testator is to be accepted as a rule and want of capacity is an exception was made by Mr. Ismay, Judicial Commissioner, in *Anandibai's* case (1902) 15 CPLR 1, not as a general observation with regard to the established law, but it was qualified by restricting it to cases for a probate in non-contentious cases. Then he had referred to the question whether there were circumstances which would negative natural presumptions and create a suspicion. The observations made in that case for the facts of that case and on the basis of the findings of fact which he was accepting for his decision cannot be treated as an expression of the position of law applicable to all cases. The principles of burden of proof with regard to wills have been expressed in several well-known authorities including *Barry v. Butlin*, (1838) 12 ER 1089; *Tyrrell v. Panton*, 1884 P 151; *Boyse v. Rossborough*, (1856) 6 HLC 2, and *Craig v. Lamoureux*, (1920) AC 349; AIR 1919 PC 132 Applying the principles laid down in these cases, their Lordships of the Privy Council have made the following observations in AIR 1949 272 (Privy Council) :

"The onus probandi to establish a will lies on the person who propounds it. This onus is in general discharged by proof of capacity and the fact of execution, from which the knowledge and the assent to its contents by the testator will be

assumed But where a will is prepared and executed under circumstances which excite the suspicion of the Court it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the Will. Where once it is proved that a Will has been executed with due solemnities by a person of competent under standing and apparently a free agent, that is, when the propounder of the Will has discharged the onus, the burden of proving that it was executed under undue influence is on the party who alleges it."

12. Their Lordships of the Supreme Court have also considered the question of burden of proof of a Will in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, , and have observed:

"The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents."

Then after considering Sections 67, 68, 45 and 47 of the Evidence Act and Sections 59 and 53 of the Indian Succession Act, their Lordships proceeded to observe:

"Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills, it would be idle to expect proof with mathematical certainty The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

"However, there is one important feature which distinguishes Will from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same inquiry as in the case of the proof of documents The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free Will Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law. Courts would be justified in making a finding in favour of the propounder In other words, the onus on the

propounder can be taken to be discharged on proof of the essential facts just indicated."

In the face of the aforesaid observations, it is not at all possible to subscribe to the erroneous view of the learned District Judge with regard to the burden of proof of Wills.

13. The learned District Judge then went on to say that the Will being a registered document, executed 30 years before his death, the testator would have naturally taken some action to revoke it if there was any fraud or suspicion in securing the Will, but he had not taken any such steps and therefore these were the circumstances which would support the testator's capacity and the validity of the Will instead of creating any suspicion. If the fraud was not known to the testator during his lifetime or if he did not suspect any fraud, or if it was brought about by exercise of coercion and under influence which continued upto his death, there would be no question of his taking any such action. The mere fact that he took no action for revoking the Will subsequently would not project that inaction upon the date of the Will, to create evidence of his capacity to make a valid or of the validity of the Will What the propounder of the Will has to prove is that on the day the Will was executed the testator was a capable, free agent and the Will was valid What the testator subsequently did or did not do after 30 years would not, by itself, be an indication of the capacity to execute the Will or of the validity of the Will.

13a. The trial Judge had declined to act u/s 90 of the, Evidence Act also on the ground that Bondku had survived for more than 30 years though the Will had purported to recite that he was executing it because of an apprehension of death. From that very circumstance, the learned District Judge went on to say that no fraud or coercion had brought about the Will and the Will must have been executed with his full consent, It is indeed difficult to see how the conclusion follows from this premise. I am not intending to interfere with the finding of fact, or the discretion of the District Judge but I am making these comments because it is on these grounds that the learned District Judge has proceeded to apply the presumption u/s 90 of the Evidence Act and I am only indicating that his reasons for doing it were not justified The learned District Judge then came to the conclusion that no burden lay on the plaintiff and the defendants not having rebutted the Will, it remained proved. The observations with regard to burden of proof which I have quoted above will clearly show that this view of the learned Judge was wrong,

14. Section 90 of the Evidence Act lays down that where a document purporting to be thirty years old is produced from any custody which the Court considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and; in the case of a document executed or attested that it was duly executed and attested by the person by whom it purports to be executed and attested. Section 4 of the Evidence Act explains what the

expression "may presume" means, by saying that the Court may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. Thus, the trial Court has a discretion either to presume a fact or to call for proof of it. A reference to the trial Court's record would show that the learned trial Judge had not proceeded to presume the facts as per Section 90 but had called for proof of these facts by framing issue No. 1. As I have stated earlier, the learned trial Judge had given detailed reasons in paragraph 7 of his judgment for exercising his discretion by not presuming the fact but by calling for proof for it as he was entitled to do. The learned District Judge however purported to interfere with the discretion of the learned trial Judge in this matter and made the following observations:

". . . there was no question of suspicion because the Will was a registered document and was not challenged by the testator himself although he lived for thirty years more. There was thus no reason for the lower Court to refuse drawing a presumption u/s 90 in favour of the Will, which if done, there was obviously no necessity for the plaintiff, either to prove its execution or even to prove the capacity of the testator. ...

* * * * * For all these reasons, therefore, it must be held that the lower Court was wrong in rejecting the Will as a document not duly proved. In my opinion, the registered Will (exhibit P-1) was an ancient document, beyond any suspicion, and therefore, its genuineness should have been presumed u/s 90, without calling upon the plaintiff to lead any additional evidence."

In making these observations, the learned District Judge had virtually substituted the expression "shall presume" as defined in the latter part of Section 4 of the Evidence Act in place of the expression "may presume" which finds place in Section 90. That was not permissible. It is settled law that when the trial Court has exercised its discretion, the appellate Court ought not to interfere with the discretion unless it appeared from the record that the discretion was exercised arbitrarily, injudiciously or capriciously. The learned District Judge was aware of this position and had referred to the case of Vaidyanathaswami Aiyar v. Natesa Malavarayam, 69 Ind Cas 289: AIR 1921 Mad 452, which laid down that an appellate Court will not interfere with the discretion of the lower Court in the matter of raising the presumption of genuineness in respect of an old document, if the reasons given are not prima facie unsound. The learned District Judge took the view that the reasons given by the learned trial Judge were prima facie unsound and therefore he was justified in interfering with the discretion. As I have shown above, the reasons given by the learned trial Judge were not unsound even prima facie, and actually it was the District Judge's reasoning in this connection which is prima facie unsound as he has misunderstood the nature of onus of proof and has drawn inferences which were not warranted by the premises. Consequently, the learned District Judge was in error in interfering with the judicial discretion exercised by the trial Court in this matter and in proceeding to act upon the registered will under the provisions of Section 90 of

the Evidence Act. Even if it were to be assumed that the learned trial Judge did not exercise a proper judicial discretion the following observations of the Allahabad High Court in *Mt. Gomti and Others Vs. Meghraj Singh and Others* appear to have been lost sight of by the learned District Judge:

"The raising or not of a presumption u/s 90 as to the genuineness of * document is a matter for judicial discretion; and the Court must apply its mind in each case to the question whether it is a proper case to raise such presumption. When the lower Court does not exercise a proper judicial discretion, in raising the presumption of the genuineness of a document, ordinarily it is not proper for the appellate Court to overrule the discretion of the trial Court; but where it is constrained to do so the party producing the document should be given an opportunity of supporting the presumption."

If the learned District Judge thought that the discretion was not properly exercised, he should have remanded the case to the trial Court and should have given a proper opportunity to the plaintiff to support the presumption by leading evidence which would have been available.

15. I would make it clear that I am not proceeding to interfere with the discretion of the learned District Judge in the matter of applicability of Section 90. What I am pointing out is that the learned District Judge had committed an error of law in interfering with the discretion of the trial Court and I am only setting right that error without meaning or intending to substitute my discretion for that of the learned District Judge. I think it is necessary to make this clear, lest I should myself have committed the same error for which I am commenting on the learned appellate Judge. I am not interfering with his discretion in the matter, but I am only showing the illegality of his interfering with the trial Court's discretion.

16. I would now consider the matter on the assumption that the learned District Judge was right in exercising the discretion in the manner in which he did. He had relied on the Privy Council decision in *Munnalal v. Mst. Kashibai* 1947 Nag LJ 106: 49 Bom LR 231: AIR 1947 PC 15. In that decision, their Lordships had made the following observations:

". . . but in the absence of any evidence as to the state of the testator's mind, proof that he had executed a Will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of Section 90 of the Evidence Act, if the Will is more than 30 years old since a Will cannot be said to be "duly" executed by a person who was not competent to execute it. This presumption can be fortified under the more general provisions of Section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what it is about."

17. Before I discuss the matter further, I would like to point out that the learned Judge has lost sight of the fact that a case decides its own facts and the decision

therein ought not to be extended unless it purports to lay down a general rule. The following dictum of Earl of Halsbury L.C. in the House of Lords decision in *Quinn v. Leatham*, 1901 AC 495, would pertinently apply:

"Now, before discussing the case of *Allen v. Flood*, 1898 AC 1, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

18. Accordingly, a reference to the facts of the case relied upon by the learned Judge would show that their Lordships had purported to decide only the facts of that case and drawn the presumption u/s 90 because of the circumstances established therein. In that case, a certain field property was held by one Bahadur Singh. He executed a Will with regard to that property on 30-3-1890 and he died on 13-4-1890. On his death, his daughter Jankibai entered into possession of the property and applied to the revenue authorities for substitution of her name in respect of that property on the ground that her father, who was in possession of the property, had executed a Will in her favour under which she was in possession. The contesting opponent Balwant Singh opposed the application on the ground that the right of maintenance possessed by Bahadur Singh did not pass to his daughter. The revenue authorities held that Jankibai was not entitled to be entered as a proprietor on the muafi register but acceded to Jankibai's request that she should be entered as occupier in the jamabandis in lieu of Bahadur. Accordingly her name, and after her, her son's name were recorded. Though she had failed to satisfy the revenue authorities as to her title they accepted the fact that she was in possession and entered her name as the occupier. There was nothing to show that she ever withdrew her claim to title under the Will of Bahadur and that claim was plainly adverse to the title of Balwant. This Balwant had not challenged her claim in a civil suit and Jankibai, as also her successors, remained in possession of the property for some forty years prior to the institution of the suit on 28-10-1931. It was under all these circumstances that their Lordships of the Privy Council proceeded to presume u/s 90 that the document which had come from proper custody and was more than forty-one years old at the date of the suit, should be accepted under colour of Section 90. Such a view was natural because despite the death of the last male holder Bahadur, his daughter Jankibai was allowed, even by the contesting claimant of the property to remain in possession for over forty years. Under these circumstances, their Lordships thought that the document must have been

genuine, or else it would have been challenged in a proper Court. The facts of the present case however are very much different. The Will was no doubt more than thirty years old, but the plaintiff Rambha and her husband were, on her own admission, managing the property on behalf of Bondku almost from the time of the Will, if not before it, and they were dispossessed shortly after the death of Bondku by persons who were claiming to be entitled to inherit Bondku. The learned District Judge seems to have been greatly impressed by the mere fact that the Will was a registered document, but the mere fact of registration is not incompatible with the document having been brought about under circumstances which were open to challenge. Moreover, their Lordships had also purported to use the general presumption u/s 114 for supporting their view that the presumption could arise about the testamentary capacity of the testator. In view of the distinguishing facts of that case, it would not be correct to say that the presumption u/s 90 could arise in this case particularly when no material was brought on record to show that the witnesses were not examined because they were not or could not be available.

19. Mr. Deopujari was wanting to rely on some other decisions in support of the reasoning of the learned District Judge that the presumption u/s 90 should be extended not only to the execution and attestation of the document but also to the existence of the testamentary capacity of Bondku. In *Kotayya v. Vardhamma* AIR 1930 Mad 744, the two Courts below had exercised their discretion in favour of the propounder of the Will and the High Court only upheld that. That was not a case where the appellate Judge had interfered with the discretion of the trial Court. When I have held that the District Judge had committed a legal error in interfering with the discretion of the trial Judge, it is not at all necessary to consider whether the presumption u/s 90 could or could not extend to the testamentary capacity of the executant of the Will. In *Badri Prasad Singh v. Anpurna Kuar*, 52 Ind Cas 837: (AIR 1919 Oudh 210), also the High Court had upheld the discretion of the Subordinate Judge in applying the presumption u/s 90. In *Mahendra Nath Surul and Another Vs. Netai Charan Ghosh and Others*, a presumption u/s 90 was applied. There the Will was executed more than 70 years before the question arose for decision. On a scrutiny of the Will, their Lordships found that there were no suspicious circumstances. As I have shown, the facts in the present case are distinguishable. Moreover, that decision will not be of help in view of the fact that the learned District Judge had erred in interfering with the judicial discretion of the trial Judge.

20. I was taken through the pleadings by the learned advocates for the parties and I was surprised to find that the plaintiff had not even alleged, much less proved, that the Will in question was duly attested or was the last Will of the testator. While not disputing, that in a case based upon a Will, the propounder or the plaintiff must plead that the document was properly executed and duly attested and was the last Will of the testator. Mr. Deopujari was submitting that the omission to plead attestation of the Will and the fact that this was the last Will of the testator should not prejudice the plaintiff's case and it should be

presumed that the plaintiff went to trial on the basis that the Will was attested and was the last Will of the testator. He was laying stress on the fact that the defendants had ;not denied these facts. That argument assumed that the defendant is required to deny facts which are not pleaded by the plaintiff, but that would obviously not be the correct position. If the plaintiff chooses not to plead certain material aspects of the case, it is no part of the duty of the defendant to make denials about points which have never been raised by the plaintiff in his case. Consequently the plaintiff cannot seek umbrage behind the omission of the defendants to deny facts which were not pleaded and she cannot urge that certain pleadings should be attributed to her because the defendants had not denied them. The question of presumption even u/s 90 would arise only with respect to a case set up by the plaintiff and not with respect to a case which was never pleaded by the plaintiff. The plaintiff not having pleaded that the Will was duly attested, there will be no question of presuming attestation u/s 90 of the Indian Evidence Act even if that section were applicable. Even if it were to be assumed that the presumption u/s 90 could be made and the valid attestation of the Will could be upheld, though not pleaded by the plaintiff, there was no warrant for the suggestion that the presumption should also extend to the Will in question being the last Will of the testator. The mere fact that it was a registered document would not contra-indicate its cancellation at a subsequent date or the making of another Will at a later date, particularly when the testator lived for more than thirty years after the Will. It appears that on the date of the Will. Bondku had only four daughters. Even if he had chosen to bequeath his property to two of his daughters in the year 1926, the possibility of his changing his mind and bequeathing some property to the other daughters or their children at a later period cannot be negated. Thus, the essential basis for a suit based on a Will that it was the last Will of the testator was neither pleaded nor proved and therefore the plaintiff's suit based on the Will was bound to fail on that ground, even if she was entitled to succeed on the other grounds.

21. It would be clear from the foregoing discussion that the learned District Judge was in error in putting the burden of proof wrongly on the other side and in proceeding to interfere with the judicial discretion of the trial Court by misapprehending the pleadings of the defendants and by raising conclusions which were not warranted by the premises. His conclusions were entirely erroneous and illegal and cannot be affirmed. The plaintiff's claim based on the Will must therefore stand rejected.

22. However, even Mr. Nandedkar did not dispute that the plaintiff as one of the daughters of Bondku was entitled to a one-third share in Bondku's property because the fourth daughter Kewna is now already dead without any issues or heir. Consequently, the appellate decree will have to be set aside and the trial Court's decree will have to be restored.

23. To the result, the appeal is allowed with costs, the judgment and decree by the appellate Court are set aside and the decree given by the trial Court is

restored.