

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SECOND APPEAL NO. 107 of 2024****With****CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2024****In R/SECOND APPEAL NO. 107 of 2024**

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KAMLESHBHAI KANAIYALAL KOTECHA**Versus****CHANDRIKABEN BAKULBHAI MANIK D/O KANHAIYA LAL KOTECHA**

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Appearance:**MR DHAIRYAWAN D BHATT(11817) for the Appellant(s) No. 1****for the Respondent(s) No. 1**

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CORAM:HONOURABLE MS. JUSTICE GITA GOPI**Date : 11/03/2024****ORAL ORDER****Order in the Second Appeal:-**

Mr. Dhairyawan D. Bhatt, learned advocate for the appellant submits that both the courts below being the learned trial court as well as the learned first appellate court had not taken into consideration the provisions of Section 69 of the Indian Evidence Act wherein a case when both the witnesses to the Will dies and in that circumstances, the Will could be proved by identifying the signature of the one of the attesting witness and herein this case the brother Ranjitbhai V. V. Dodia had identified the signature of the witness Parshottambhai Dodia who had died on 30/07/2016.

Mr.Bhatt, learned advocate submits that from the court file, he had referred to Exh.16, the original will dated

05/03/1973 and has identified the signature of his brother who is one of the witness to the Will.

Mr. Bhatt, learned advocate submits the requirement of Section 69 of the Indian Evidence Act has been proved and inspite of that, both the courts below being the trial court as 8th Additional Senior Civil Judge, Rajkot in Civil Miscellaneous Application No.498 of 2012 and the appellate court as 11th Additional District Judge, Rajkot in Regular Civil Suit No.26 of 2011 has failed to even refer to the provisions of Section 69 of the Indian Evidence Act.

Admit.

Substantial questions of law that arises for consideration of this Court are as under:

- (1) Whether the both the Courts have erred in law by misplacing burden of proof and onus of proof?
- (2) Whether the order dated 16/07/2021 in Civil Miscellaneous Application No.498 of 2012, Rajkot is bad in law as procedure prescribed in Section 295 of the Indian Succession Act was not followed by the learned civil court?
- (3) Whether the procedure adopted in Civil Miscellaneous Application No.498 of 2012, Rajkot is valid and legal despite being contrary to procedure prescribed under Section 295 of Indian Succession Act?

(4) Whether both the courts have erred in law by not attributing statutory presumption regarding genuineness of will being 30 years old?

(5) Whether both the Courts have erred in law by not considering Section 69 of Indian Evidence Act to the facts and circumstances of the case?

Order in the Civil Application:-

Rule, returnable on 09/04/2024.

Interim relief in terms of para-6(B) is granted till then.

(GITA GOPLJ)

ILA