IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 628 OF 2018

1) Mr. Kishor S/o Govindrao Chimurkar,
aged about 58 years, Occu. : Retired,
R/o. Amba Niwas, Chitnis Park Square,
Near Devadiya Congress Bhavan,
Pachpaoli Road, Bhaldarpura,
Nagpur.

2) ~~Mr. Prakash S/o Govindrao Chimurkar,~~
~~Aged about 55 years, Occu. : Nil~~,
~~R/o. Amba Niwas, Chitnis Park Square~~,
~~Near Devadiya Congress Bhavan~~,
~~Pachpaoli Road, Bhaldarpura~~,
~~Nagpur~~.

Respondent No. 2 is deleted as per order dt.05.12.2019.

.... APPELLANTS

// VERSUS //

Mr. Suresh Govindrao Chimurkar,
Aged about 66 years, Occu. : Retired,
R/o. Plot No.47, House No.783,
Balaji Nagar, Digdoh,
Hingna Road, Nagpur – 440016. .... RESPONDENT

Mr. U.A. Gosavi, Advocate for Appellant.
Mr. S.P. Kshirsagar, Advocate for Respondent.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 01.07.2024.
DATE OF PRONOUNCING THE JUDGMENT : 22.07.2024.

JUDGMENT.

1. This appeal is preferred against the Judgment and decree passed by the District Judge-12, Nagpur in Regular Civil Appeal No.326 of 2013, dated 03.12.2016, which was preferred against the Judgment and decree passed by 3rd Joint Civil Judge, Junior Division, Nagpur in Regular Civil Suit No.3101 of 2012 (Old Special Civil Suit No.877/2006), dated 06.08.2013. The suit is filed for declaration, partition, separate possession and for perpetual injunction, it was dismissed and the Appeal was allowed. In the said Appeal, it was held that the plaintiff and defendants are entitled to 1/5th share each in the suit properties.

2. Brief facts of the plaintiff's case are as under :

(i) The house properties are situated at the Municipal Corporation Nagpur City bearing Nos. 262 and 263 are the subject matter of the suit. Late Govindrao Ganpatrao Chimurkar was owner of it. He was M.A., L.L.B. He retired from the Customs Department as Assistant Collector. After his retirement, he was practicing as an Advocate. He died on 29.11.2002. Defendant No.1 was his wife. The plaintiff and other defendants are his sons and daughter.

(ii) The plaintiff contended that late Govindrao never executed any Will. He died intestate, therefore, he has succession right in the suit properties as he is his Class-I heir. The suit property No.263 was purchased by late Govindrao and his father. The suit property No.262 was purchased by late Govindrao and constructed house over it by his own funds. After his death the plaintiff enquired about partition of the suit properties to the defendants. But they did not express anything about it. Thereafter, the plaintiff submitted an application to the Municipal Corporation, Nagpur that if any application for mutation is filed by anybody regarding the suit properties, no any mutation be effected without giving notice to him as he is Class-I heir of late Govindrao.

(iii) Defendant No.2 submitted an application for mutating his name to the suit properties to the City Survey Office Nagpur and Municipal Corporation, Nagpur. The notices were issued to the plaintiff as well as defendants by the said authority. That time, in the month of August-2003, the plaintiff got knowledge of alleged Will dated 26.10.1995 executed by late Govindrao in favour of defendant No.2. The said mutation proceedings was rejected by the City Survey Officer and directed defendant No.2 to bring the order from the Court in respect of a Will. The Municipal Corporation also refused to

mutate name of the defendant No.2 and directed him to bring the order from the Court in respect of the Will. Those orders were not challenged by the defendant No.2.

(iv) The Second Appeal No.292 of 1996 was filed by late Govindrao in the High Court regarding the claim of the lane by the side of the suit properties. Thereafter, he died and the plaintiff and defendants were brought on record as legal representatives of late Govindrao by application dated 09.01.2003 filed by defendant No.2 along with his affidavit. That time a disputed Will was not produced and exclusive right under the Will was not claimed by defendant No.2.

(v) The plaintiff got copy of the Will from the office of City Survey and tried to persuade to defendant No.2 and other defendants for making amicable partition of the suit properties, but it went into vain. The plaintiff further contended that one of the attesting witness to the alleged a Will namely Manik Mahadeorao Ingole specifically stated before the City Survey Officer that though his signature as a witness is on a Will, he neither saw execution of the Will by late Govindrao nor he knew the contents therein. The plaintiff issued notice/letter dated 19.06.2006 to the defendants claiming partition and separate possession of his share in the suit properties. Defendant

No.2 replied the said notice and claimed that he is owner of the suit properties as per a Will executed by Govindrao.

(vi) The plaintiff contended that the alleged Will is not akin to the language of the late Govindrao. Though the plaintiff was residing at Bhilai, Chattisgarh-State, because of his service, he used to come at Nagpur for festival etc. and used to reside in the suit properties. The defendant No.2 might have influenced the late Govindrao for execution a Will and might have obtained his signatures over it. The Will is false and fabricated in order to grab the suit properties. There was no any reason for late Govindrao to exclude the plaintiff from getting his share in succession in the suit properties. There was no any strain in their relationship between the plaintiff, late Govindrao and other defendants. Therefore, the plaintiff prayed for declaration that a Will is illegal and not binding upon him and he is entitled for 1/5th share in the suit properties with mesne profits of it.

3. Defendant Nos.1 to 3 strongly opposed the claim and denied the material contentions raised in the plaint. The defendants denied that the plaintiff has share in the suit properties. They contended that late Govindrao executed a Will on 26.10.1995 and bequeathed the suit properties in favour of defendant No.2. The

plaintiff was aware of a Will. The suit houses were his self acquired properties and said fact is also mentioned in a Will. He was having right to execute a Will in favour of defendant No.2. The house No.263 was not purchased with joint funds of late Govindrao and his father. The plaintiff's claim is baseless. A Will is genuine, it cannot be declared invalid. It is further contended that late Govindrao purchased two quarters at Bhilai, one in the name of plaintiff and one in the name of their mother. The plaintiff was serving there. The plaintiff has let out these quarters and he is earning substantial amount of rent. That property was purchased in his name therefore, a Will is executed in favour of defendant No.2 by his father. Therefore, the plaintiff cannot claim share in the suit properties. It is lastly prayed to dismiss the suit.

4. The learned trial Court after considering the matter before it held that the plaintiff is not entitled to share in the suit properties. The defendants have proved that Will is valid and thus, the suit was dismissed.

5. The learned First Appellate Court held that Will is not legal and valid. The plaintiff is entitled for partition and separate possession of the suit properties. The appeal was allowed and suit for partition was decreed.

6. The following substantial questions of law are formed :

"*I) Whether bringing name of a son who was divested from inheritance by testator in his Will, on record, as his legal representative in Second Appeal filed by testator during his life time, against the strangers with respect to suit property, by the beneficiary of the Will of testator can be said to be a suspicious circumstance surrounding Will ?*

II) Whether the failure of beneficiary to produce the title document (Sale deed) of the property in possession of plaintiff (divested son), purchased by the deceased testator in the name of plaintiff (divested son) and his wife can be suspicious circumstance surrounding Will?

III) Whether or not the examination of one of the attesting witnesses to the Will by the plaintiff and/or either of parties to the suit, is a sufficient compliance of Section 63 of the Indian Succession Act, 1925?

IV) Whether the learned First Appellate Court has erred in not considering that, non-disclosure of Will by the appellant while bringing legal representatives on record does not ipso facto termed as suspicious circumstance surrounding Will ?

V) Whether the learned First Appellate Court ought not to have recorded a finding contrary to that of learned Trial Court least on the ground that failure of appellant to give notice to produce document i.e. sale deeds amounts to failure of appellant to prove suspicious circumstance as regards to the exclusion of other legal heirs from the share in the suit properties ?"

7. Learned Advocate for the defendant No.2/appellant submitted that the attestation of Will is proved by the evidence of Manikrao Ingole (PW-2). All the alleged suspicious circumstances are

explained which can be seen from the judgment of the learned trial Court. The reasons and findings of the trial Court are legal and correct. The first appellate Court erred in re-appreciating the evidence on record. It is prayed that appeal be allowed and judgment and decree passed by the First Appellate Court be quashed and set aside and to restore the judgment and decree of the trial Court.

8. The learned Advocate for the appellant is relying upon the following authorities :

(i) ***Madhukar D. Shende Vs. Tarabai Aba Shedage***, reported in ***(2002) 2 SCC 85***, in which it is held that, "the requirement of proof of a Will is same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872.

(ii) ***Ganesan (Dead) through LRs. Vs. Kalanjiam & Ors.***, reported in ***(2020) 11 SCC 715***, in which it is held that, "the requirement of Section 63(3) of the Indian Succession Act, 1925 is requires an acknowledgment of execution by the testator followed by the attestation of the Will in his presence. There is no express prescription in the statute that the testator must necessarily sign the Will in the presence of attesting witnesses."

(iii) ***Ved Mitra Verma Vs. Dharam Deo Verma***, reported in ***(2014) 15 SCC 578***, in which it is held that, "the exclusion of the other children of the testator and the execution of the will for the sole benefit of one of the sons i.e. the respondent, by itself, is not a suspicious circumstance. The property being self-acquired, it is the will of the Testator that has to prevail.

(iv) ***Shewantabai Wd/o Vishwanathji Bhagat Vs. Arun S/o Kisanji Bhagat & Ors.***, reported in ***2011(3) Mh.L.J. 136***, in which it is held that, "As can be seen from the judgment of the Apex Court in H. Venkatachala Iyengar's case (supra) the Apex Court has laid down the tests that a propounder of a Will would have to satisfy to prove the genuineness of the Will. It is on the touchstone of the said tests which have been laid down by the Apex Court that the issue would have to be considered. The genuineness of the Will touches both the questions of law which have been framed in the instant Second Appeal."

9. The learned Advocate for the respondent submitted that whether the Will is proved or not is the crux of the matter and for that purpose, suspicious circumstances are decisive. The basic requirement of attestation of a Will is not proved by the defendant No.2, who is the propounder of it. He further pointed out that the suspicious circumstance that why the plaintiff is excluded from inheritance is not stated in a Will though the late Govindrao was an

Advocate. Therefore, the First Appellate Court rightly held that the Will is not proved by defendant No.2. He submitted that the reasons and findings of the First Appellate Court are legal and correct and, therefore, no interference is warranted in the impugned judgment and decree. He is relying upon following authorities :

(i) ***Purushottam Haribhau Pijgade & Anr., Vs. Ambadas Sitaramji Pajgade & Ors.***, reported in ***2010(5) Bom.C.R. 476***, in which it is held that, "requirement of proof of Will in view of section 63 of the Indian Succession Act is that at least one attesting witness must be examined to prove execution of the Will. If evidence is available of at least one attesting witness who deposed about having seen the testator putting his signature under the Will in presence of attesting witness the Will, it must be concluded that it is duly proved."

(ii) ***Kakasaheb S/o Bhaurao Vidhate Vs. State of Maharashtra & Ors.***, reported in ***1010(5) Mh.L.J. 533***, in which it is held that, "in the matter of civil Court's exercise of testamentary jurisdiction; whereas "*onus probandi*" lies in every case upon the party propounding a Will, the expression "*animo attestandi*" means and implies animus to attest; to put it differently and in common parlance, it means intent to attest."

10. Nobody will dispute the *ratio* laid down in the above authorities. However, facts of the cases are decisive. I have perused

the case laws of both sides. Perused the impugned judgment and decree. Perused the record and proceedings.

11. As far as proof of Will is concerned, Section 100 of the Indian Evidence Act says that a Will is to be proved as per the provisions of Indian Succession Act, 1925. It means Section 68 of the Indian Evidence Act, 1872 is not applicable for proving a Will. At least one attesting witness is to be examined for proving the attestation of a Will as per requirement of Section 63 of the Indian Succession Act, 1925. The testator and attesting witness must sign it with *animo attestendi* i.e. with intention to sign as attesting witness as per law laid down in authorities of ***Purushottam Haribhau Pijgade*** and ***Kakasaheb Bhaurao Vidhate*** cited supra by the learned Advocate for the respondent. The Court has to apply the "ARMCHAIR PRINCIPLE" while appreciating the evidence in the cases where a Will is in question. It means Court has to think like testator after considering his background that how he might have think over while executing a Will and is it possible from the meaning of Will by interpreting a Will. Thus, one may when construing a Will place oneself in the testator's armchair and consider the circumstances which he was surrounded when he made a Will.

12. In case of ***N. Kamalam Vs. Ayyasami***, reported in ***AIR 2001 SC 2802***, object and meaning of attestation is given aptly. The meaning of attestation is that the attesting witness has to sign a Will as a witness that he saw the testator while signing thereon in his presence. It strengthens evidence of the signature of maker of document that it is genuinely signed by him. There must be *animus attestandi* i.e. intention to attest the document on the part of attesting witness. It is not ordinary but special kind of witness. The object of attestation is to prove that really executant had signed a Will in the presence of attesting witness. It is because generally, a person who executes/signs documents like a Will, Gift and Mortgage are not remaining alive as the documents are challenged in the Court in future. Therefore, it is naturally expected that after the death of testator, it can be proved that a Will was signed by that person in his presence which was seen by attesting witness. Thus, the object of attestation is clear that even though the testator who executes a Will etc. died, he/she executed/signed it in his presence. Attestion is special condition to prevent fabrication of document like a Will after the death of that dead person. Thus, it must be proved that it is signed in the presence of attesting witness.

13. The plaintiff has examined attesting witness Manik Ingole (PW-2) to prove that he did not see the testator Govindrao while signing a Will Exhibit-47. He deposed that he signed a Will - Exhibit-47 on the say of late Govindrao and the late Govindrao did not sign that Will in his presence. In his cross-examination, he denied the signatures of late Govindrao at each page of a Will Exhibit-47. He further admitted that his signature as attesting witness No.1 is at page No.3 on a Will Exhibit-47. He further admitted that there is a signature of Manohar Wadyalkar, who is another attesting witness No.2 on Exhibit-47. It is also admitted fact that the defendant No.2 - the propounder of a Will, did not examine another attesting witness Manohar Wadyalkar to prove attestation of a Will. In the first appeal, it was argued that he is no more and his death certificate without following procedure under Order 41 Rule 27 of the Code of Civil Procedure, 1908 was filed. Therefore, it was not relied upon by the first appellate Court. The witness Manikrao Ingole (PW-2) has not deposed that he saw the testator Govindrao while signing a Will Exhibit-47. He is not cross examined on this point. His testimony is not shaken in the cross-examination in this regard. There is no evidence of *animus attestendi* i.e. intention to attest a Will Exhibit-47 on the part of Manikrao Ingole (PW-2). The attestation of the Will is

not proved by Manik Ingole (PW-2) who has specifically stated that he did not see late Govindrao while signing a Will Exhibit-47.

14. If Manohar Wadyalkar, the another attesting witness, to prove the attestation of a Will – Exhibit 47 is not examined, it is failure on the part of the propunder to prove attestation which is a requisite of Section 63 of the Indian Succession Act. As per illustration (9) of Section 114 of the Indian Evidence Act, adverse inference can be drawn against propounder that he avoided to adduce his evidence which is against him. Thus, burden to prove the attestation is not discharged by the defendant No.2 propounder of a Will. There is no any justifying reason for it. The argument that Manik Ingole (PW-2) is own-over by the plaintiff is not acceptable and sufficient to prove the attestation which is requisites to prove a Will as per Section 63 of the Indian Succession Act.

15. A Will has to be proved by removing the suspicious circumstances by the propounder. The first suspicious circumstance is that the plaintiff is deprived from the right to succession to the suit properties by a Will. No any reason is stated in a Will which is naturally expected from late Govindrao, who was an Advocate, that for what reason he is excluded from succeeding to the suit properties.

However, there is no explanation on the part of testator in the Will as to what is special circumstance or reason to execute the Will in favour of propounder excluding plaintiff.

16. The propounder come with the case that late Govindrao purchased two quarters/flats at Bhilai from his own income, one in the name of plaintiff and one in the name of defendant No.1 their mother. It is contended that those are in the possession of the plaintiff and he is fetching its rent. Therefore, the plaintiff is excluded to inherit suit properties. To prove the said fact, the defendant No.2 did not produce the sale-deeds of those two properties or other documents to show that those were purchased out of the funds of late Govindrao. But for that reason his exclusion to succeeding to the suit properties by a Will is also not justifiable. No any notice was issued by the propounder to the plaintiff to produce sale-deed on record. Thus failure to give notice on his part to the plaintiff to produce the sale-deed of his property situated at Bhilai is also failure to justify for exclusion of the plaintiff to inherit to the suit properties as he is owner of it paying fund by father late Govindrao for purchasing it is not proved by the propounder of Will. The exclusion of the plaintiff from the succession to suit properties of late Govindrao on this ground is the suspicious circumstance surrounding a Will Exhibit-47.

Here, case law of ***Ved Mitra Verma*** cited supra by the appellant is not useful to him as there are many suspicious circumstances to disbelieve the Will Exhibit-47.

17. Another suspicious circumstance is that, in an appeal pending in the High Court after the death of late Govindrao admittedly the names of his legal representatives as heirs were brought on record. In support of that application, propounder filed his affidavit also in that appeal. However a Will was not produced in that appeal. It is not natural conduct of propounder as to why he did not produce a Will as soon as Govindrao died. This conduct along with delayed producing a Will before City Survey Officer etc. within reasonable time when Govindrao died is serious suspicious circustance as to genuineness of a Will. A Will has thus serious smell of suspicious. The First Appellate Court was correct in holding that non-disclosure of the Will by the appellant while bringing legal representative of the late Govindrao in Second Appeal No.292 of 1996 is suspicious circumstance surrounding the Will is also suspicious circumstance.

18. Admittedly the Bank account of late Govindrao is handled by propounder of a Will and after his death, an amount of

Rs.1,00,000/- was withdrawn by him. A signature of late Govindrao must be fabricated by propounder for withdrawal of that amount or it must have been obtained by using undue influence on Govindrao as he was residing with him. This suspicious circumstance is not explained him. Therefore, there is suspicion of fabrication of a Will or using of undue influence on Govindrao to execute a Will Exhibit-47. This conduct goes to the root of the case as per Section 8 of the Indian Evidence Act. Thus, all these conducts of propounder are serious suspicious circumstances against genuineness of a Will Exhibit-47. It fails to the test of satisfaction of judicial conscience.

19. It is pointed out by the learned Advocate for the plaintiff that trial Court erred in following manner :

(I) The learned trial Court in para **No.11** held that,

> *"**11**. …..He is a graduate of Nagpur University of the year 1953. He further disclosed that his duty in the year 1995 was to advice on the issue of Central Excise to his employer. All these informations to this witness would indicate that he is well acquainted with the legal provisions of law. Therefore, to support the case of plaintiff he has denied the suggestions of defendant regarding the attestation of the document by him."*

(II) The learned trial Court in para **No.13** held that,

*"**13**. .....But only from this entry, it can not be said that the account is operated by defendant no.2. **It might have happened that prior to** the death of deceased, the deceased had issued cheque in favour of defendant no.2 and therefore, defendant no.2 has withdrawn the said amount. Defendant no.2 was suggested by the plaintiff during cross-examination that he made false signature of his father on cheque of account of his father and withdrawn amount of Rs.1,00,000/- on 5/12/2002."*

(III) The learned trial Court in para **No.14** held that,

*"**14**. .....The plaintiff has averred in plaint that the suit filed by Govindrao Chimurkar was regarding the claim of lane by the side of the suit property. Thus, the said dispute was not in respect of the suit property or any right therein and therefore, it was not necessary for the defendant to disclose before the Hon'ble High Court that his father executed the alleged Will Deed.*

(IV) The learned trial Court in para **No.15** held that,

*"**15**. .....He further disclosed in cross-examination that both quarters at Bhilai are let out to tenants and since 1997 the tenants are having occupation of both quarters at Bhilai and he is appropriating entire rents of both quarters. From this version of the plaintiff, it is clear that two quarters are situated at Bhilai which are given on rent and the rent thereof is being appropriated by plaintiff."*

20. On reading of all above reasons this Court is of view that these are not legal and correct in the context of case in hand. On the contrary reasons in para Nos. 11, 13, 14 and 15 are given only on surmises and conjuncture without any legal or factual base even apparently it are not convincing. It are not acceptable.

21. As discussed above, a Will – Exhibit 47 is surrounded by suspicious circumstances and those are not removed by propounder of Will. An *animo attestandi* is not proved by the propounder. The reasons and findings of the learned First Appellate Court are correct and no interference is warranted in it. It has rightly exercised correctional jurisdiction and decreed the suit for partition of suit properties. The evidence of propounder and his witness is rightly not believed by it while re-appreciating the evidence and matter before it. A suspicion cannot foundation of judicial verdict by applying Armchair Principle, this Court also found that Will Exhibit-47 is not genuine.

22. Therefore, substantial question Nos.1 to 4 are answered that those are suspicious circumstances and that a Will Exhibit-47 is surrounded by suspicious circumstances and it is not legal and genuine and a propounder failed to prove a Will Exhibit-47. The

argument of learned Advocate for the appellant is, therefore, not acceptable in this regard. Other case laws cited by him are not helpful to the appellant and hence it are not relied upon, as there are many suspicious circumstances which disproves a Will Exhibit-47. No any interference is warranted in the impugned judgment and decree.

23. The Appeal being devoid of merit, deserves to be dismissed. The Appeal is **dismissed**. No order as to costs.

(SANJAY A. DESHMUKH, J.)

Kirtak