A

MADHUKAR D. SHENDE

v.

TARABAI ABA SHEDAGE

JANUARY 9, 2002

B

[R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

Indian Evidence Act, 1872—Section 68—Will—Proof of execution of—Burden of proof lies on propounder to prove competence of testator and
C *execution of will in the manner contemplated by law—preponderance of probabilities and shifting of onus—suspicion or unnatural circumstances attaching to a will have to be explained but assumed suspicion or supposition cannot disprove a will—Relationship and status of persons setting up and disputing will and pleadings, are relevant and significant—Held, on facts, the will is proved—Indian Succession Act, 1925—Section 63.*

D

Section 3—'Proved', 'Not proved' (in relation to will)—Meaning of.

Sections 11, 13 and 35—Finding upholding due execution of the same will by court in a different suit between same parties relating to a different property is relevant evidence.

E

One B Executed a registered will in favour of her sister's daughter C bequeathing four properties including the suit property. B died a day after the execution. C transferred her title and possession of the property to appellant under a registered sale deed for a consideration of Rs. 5000. Defendant claimed title to the property. The appellant filed a suit in trial court
F **against the defendant for declaration of title to the property and for recovery of possession. The defendant pleaded that the suit property was orally gifted to her by one BK and that she acquired the title by adverse possession. The trial court dismissed the suit of the appellant on the finding that the will executed by B was not proved. The finding of the trial court was affirmed by appellate court. High Court attributed various suspicious circumstances**
G **centring around the execution of the will and dismissed the appeal of the appellant even though the defendant gave up the plea of acquisition of title by adverse possession and conceded that the title in the property vested with B and the sale deed executed by C in favour of the appellant was proved.**

H **In appeal to this Court, the appellant contended that the execution of**

the will should be treated like any other issue of fact even though certain additional relevant considerations to be taken; that the evidence relating to execution of will should not be seen with suspicion and doubt; that the burden of proof relating to the execution of will should be seen in the background of relationship and status of the parties; that the appellate court and the High Court in a different suit proceeding among the same parties relating to another property under the same will, held that the will has been adequately proved; and that the said decision of the courts would constitute *res judicata* for the present case.

The defendant contended that the concurrent finding of facts arrived at by the courts below should not be interfered with; that the previous suit-proceedings related to a different property and was based on landlord-tenant relationship; and that such finding would not constitute *res judicata* in the present case.

Allowing the appeal, the Court

HELD : 1.1. The requirement of proof of a will is the 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. If, after considering the facts and circumstances as emanating from the material available on record, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. [138-A-C]

R. v. *Hodge,* [1838], 2 Lewis CC 227 referred to.

1.2. The conscience of the court has to be satisfied by the propounder of the will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot

A form the foundation of a judicial verdict-positive or negative. [138-E-F]

1.3. One who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing *prima facie* evidence proving the competence of the testator and execution of the will in the manner contemplated B by law. The contestant opposing the will may bring material on record meeting such *prima facie* case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or C executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. [138-G-H; 139-A]

D 1.4. The factum of will executed by B in favour of C bequeathing the suit property is specifically alleged in the plaint. In the written statement, excepting for a bare denial, there is no other pleading questioning the sane disposing capacity of B at the time of execution of will. C could not be examined for evidence because she was indisposed. C's son was examined for evidence. The two attesting witnesses on account of being known to C's son, being his E classmates, were known to the family and therefore were natural witnesses to be called to attest the execution of the will. On account of their acquaintance with the family, they could have naturally known and identified the executant. Merely because of being classmates they would be interested in obliging their classmate's mother so as to benefit her and go to the extent of falsely deposing F is too far fetched an inference to draw. [139-C-D]

The reasoning of the trial court and the appellate Court for holding the will not proved verge on absurdity. B died a day after the execution and registration of the will. There is nothing to show that B was physically or mentally incapacitated from executing the will. There is nothing to doubt the G mental and physical capacity of B but the same has been suspected because of complete absence of any medical evidence of a doctor which would show that the testator was in a sound and disposing state of mind. There is no rule of law or of evidence which requires a doctor to be kept present when a will is executed. The court below have allowed their findings to be influenced by such suspicion and conjectures as have no foundation in the evidence and have no H relevance in the facts and circumstances of the case and unwittingly allowed

their process of judicial thinking to be vitiated by irrelevant reasoning and considerations. The weighty factor that the factum of execution of will by B was being denied by a rank trespasser without raising any specific pleadings and the fact that no relation of B has chosen to lay a challenge to the will have been overlooked. The High Court ought not to have sustained such a perverse finding which would result in the property of a rightful owner lost to a trespasser. [142-B-G]

2. The judgment of the courts given in the earlier suit among the same parties relating to another property under the same will is a relevant piece of evidence under Sections 11, 13 and 35 of the Indian Evidence Act ignoring such a relevant and material piece of documentary evidence of undoubted veracity is a serious error of law having a vitiating effect on the finding on the most vital issue in the case. [141-H; 142-A]

Tirumala Tirupati Devashthanams **v.** *K.M. Krishnaiah,* **[1998] 3 SCC 331 referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 110 of 2002.

From the Judgment and Order dated 12.1.2001 of the Bombay High Court in S.A. No. 360 of 1988.

Subrat Birla and S.C. Birla for the Appellant.

A.S. Bhasme, S.K. Visen and Manoj Mishra for the Respondent.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. The plaintiff, who has lost in a suit for declaration of title and issuance of preventive injunction, in the alternative for recovery of possession, from the courts below as also the High Court, has filed this petition seeking special leave to file appeal.

Leave granted.

The suit property is situated at Shaniwar Peth, Satara in the State of Maharashtra. It bears C.T.S. No. 876 and admeasures 218 sq. meters. It is not disputed between the parties that the suit property was initially owned by late Bhagubai who expired on 24th September, 1963. According to the plaintiff, late Bhagubai executed a registered deed of will on 22nd September, 1963 in favour of Chingubai, who is none else than her own sister's daughter. Having

A inherited the property under the will of Bhagubai, Chingubai transferred her title and possession to the plaintiff under a registered deed of sale dated 24th September, 1976 for a consideration of Rs.5,000. The suit was filed some time in the year 1976 itself alleging that defendant was threatening to dispossess the plaintiff and was claiming title in herself. The defendant, in her written statement, submitted that the property had come to vest in one Babu Kanha B Mali who had orally gifted the same to the defendant 35 or 40 years prior to the institution of the suit and therefore the title in the suit property vested in her. A plea of plaintiff's title having been extinguished and the same having vested in the defendant by adverse possession was also raised in the written statement. The trial court found the will dated 22nd September 1963 not C proved, and so the plaintiff having not acquired any title under the sale deed executed by Chingubai in his favour, and therefore, directed the suit to be dismissed.

The plaintiff preferred an appeal. He also sought for an amendment of the plaint so as to seek relief of recovery of possession in alternative to the D relief of preventive injunction, in the event of the defendant being found in possession of the suit property. The amendment was allowed. However, on merits the appellate court affirmed the finding of the trial court that the will dated 22nd September 1963 was not proved. This finding has been maintained by the High Court while dismissing the second appeal preferred by the E plaintiff. It is pertinent to note that before the High Court, the learned counsel for the defendant did not dispute that the defendant's title in the suit property was not proved. The learned counsel for the defendant also gave up the plea of acquisition of title by adverse possession by the defendant. It was conceded before the High Court that the title in the suit property undisputedly vested in Bhagubai to begin with and the sale deed dated 24th September, 1976 by F Chingubai in favour of the plaintiff was also proved. The only question surviving for consideration was whether the approach of the courts below while recording a finding of non-proof of the will dated 22nd September, 1963 allegedly executed by Bhagubai in favour of Chingubai was vitiated by error of law and in substance that was the substantial question of law on which G the second appeal was admitted for hearing by the High Court. The same question arises for consideration before this Court.

Having heard the learned counsel for the parties, we are of the opinion that the findings of the trial court and the first appellate court as also of the High Court are vitiated for adopting an approach not permitted by law and H because of overlooking the material and relevant legal considerations.

The High Court has in its judgment summed up the so-called suspicious circumstances centering around the execution of the will, and found by the courts below, as under:- A

1. At the time of execution of the will, late Bhagubai was about 80 years of age and there is complete absence of any medical evidence to show sound and disposing state of mind of the executant; B

2. The will was executed on 22nd September, 1963 and within two days thereafter on 24th September, 1963, the executant expired;

3. The Sub-Registrar went to the house of the executant for registration of the will though his office was situated only half a furlong away from the residence of the executant and no reason has been assigned why the executant could not have gone to the office of the Sub-Registrar if she was in a sound mental and physical state; C D

4. Chingubai, the plaintiff and beneficiary under the will, has not been examined; Vasant, son of Chingubai, examined in evidence is not a witness to the execution of will;

5. Mohammed and Narhari, the two attesting witnesses to the will, also examined in the Court, were classmates of Vasant. E

Shri Subrat Birla, the learned counsel for the appellant has submitted that an issue as to the execution of will has to be determined in a civil case like any other issue of fact though certain additional considerations become relevant because of the document being a will in a dispute relating to which F the executant is not available to depose to the factum of execution and the will may have the effect of interfering with the ordinary and natural course of succession. In any case, submitted the learned counsel, evidence relating to execution of will cannot be appreciated with an eye of suspicion and assuming the existence of certain circumstances as suspicious though there G is no suspicion about them. He further submitted that in a given case, whether the burden of proof relating to execution of will has been discharged or not should be appreciated in the background of relationship and status of the parties between whom the dispute has arisen. Mr. Bhasme, the learned counsel for defendant, submitted that the concurrent findings of fact arrived at by the courts below and maintained by the High Court do not call for any interference. H

A The requirement of proof of a will is the 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. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was B duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind C cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in *R* v. *Hodge,* (1838) 2 Lewis CC 227 may be apposite to some extent-"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, D if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." The conscience of the court has to E be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but F suspicion alone cannot form the foundation of a judicial verdict-positive or negative.

It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. G The onus is discharged by the propounder adducing *prima facie* evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such *prima facie* case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed H the same. The factors, such as the will being a natural one or being registered

or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

The factum of will having been executed by Bhagubai in favour of Chingubai, the sister's daughter, bequeathing the suit property is specifically alleged in the plaint. In the written statement excepting for a bare denial, there is no other pleading raised questioning the sane disposing capacity of Bhagubai at the time of execution of will. It is true that the plaintiff Chingubai did not appear in the witness box but that is because she was indisposed. Her son has appeared in the witness box. The two attesting witnesses on account of being known to Chingubai's son, being his classmates, were known to the family, and therefore, were natural witness to be called to attest the execution of will. On account of their acquaintance with the family, they could have naturally known and identified the executant. Merely because of being classmates they would be interested in obliging their classmates' mother so as to benefit her and go to the extent of falsely deposing is too far fetched an inference to draw. The contents of the will, coupled with oral evidence, show that for last 25/30 years, Chingubai had taken care of Bhagubai and it was due to love and affection of Bhagubai for Chingubai that the former was bequeathing her properties in favour of Chingubai. Chingubai is none else than Bhagubai's sister's daughter and probably the only heir. There is nothing to suggest that Bhagubai had anyone else than Chingubai, who could be a closer heir or relation of Bhagubai and with whom Bhagubai could have spent her last days. No other relation of Bhagubai, who would have succeeded to the estate of Bhagubai if the will would not have been there, has come forward to dispute or to object to the will. The challenge is thrown by a stranger to the family and one who has trespassed upon the property.

There is another very important piece of evidence. There are four properties bequeathed by the same will by late Bhagubai in favour of Chingubai. One of those four pieces of property (and not the property in dispute in the present proceedings) has been earlier a subject matter of dispute and litigation between these very parties. It appears that such other property was held by Tarabai, the defendant respondent as a tenant of Bhagubai while the property CTS No.876 (subject matter of dispute in the present proceedings) was

A trespassed upon by Tarabai. As to the tenancy premises, Chingubai filed a suit for ejectment against Tarabai after terminating her tenancy and claiming right to sue by virtue of this very will dated 22.9.63. In that suit also Tarabai, the defendant-respondent, had denied the will. The suit was dismissed by the trial court. The plaintiff Chingubai preferred an appeal in the court of District Judge, Satara which was allowed. In its judgment dated 30.8.1966, the learned B District Judge while dealing with the will held *inter alia* as under:

> "Bhagubai was a helpless widow staying in her old age under the protection of Chingubai at her place and she appears to have insignificantly small property and naturally she would desire to give C this property to the person who was looking after her in her old age when she had become helpless. The Sub-Registrar has examined the woman and being satisfied about the testamentary capacity of the woman has registered the will. This also is the circumstance which has to be taken into consideration. Having regard to the fact that the Will is challenged by a mere tenant having no interest in the property D except by adverse possession, the evidence which has been tendered is, in my view, adequate to prove the testamentary capacity as well as the execution of the Will. Therefore, differing with the learned Judge of the trial court, I hold that the will has been duly propounded and the proof tendered for execution of the will and the proof of the fact that Bhagubai was having disposing state of mind at the time of E the execution of the will are adequately proved in this case. Under these circumstances I hold that Chingubai has succeeded in establishing the fact that the will propounded by her confers on her such interest as may be had by Bhagubai."

F The defendant Smt. Tarabai filed a petition under Article 227 of the Constitution before the High Court laying challenge to the judgment of District Judge. The High Court by judgment dated 2.10.1970 (in Special Civil Application No.1802 of 1966) while dealing with this very will recorded the following finding:

> G "In the first place, the Defendant has not led any evidence whatsoever to raise any doubt about the evidence of the Plaintiff. Secondly, the will is attested and a registered document. Thirdly, the plaintiff has examined the attesting witness, who was in a position to judge whether Bhagubai was in a disposing state of mind or not. Now, the finding of this issue essentially is a finding of fact and I cannot conceive any H reason why this one sided evidence could not have been believed by

the lower appellate court." A

The finding of the lower Appellate Court holding the will to be a duly attested and registered document executed by Bhagubai was upheld. This finding has been discarded in the present proceedings by all the three courts, up to the High Court, on a singular reasoning that the property in the earlier suit being a different one, the finding as to execution of the will could not B be *res judicata* in the present proceeding though the parties are same. To our mind, the three courts upto the High Court have all missed something significant as stated hereinafter.

Shri Subrat Birla the learned counsel for the plaintiff-appellant submitted C that the above said decisions which are inter party would constitute *res judicata* for the purpose of the present suit and the finding that the will dated 22.9.1963 is a duly executed last will and testament of late Bhagubai could not have been re-agitated by the defendant-respondent in the present suit. On the other hand, Shri Bhasme the learned counsel for the defendant-respondent submitted that the previous suit, though between the same parties, related to D some other property and was based on landlord-tenant relationship and any finding recorded in the decision therein would not constitute res judicata in the present suit which is a title suit. We are not inclined, in the facts and circumstances of this case, to weigh the admissibility and binding efficacy of the decision rendered in the earlier suit on the doctrine of *res judicata* and E holding the earlier decisions as conclusive between the parties. *Res judicata* is a mixed question of fact and law. We do not find the plea of *res judicata* having been raised in the plaint. Copies of pleadings and issues framed in the earlier suit have not been tendered in evidence and we do not find any issue on *res judicata* having been framed and tried between the parties in the present suit. No submission raising the plea of *res judicata* was made before F any of the courts below or the High Court. We do not think such a plea can be permitted to be raised before this Court for the first time and at the hearing. However, still it cannot be lost sight of that the earlier litigation was between the same parties wherein this very will was relied on by this very plaintiff in support of his title to the property in dispute therein. The plaintiff's right to G sue based on this very will was claimed and asserted in the earlier suit and was upheld though denied by this very defendant. These facts and finding are recorded in the previous judgment and have relevance in the present suit. [Also see, *Tirumala Tirupati Devasthanams* v. *K.M. Krishnaiah,* [1998] 3 SCC 331. Thus away from *res judicata* the judgment given in the earlier suit is relevant piece of evidence under Sections 11, 13 and 35 of the Evidence Act H

A and has a material bearing on the controversy arising for decision in the present suit. This material aspect has been completely overlooked by the High Court and the courts below. A relevant and material piece of documentary evidence, of undoubted veracity, has been ignored and that is a serious error of law having a vitiating effect on the finding on most vital issue in the case.

B Other reasonings of the trial court and the first appellate Court, for holding the will not proved, too, to say the least, verge on absurdity. Bhagubai died a day after the execution and registration of the will. There is nothing to show that Bhagubai was physically or mentally incapacitated from executing the will. On the one hand, the courts below have questioned the propriety C of the Sub-Registrar having come to the house of Bhagubai for registering the will on the ground as to why Bhagubai could not have gone to the office of Registrar on an assumption that she was fit to do so and yet the mental capacity of Bhagubai to execute the will has been doubted. The two attesting witnesses have been held to be 'interested' on the ground of their being class-fellows of Chingubai's son and on the other hand, it has been doubted D whether they would have known and identified the executant. There is nothing to doubt the mental and physical capacity of Bhagubai but the same has been suspected because of "complete absence of any medical evidence, of a doctor which would show that the testator was in a sound and disposing state of mind". There is no rule of law or of evidence which requires a doctor to be E kept present when a will is executed. In short, the courts below have allowed their findings to be influenced by such suspicion and conjectures as have no foundation in the evidence and have no relevance in the facts and circumstances of the case and unwittingly allowed their process of judicial thinking to be vitiated by irrelevant reasonings and considerations. The weighty factor that the factum of execution of will by Bhagubai was being denied by a rank F trespasser without raising any specific pleadings and the fact that no relation of Bhagubai has chosen to lay a challenge to the will, have been simply overlooked. In our opinion, the High Court ought not to have sustained such a perverse finding which would result in the property of a rightful owner being lost to a trespasser.

G The appeal is allowed. The judgment and decree of the Trial Court as upheld by the first Appellate Court and the High Court are set aside. Instead the suit filed by the plaintiff is directed to be decreed. The plaintiff is declared to be the owner of the suit property and entitled to recovery of possession from the defendant. The defendant shall hand over vacant and peaceful H possession of the suit property to the plaintiff within a period of two months

from today failing which the plaintiff shall be entitled to execute the decree and recover possession. The plaintiff appellant shall also be entitled to costs throughout A

B.S. Appeal allowed.