

ORDER BELOW EXH.1 IN RD NO. 12 of 2008
(Kondabai Taware Vs. Nivrutti Taware)

1] DH No. 1 Kondabai and DH No. 2 Sushilabai filed execution petition to get executed decree passed by Hon'ble District Court, Pune in Civil Appeal No. 974/2000 dt. 18/10/2003. During pendency of the execution petition DH No. 1 Kondabai expired. JD moved application vide Exh. 48 and prayed to stay execution of decree. Said application was partly allowed.

2] It is contention of the JD that, DH no. 2 and JD No. 1 to 6 are also legal heirs of DH No. 1 Kondabai. They have filed application. DH filed their say to said application and contended that, DH no. 1 Kondabai executed Will of her share in favour of DH no. 1 Sushila Parshuram Konde and Vijay and Pandurang Parshsuram Konde. JD denied the execution of said Will deed. They have contended that, the issue of execution of Will needs to be adjudicated as per section- 47 of the Code of Civil Procedure.

3] On perusal of Exh. 32, it appears that, JD No. 1 sought to modify the decree in respect of the 7/18th share of DH No. 1 and same be allotted to JD no. 5 as per section-6 of the Hindu Succession Act.

4] DH No. 2 filed her detailed say to application Exh. 48 vide Exh. 51. She contended that, the executing court can decide all questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the

decree shall be to determined by the court executing the decree and not by the separate suit.

5] DH were directed to produce and prove Will dt. 08/11/2001 by order dt 17/02/2017. Accordingly, DH produced original Will deed.

6] On perusal of record and arguments advanced by both sides, following points arise for my consideration and I have given findings on those points as follows -

Sr. No	points	Findings
1	Whether DH No. 2 and the propounders of Will proves that, DH no. 1 Kondabai Narsing Taware executed Will dt. 08/11/2001 in fit and disposable state of mind ?	---Proved.
2	Whether DH no. 2 and the propounders of Will would get share of deceased Kondabai as per Will dt. 08/11/2001 ?	---Proved.
3	Whether JD No. 5 would be entitled to get share in the 7/18 th share of deceased Kondabai ?	--- No.
4	What order ?	As per final order.

7] As per order of the court dt. 17/02/2017, the propounders of the Will examined Kuber Chandrakant Chavan vide Exh. 103 and Sambhaji Raghunath Gaikwad vide Exh. 105. They closed their evidence vide Exh. 106. JD did not adduce any evidence.

REASONS

As to Issue no. 1 :-

8] It is admitted fact that, the suit filed by DH bearing RCS No. 21/1997 was decreed by Saswad court. Being aggrieved by said judgment, JD No. 1 & 5 preferred RCA No. 974/2000 before Hon'ble District Court, Pune. Said appeal was dismissed. The decree passed by Saswad court was confirmed with modification in respect of share in house no. 275 and 186 situated at village Javalarjun Tal. Purandar Dist. Pune. It was declared that DH no. 1 is having 7/18th share and DH no. 2 is having 1/18th share in the suit properties.

9] The decree passed by Hon'ble District Court, Pune in RCA No. 974/2000 attained finality as no appeal was preferred against the same. Therefore, as per said decree DH no. 1 was having 7/18th share and DH no. 2 is having 1/18th share in the suit properties. DH no. 1 and 2 filed execution petition on 14/07/2008. DH no. 1 Kondabai expired on 08/12/2008.

10] It is well settled law that, the propounder of the Will has to prove due execution of the Will. It is for the propounder to remove the suspicious circumstances surrounding the Will, if any, that may be brought on record. The propounder of Will is also duty bound to prove that, the executant of the Will was in fit and disposing state of mind at the relevant time.

11] As per section-68 of the Indian Evidence Act, if a document is required by law to be attested, it shall not be used as

evidence until one attesting witness at least called for the purpose of proving its execution. The Will is a document required by law to be attested. Attestation means signing of a document to signify that the attester is witness to the document. Attesting witness is one who signs the document in presence of the executant after seeing the execution of the document or after receiving the personal acknowledgment of the executant with regard to the execution of the document.

12] Kuber Chavan is examined as attesting witness on Will dt. 08/11/2001. He deposed that, Kondabai was residing in his neighbour at village Vanewadi. Kondabai knew reading and writing. She told him in the morning of 08/11/2001 to accompany her at Pune. He along with Pandurang Parshuram Konde, Sushila and Kondabai had gone to the chamber no. 54 in the vicinity of Shivajinagar court, Pune.

13] It is deposed by Kuber Chavan that Kondabai had some talks with Adv. Gaikwad. Adv. Gaikwad prepared draft of Will as per direction of Kondabai. Kondabai told him and Pandurang that, she wants to execute Will. He also deposed having put signature on Will in the presence of Kondabai and Pandurang. He identified his signature on Will. He also deposed that, Kondabai signed the Will in his presence and in presence of Pandurang.

14] Oral evidence of Kuber Chavan has fulfilled the requirements of Section-68 of the Indian Evidence Act. He proved the execution and attestation of the Will at Exh. 104. He was

subjected to cross examination at length by JD. He admitted that, there are 4-5 other residential houses between his house and house of Kondabai. He is labourer. Pandurang was also doing labour work. Kondabai was more than 75 years old. He is good friend of Pandurang. He did not inquire with Kondabai during journey as to why they were proceeding to Pune.

15] It is admitted by Kuber Chavan that, he went in Pune court for the first time. He does not know about the conversation took place between Kondabai and Pandurnag inside the room. They had taken Pandurang from village Shivari. Kondabai executed Will in respect of her lands. He does not know anything except execution of the Will by Kondabai in respect of her landed properties. JD also cross examined Kuber Chavan with reference to the relation of Kondabai and her husband and land disputes between them. Those are not relevant for consideration as to proving the Will.

16] The oral evidence of Kuber Chavan did not shatter during his searching cross examination. His evidence about execution of Will by Kondabai and attestation as per requirements of Section-68 of the Indian Evidence Act is reliable and trustworthy. There is no reason to disbelieve his evidence. The execution and attestation of Will at Exh.104 is duly proved.

17] On perusal of original Will at Exh. 104, it appears that, Kondabai was 70 years old at the relevant time. The Will is running into 6 pages. Certificate of doctor is also attached with the said Will. The Will at Exh. 104 reads the details of previous litigations in

respect of suit properties. The Will at Exh. 104 also reads that, the executrix was in fit mental state of mind. She had given her share declared in RCS No. 121/1997 to her daughter Sushila Konde and grand-sons Vijay and Pandurang Konde.

18] The reason of exclusion of her step sons is given in the said Will. JD No. 1 to 5 were excluded from her 7/18th share in the suit properties as declared by the court. The medical certificate also reads that, Kondabai was examined by medical officer of Primary Health Center, Hol Tal. Baramati Dist. Pune and she was 70 years old. It does not read about fitness of Kondabai. Therefore, it is not a fitness certificate. However, it is not the case of JD that Kondabai was incapacitated to execute a Will.

19] DH also examined Adv. Sambhaji Gaikwad, who drafted the Will at Exh 104. He is a practicing lawyer for 8 years at Pune. He deposed that, Kondabai was client of Adv. Mukund Nanaware. Her civil suit and civil appeal was conducted by Adv. Nanaware. He was working with Adv. Nanaware. He deposed that, on 08/11/2001, he prepared Will as per her directions of Kondabai at chamber no. C-54, District Court, Pune. He also deposed that, Kondabai gone through the document of Will and signed on each page in presence of Kuber Chavan and Pandurang Gaikwad. He got registered said Will with notary Shri. Anil Kankariya.

20] JD have also cross examined Adv. Sambhaji at length. He admitted that, he is practicing law since 1999. He knew facts of RCS No. 121/1997 since beginning. Said suit was decreed on

31/07/2000. He was looking after RCA No. 974/2000 at Pune Court. He also admitted that, he was looking after the present execution petition. He took one and half hours for preparation of Will deed. He admitted that, Kondabai and witnesses had come together at his office. Adv. M. R. Nanaware was looking after entire proceeding of RCS No. 121/1997. He also admitted that, there is no medical certificate showing that, Kondabai was fit to execute Will.

21] From the oral evidence and cross-examination of witness Sambhaji Gaikwad, it appears that, he was involved in the present proceeding since beginning of his career as a lawyer. He knew fact of RCS No. 121/1997 and RCA No. 974/2000. He was also looking after the present execution petition. He drafted the Will as per request of Kondabai. His role is very limited one. The lawyer acts as per the wishes of his client.

22] Kondabai knew witness Sambhaji since long. Therefore, it is quite natural that, she would request him to prepare the Will as per her wish. Evidence of Sambhaji is also sufficient to prove that, the Will at Exh. 104 was prepared by him as per dictation of Kondabai and it was registered with notary Shri. Anil Kankariya.

23] Kondabai expired after 7 years of execution of Will at Exh. 104. There is no evidence on record to prove that, she was suffering from any ailment. JD have not given any single suggestion to both witnesses about mental incapacity of Kondabai to execute the Will. Kuber Chavan deposed that, Kondabai was in fit state of mind. Said evidence is not disturbed during cross-examination.

24] The propounders of Will have proved that, Kondabai executed Will on 08/11/2001 in her full senses and in fit state of mind. No suspicious circumstances surrounding the execution of Will have been brought on record by JD. The execution and attestation of Will is duly proved. Therefore, I answered issue no. 1 in the affirmative.

As to Issue no. 2 :-

25] As per Section-14 of the Hindu Succession Act, any property possessed by a female Hindu shall be held by her as full owner thereof and not as a limited owner. Explanation appended to said section says that, property includes movable and immovable property acquired by a Hindu family by inheritance or at a partition or any other manner whatsoever.

26] The competent court has declared that, DH no. 1 Kondabai was having 7/18th share in the suit properties. The said share of Kondabai is her absolute property given in a partition decree. She was having absolute right to deal with the said property during her lifetime.

27] DH no. 2 proved due execution of Will dt. 08/11/2001 at Exh. 104. Deceased Kondabai executed Will of her 7/18th share in the suit properties in favour of DH No. 2 and Pandurang and Vijay Parshuram Konde. Therefore, the 7/18th share of deceased Kondabai would go to her daughter and two grand-sons as per last wish of deceased Kondabai. Hence, I answered issue no. 2 in the affirmative.

As to Issue no. 3 :-

28] On perusal of record, it appears that, one Narsing was common ancestor of parties. He had two wives namely Kondabai and Chandrabhaga. DH no. 2 Kondabai and her daughter DH no. 2 Sushila instituted RCS NO. 121/1997 against Chandrabhaga and her sons and daughter. Said suit was decreed. It is declared by the competent Court that Kondabai was having 7/18th share and Sushila was having 1/18th share.

29] DH no. 1 and JD no. 5 were co-wives. DH no. 1 executed Will deed of her 7/18th share during her lifetime. She was absolute owner of her share. Therefore, her 7/18th share will be governed by Will at Exh. 104 and not as per succession. JD No. 5 cannot get any right in said share. Therefore, I answered issue no. 3 in the negative.

As to Issue no. 4 :-

30] The decree under execution needs to be modified after subsequent events. The 7/18th share of DH No. 1 Kondabai would be governed by Will at Exh. 104. DH no. 2 and Vijay and Pandurang Konde would get 7/18th share of deceased Kondabai. Considering above discussion following order....

Order

- i- The decree is modified as under :-
- ii- It is hereby declared that, DH No. 2 Sushila Parshuram Konde would be having her original 1/18th share along with additional share in the 7/18th share of deceased Kondabai.
- iii- It is hereby declared that, DH No. 2 Sushsila Parshuram

Konde, Vijay Parshuram Konde and Pandurang Parshuram Konde would be entitled to get 7/18th share of DH No. 1 Kondabai Narsing Taware as per Will at Exh. 104.

- iv- Decree shall be sent to the Collector, Pune to effect partition of the suit properties and to put DH No. 2 Sushsila Parshuram Konde, Vijay Parshuram Konde and Pandurang Parshuram Konde in possession of 1/18th plus 7/18th i.e. total 8/18th share vide section-54 of the Code of Civil Procedure, 1908.

Place:Saswad

(Vaibhav K. Jadhav)

Date : 12/10/2018

Civil Judge Junior Division, Saswad.

CERTIFICATE

I affirm that the contents of this P.D.F. File order are same word for word as per original order.

Name of Steno - G. S. Chougule

Court Name - V.K. Jadhav, CJJD, Saswad.

Date - 12/10/2018

Order signed by

P.O. on : 17/10/2018

Order uploaded

on : 26/10/2018