



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

**SECOND APPEAL NO.235 OF 2022.**

**APPELLANTS** : 1 Smt. Sheela Assav Thomas, Aged  
(Orig – Defendants) (on RA) about 62 years, Occupation :  
Household  
2 Assav Thomas, Aged about 69 years,  
Occupation – Service  
Both R/o Ambedkar Nagar Gadga  
Dharmpeth Nagpur  
3 Swapnil Assav Thomas, Aged about  
42 years, Occupation – Service, R/o  
House No.642/0+2, Gadga  
Dharmpeth Nagpur  
4 Kshitij Assav Thomas, Aged about  
38 years, Occupation – Service, R/o  
101 Orchid Petals, Somalwada  
Nagpur.

--**VERSUS**--

**RESPONDENT** : Swarnalata Wd/o Deepak Wasnikar  
(Orig. Plaintiff No.2) Aged 65 years, Occu: Retired, R/o  
(on RA) Wasnikar Building, Ambedkar Nagar  
Gadga Dharampeth Nagpur.

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Mrs Ramnik Kaur Dadiyal, Advocate for Appellants.  
Mr Mahesh Masodkar, Advocate for Respondent.  
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**CORAM** : **URMILA JOSHI-PHALKE, J.**

**RESERVED ON** : **17<sup>th</sup> MARCH, 2023.**

**PRONOUNCED ON** : **7<sup>th</sup> JUNE, 2023.**

## JUDGMENT

. Heard learned Counsels appearing for the parties.

2. Present appeal is preferred by the appellants, who are the original defendants, against the judgment and decree dated 16.04.2022 passed by the District Judge-1, Nagpur in Regular Civil Appeal No.392 of 2019 maintaining the judgment and decree passed by the 23<sup>rd</sup> Joint Civil Judge Senior Division, Nagpur in Regular Civil Suit No.2571 of 2012. The parties hereinafter referred as per their original nomenclature.

3. The brief facts, which are necessary for the disposal of the appeal, are as under :

The plaintiffs have filed a suit for possession of suit property bearing Plot No.82 and 92 admeasuring 172.93 Sq. Mtrs. situated in City Survey No.388 at Ambedkar Nagar, Nagpur (hereinafter referred as “house property”). The plaintiffs are residing on first and second floor and the defendants are residing on ground floor of the house property consists of

Varandha, Hall, Store Room, Kitchen, Bedroom admeasuring total build up area 41.66 Sq Mtrs. (hereinafter referred as “the suit property”).

4. The relationship between plaintiff No.1 and plaintiff No.2 is mother-in-law and daughter-in-law.

5. Defendant No.1 is niece of plaintiff No.1. Defendant No.1 was brought up by plaintiff No.1 and performed her marriage with defendant No.2 Assav Thomas. After marriage, defendant No.1 resumed cohabitation with defendant No.2 at his house in the year 1979. After marriage of plaintiff No.2 with son of plaintiff No.1 Deepak, some disputes arose between them, therefore, plaintiff No.2 started residing separately. The defendant No.1 came to reside alongwith plaintiff No.1. Plaintiff No.2 filed a suit for partition for herself and her minor daughter bearing Special Civil Suit No.919 of 1991 against plaintiff No.1. The preliminary decree of partition was passed vide judgment dated 13.12.1994 by the Joint Civil Judge Senior Division, Nagpur. By the said decree, plaintiff No.2 alongwith her minor

daughter got half share and plaintiff No.1 got half share in the house property. On 08.12.2000, daughter of plaintiff No.2 died, hence, plaintiff No.2 only became owner of the house property to the extent of half share. She filed final decree proceeding arising out of Special Civil Suit No.919 of 1991.

6. During pendency of the said proceeding, both the plaintiff Nos.1 and 2 arrived at a settlement and filed a joint pursis that they do not want to proceed further and withdrawn the final decree proceeding. Thus, there was no final decree as to partition. The plaintiff No.1 was residing with the defendants, however, on 23.01.2003, the defendants drove her out of the house, and therefore, she has taken shelter at the house of plaintiff No.2 and was residing with her. She had also lodged a report against defendants about alleged incident. As per the allegations of plaintiffs, the defendants have taken disadvantage of old age of plaintiff No.1 and prepared the false documents to grab the house property. After plaintiff No.1 was driven out of the house, the defendant No.1 has filed Special Civil Suit

bearing No.209 of 2003 for specific performance of contract against plaintiff No.1. The plaintiff No.2 filed intervention application in the Special Civil Suit No.209 of 2003, which was allowed. Plaintiff No.2 filed her written statement alongwith counter claim for damages on the ground floor that defendants caused damage to the ground floor on account of renovation. The civil suit filed by the defendant Nos.1 and 2 alongwith the counter claim was dismissed. The defendants as well as plaintiff No.2 both have challenged the judgment and order of dismissal by preferring First Appeal Nos.934 of 2009 and 1424 of 2009 before this Court. Both these appeals are dismissed on 14.09.2010.

7. During pendency of civil suit bearing No.209 of 2003, plaintiff No.2 filed Regular Civil Suit No.151 of 2007 before the Small Causes Court at Nagpur against defendant Nos.1 and 2 for recovery of rent and eviction. As per the contentions of plaintiffs, after 23.01.2003, defendants are residing in the suit premises with intent to grab the house

property. During pendency of suit, plaintiff No.1 died on 14.03.2013. After the death of plaintiff No.1, the plaintiff No.2 filed amendment application in Regular Civil Suit No.2571 of 2012 and contended that she became owner of entire house property on the basis of Will executed in her favour on 10.02.2003 by plaintiff No.1 and claimed the possession of the suit property. In the meantime, she has withdrawn Regular Civil Suit No.151 of 2007 pending before the Small Causes Court, Nagpur. By filing Regular Civil Suit bearing No.2571 of 2012, plaintiff claimed the possession of suit property from the defendants.

8. In response to the suit summons, defendants filed written statement and admitted that defendant No.1 had filed suit for the specific performance of contract against plaintiff No.1 bearing No.209 of 2003, which was dismissed. They further have not disputed that the plaintiff No.2 filed intervention application which was allowed and plaintiff No.2 filed written statement and counter claim. As per the

contentions of the defendants, pleadings of plaintiff No.2 in written statement in Special Civil Suit No.209 of 2003 and present suits are contradictory, hence, principle of estoppel is applicable against plaintiff No.2. The defendants further not disputed that the plaintiff No.2 filed Special Civil Suit for partition bearing No.919 of 1991, which was decreed on 13.12.1994. As per the defendants, as no final decree was passed as to the partition, plaintiff No.2 has no right, title and interest. As per the defendants, as there was dispute between the plaintiff No.1 and plaintiff No.2, the plaintiff No.1 brought them in suit property to reside alongwith her and she came to reside with plaintiff No.1 out of love and affection. The defendants denied that they drove plaintiff No.1 out of the house. As per the contentions of defendants, the plaintiff No.1 lodged false report against them, as plaintiff No.2 compelled her to lodge a report. As per the defendants, plaintiff No.1 executed Will in favour of defendant Nos.3 and 4, who are the sons of defendant Nos.1 and 2 on 28.07.1993, therefore, Will in favour of plaintiff No.2

is false and bogus. As per the defendants, plaintiff No.1 was not mentally and physically fit to execute the Will in favour of plaintiff No.2 in the year 2003, and therefore, the plaintiff No.2 is not entitled for any relief. The defendants further claimed that the suit of plaintiff No.2 is barred under Order 2 Rule 2 of the Civil Procedure Code (“CPC”, for short).

9. To substantiate the contention, plaintiff No.2 examined herself *vide* Exh-22. She reiterated the contentions as per her pleadings. In support of her contention, she placed reliance on City Survey Record Exh-55, Tax Receipt Exh-56, Certified Copy of the Judgment in Special Civil Suit No.919 of 1991 Exh-57, Certified Copy of the Judgment in Special Civil Suit No.209 of 2003 Exh-58, Certified copy of the Judgment in First Appeal Nos.934 of 2009 and 1424 of 2009 Exh-59, Certified Copy of Application for withdrawing Suit bearing No.151 of 2007 Exh-60, Certified Copy of Plaint in RCS No.151 of 2007. Besides her oral evidence to prove Will in her favour, she examined PW-2 Shirish Shantaram Rajurkar *vide*



Exh-94 and PW-4 Advocate Ram Krushnarao Bhide Exh-100. She also examined Shama Vijay Deshpande, Bank Employee and PW-5 Chhotulal Vishwambhar Thorat.

10. Defendants have also adduced the evidence by examining Sheela Assav Thomas vide Exh-108. DW-2 Mahendrakumar Harnam Singh Siriya Exh-123 and Advocate Prashantkumar Satyanathan to prove the Will and DW-4 Kshitij Assav Thomas. The defendants relied upon Will at Exh-114.

11. After appreciating the evidence, the Joint Civil Judge Senior Division, Nagpur decreed the suit and directed the defendants to hand over the possession of suit property to the plaintiff and also directed the enquiry for the mesne profit.

12. Being aggrieved with the said judgment and decree, the defendants preferred regular civil appeal bearing No.392 of 2019 which was dismissed by the District Judge-1, Nagpur. Against the said judgment and decree, present appeal is preferred by the defendants on the ground that the suit of the

plaintiff is barred under Order 2 Rule 2 of CPC. The another ground raised by the defendants is that the Will which is executed is false and bogus document and not liable to be relied upon. The plaintiff No.2 claiming relief on the basis of the said Will which is a bogus document which is not considered by the Joint Civil Judge Senior Division, Nagpur as well as First Appellate Court.

13. Heard learned Counsel Ramnik Kaur Dadiyal. She submitted that the suit itself is barred under Order 2 Rule 2 of CPC, as the written statement which is filed by the plaintiff No.2 in RCS No.209 of 2003, wherein she has not claimed the relief of possession by way of counter claim. Thus, she has omitted the said relief. She had filed suit bearing No.151 of 2007, which was subsequently withdrawn. Thus, in view of Order 2 Rule 2 of CPC, plaintiff cannot be allowed to seek different reliefs in different proceedings, if they arise from the same cause of action. She further submitted that the Will executed in favour of plaintiff No.2 by plaintiff No.1 is a bogus

document, as the evidence on record shows that evidence of plaintiff No.1 was recorded in Civil Suit No.209 of 2003 and the Court has observed that she is unable to answer rationally which shows that mental condition of plaintiff No.1 was not good. There is no medical certificate to show that the mental and physical condition of plaintiff No.1 was such that she was able to execute Will in favour of plaintiff No.2. She submitted that in view of the above circumstances, suit of the plaintiff deserves to be dismissed. In support of her contention, she placed reliance on following decisions :

- 1) Purna Medium Project Division, Amravati ..V/s.. Y. R. Reddy and another, reported in 2004(1)Mh.L.J. 729,
- 2) Gajanan R. Salvi ..V/s.. Satish Shankar Gupte, reported in AIR 2004 Bombay 455,
- 3) Ramlal Maniram Navdhinge ..V/s.. Maniram Patiram Navdhinge, reported in 2008(1) Mh.L.J. 860,
- 4) Gujarat Electricity board Board and others ..V/s.. Saurashtra Chemicals Porbandar, reported in AIR 2004 Gujarat 83,

5) Hari Ram ..V/s.. Lichmaniya and others, reported in AIR 2003 Rajsthan 319.

6. Prabhatia wd/o Shankarrao Bodhankar and others ..V/s.. Chimote and sons, Amravati and others, reported in 2017(2) Mh.L.J. 83.

7) M/s. Upadhyay and Co. ..V/s.. State of U.P. and others, reported in AIR 1999 SC 509.

Wherein the ratio laid down is that a plaintiff cannot be allowed to seek different reliefs at different times in different proceedings, if they arise from the same cause of action.

14. Per contra, learned Counsel Shri Mahesh Masodkar submitted that the relief claimed in counter claim in Special Civil Suit No.209 of 2003 was on the basis of different cause of action. Section 34 of the Specific Relief Act, 1963 gives discretion to the person entitled to some property to institute a suit for declaration as against the person who denies his title. He further submitted that the suit is not barred under Order 2 Rule

2 of CPC and it is rightly held by both the Courts, and therefore, no interference is called for. He further submitted that no evidence is adduced to show that the testator was suffering from any ailment and was mentally incapable of executing Will. In support of his submission, he placed reliance on Arulmigu Kolavizhi Amman Temple ..V/s.. R. Shamugham, reported in MANU/TN/2211/2008, Syeda Rahimunnisa ..V/s.. Malan Bi (Dead) and another, (Civil Appeal Nos.2875-2879 of 2010) decided on 03.10.2016, Shri Santosh Raghu Raikar and others ..V/s.. Smt. Sitabai Ramchandra Azgaonkar and other, (Second Appeal No.174 of 2005) decided on 26.02.2021, Ramabai Padmakar Patil (Dead) and others ..V/s.. Rukminibai Vishnu Vekhande and others, reported in AIR 2003 SC 3109, Z Star Distilleries ..V/s.. Kopargaon Sahakari Sakhar Karkhana Limited (First Appeal No.316 of 2015) decided on 21.11.2015, Samta Vikas Mandal and others ..V/s.. Shaikh Sirajuddin and others, (Civil Writ Petition No.1691 of 1994) decided on 14.06.2011, Vallabh Das ..V/s.. Dr. Madanlal and others,

reported in *AIR 1970 SC 987* and *Girdhari Lal Bansal ..V/s.. The Chairman, Bhakra Beas Management Board, Chandigarh and others*, reported in *AIR 1985 Punjab and Haryana 219*.

15. After hearing both the sides and on perusal of the record, following substantial questions of law involved in the appeal are :

- i) Whether the suit is barred in view of provision Order 2 Rule 2 of CPC ?
- ii) Whether the Will executed in favour of plaintiff No.2 dated 10.02.2003 is legal and valid one ?

16. The relationship between plaintiff Nos.1 and 2 is not disputed. The relationship between the plaintiff No.1 deceased Ruth and defendant No.1 Sheela is also not disputed. Undisputedly, Nathan Wasanikar father-in-law of plaintiff No.2 purchased the following property :

- a) Property situated at Mouza Gadga bearing house No.642/0+2, Ward No.71

b) Property situated at Mouza Chhaoni bearing House No.531/0+1 in Ward No.60.

Plaintiff No.2 Swarnalata alongwith her minor daughter filed a suit for partition bearing No.919 of 1991 against deceased Ruth, who was plaintiff No.1 in the present suit. It is also not disputed that suit bearing No.919 of 1991 was decreed and preliminary decree was passed by which half share was allotted to plaintiff No.2 alongwith her daughter and half share to plaintiff No.1. Plaintiff No.2 filed a proceeding for passing final decree in Suit No.919 of 1991 in which, there was amicable settlement between plaintiff Nos.1 and 2. It is also not disputed that defendant No.1 Sheela was brought up by plaintiff No.1 Ruth and her husband Nathan Wasnikar. In the year 1997, the defendant No.1 Sheela got married with defendant No.2. Due to the dispute between plaintiff Nos.1 and 2, defendant Nos.1 and 2 came to reside in the suit property on the ground floor and since then, defendants are residing in the suit property. In the year 2003, plaintiff No.1 came to reside with plaintiff No.2 and

lodged report against defendant No.1. It is also not disputed that plaintiff No.1 initially executed Will dated 15.02.1990 in favour of defendant No.1 and her brothers Subhash and Sudhir. By revoking the said Will, she executed second Will on 28.07.1993 in favour of defendant Nos.3 and 4 Swapnil and Kshitij sons of defendant No.1 and third Will was executed by the plaintiff No.1 on 10.02.2003 in favour of plaintiff No.2. It is further not disputed that on 28.03.2003 defendant No.1 Sheela and her husband filed Civil Suit No.209 of 2003 against deceased Ruth for specific performance on the ground that deceased Ruth entered into an oral agreement with defendant No.1 Sheela and her husband and agreed to sale suit house No.642/0+2 situated at Mouza Gadga and not executed sale deed. Said special suit was dismissed as oral agreement not proved. Plaintiff No.2 filed intervention application in the said suit and filed counter claim. Said counter claim of plaintiff No.2 was also dismissed. Defendant Nos.1 and 2 as well as Plaintiff No.2 filed First



Appeal bearing Nos.934 of 2009 and 1424 of 2009, which are dismissed on 14.09.2010.

17. In the background of above facts, the ground raised in present appeal is that the plaintiff No.2 has filed written statement and counter claim in Special Civil Suit No.209 of 2003 and in the said suit plaintiff No.2 by filing counter claim sought a relief of damages and mesne profit but did not seek a relief for possession from defendant Nos.1 and 2. She has relinquished her right of possession under Order 2 Rule 2 of CPC. Therefore, the present suit of the plaintiff is barred. It is further submitted that the Trial Court had not considered that the suit is not maintainable and passed the judgment and decree which is erroneous one. The learned Counsel placed reliance on various decisions wherein the provision Order 2 Rule 2 of CPC was dealt with. To determine the question whether suit is barred in view of Order 2 Rule 2, the relevant provision is reproduced hereunder :

**“2. Suit to include the whole claim.”-(1)** Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

**(2) Relinquishment of part of claim.-** Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

**(3) Omission to sue for one of several reliefs.-** A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

**Explanation.-** For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

18. Admittedly, the plaintiff No.2 filed her counter claim for claiming the damages from the defendants. In suit before the Small Causes Court was under the provisions of Rent Act. The counter claim in Suit No.209 of 2003 was claimed as damage was caused to the suit property during the renovation and in suit No.151 of 2007, rent and decree of eviction was claimed under the provisions of Rent Act. In the present suit, possession was

claimed on the basis of Will executed in favour of plaintiff. In view of Order 2 Rule 2 of CPC, if the two suits and reliefs claimed therein are based on the same cause of action, then only the subsequent suits will become barred under Order 2 Rule 2 of CPC. However, when the precise cause of action upon which the counter claim was filed for damages caused to the property on the ground that defendants occupying the property on rent, then the provisions will not apply. Admittedly, Regular Civil Suit No.151 of 2007 was filed for recovery of rent and eviction which was subsequently withdrawn and present Suit No.2571 of 2012 was filed for possession on the basis of Will executed in favour of plaintiff No.2 by plaintiff No.1. The Hon'ble Apex Court in the case of Coffee Board ..V/s.. M/s Ramesh Exports P.vt. Ltd reported in AIR 2014 SC 2301, in para Nos.10 and 11 dealt with the interpretation of Order 2 Rule 2 of CPC and held that the Bar of Order 2 Rule 2 comes into operation where the cause of action which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed

the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the Trial Court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. By referring the earlier decision in *Alka Gupta ..V/s.. Narender Kumar Gupta*, reported in (2010) 10 SCC 141 and *Gurbux Singh ..V/s.. Bhooralal*, reported in AIR 1964 SC 1810, wherein it has been held that “in order that a plea of a bar under Order 2 Rule 2(3) of the Code of Civil Procedure should succeed the Defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was made; (2) that in respect of that cause of action the Plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court

omitted to the sue for the relief for which the second suit had been filed. From this analysis it would be seen that Defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. Thus, it is evident that the two requirements for the operation of bar under Order 2 Rule 2 are to be met with and it is to be seen whether the cause of action in the subsequent suit is the same and the relief claimed therein could have been claimed in the earlier suit.

19. Admittedly, at the time of the earlier suit bearing No.209 of 2003, the Will was not executed in favour of plaintiff No.2. She had only claimed damage as ground floor of the suit property was in possession of defendant No.1. She claimed that the defendant No.1 was a tenant, and therefore, claimed the damages. In suit bearing No.151 of 2007 was under the Bombay

Rent Act for eviction and recovery of rent which was subsequently withdrawn. Before withdrawing the said suit, she had filed suit bearing 2571 of 2012. Therefore, contention of the defendants that suit is barred under Order 2 Rule 2 of CPC is not maintainable. It is undisputed that plaintiff No.2 filed a suit bearing 151 of 2007 before the Small Causes Court against defendant No.1 for relief of possession and eviction. The said suit was withdrawn on 29.09.2011 and present suit is filed on 25.03.2011. Thus, it is crystal clear that present suit was filed during the pendency of the suit bearing No.2571 of 2012. Earlier relief claimed was on the contention and on the ground as landlord and tenant and in the present suit possession was claimed on the basis of Will, as in view of the Will plaintiff No.2 became the owner of the suit property. There is no dispute regarding the well settled legal position narrated by the Hon'ble Apex Court and this Court in catena of decisions relied upon by the defendants, but same will not helpful to the defendants in the present case as facts are not identical.

20. The another ground raised by the defendants is that the Will executed in favour of plaintiff No.2 by plaintiff No.1 is fabricated and bogus document. The plaintiff No.1 executed Will in favour of defendant Nos.3 and 4 on 28.07.1993, and therefore, they became the owner of the suit property. To prove the execution of Will, plaintiff No.2 adduced the evidence by examining PW-2 Shirish Shantaram Rajurkar and PW-4 Ram Keshavrao Bhide, who are the attesting witnesses on the said Will. PW-4 Bhide has prepared the said Will. The evidence of both these witnesses shows that PW-1 has executed the said Will in favour of plaintiff No.2 in their presence. PW-4 Bhide deposed that he prepared the said Will as per the directions of Ruth Wasanikar and at the relevant time, her mental condition was good. He has an opportunity to see her till 2010 and her mental condition was good. During cross-examination, he admitted that in Civil Suit No.209 of 2003, Ruth Wasanikar was unable to answer during the cross-examination, and therefore, her evidence was not recorded. On the basis of these admissions,

defendants claimed that the mental condition of the plaintiff No.1 was not good. Defendants have also examined DW-2 Mahendrakumar Harnam Singh Siriya and DW-3 Advocate Prashantkumar Satyanathan to prove the Will executed in favour of defendant Nos.3 and 4 on 28.07.1993. Admittedly three Wills are executed by deceased Ruth. First Will was in favour of defendant No.1 and her brothers. By revoking the said Will, second Will was executed on 28.07.1993 and third Will was executed on 10.02.2003 in favour of plaintiff No.2. The evidence is to be appreciated in the background that on 28.07.1993, plaintiff No.1 was residing with defendant No.1. The defendant No.1 has admitted during her cross-examination that plaintiff No.1 has filed complaint against her in the year 2003. She further admitted that she has not filed any proceeding to quash the said complaint which is lodged against her by the plaintiff No.1. The complaint was lodged by plaintiff No.1 as she was driven out of the house by defendant Nos.1 and 2. The evidence of the defendants further is to be appreciated in the



light of the circumstances that Will in favour of defendant Nos.3 and 4 was executed on 28.07.1993 by which share of the plaintiff No.1 in both the properties was allotted to the defendant Nos.3 and 4 who are the sons of defendant Nos.1 and 2. The defendant Nos.1 and 2 filed Special Civil Suit No.209 of 2003 on the ground that they have maintained the plaintiff No.1 as she was having inadequate financial assistance, therefore, plaintiff No.1 entered into the oral agreement with the defendant Nos.1 and 2 and agreed to sale suit house to the defendant Nos.1 and 2. If the suit property was already allotted by the Will to the sons of defendant Nos.1 and 2, the question arises what made the defendant Nos.1 and 2 to accept the proposal of the plaintiff No.1 to purchase the said house. Admittedly, said oral agreement was not proved and the suit was dismissed, but the conduct of the defendants filing suit for specific performance in the background that property was already allotted to their sons by Will creates the doubt regarding the execution of the Will. The evidence is to be appreciated on

the basis of preponderance of probability. If the Will was already executed in favour of defendant Nos.3 and 4 definitely the defendant Nos.1 and 2 would not agree to purchase the said suit property.

21. It is well settled that a Will has to be proved like any other document. The test we applied being the usual test of the satisfaction of the prudent mind in such matters. Section 63 of the Indian Succession Act is reproduced as follows :

*“2. Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.*

*3. Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.*

4. *Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the court, the propounder must remove all legitimate suspicion before the document can be accepted as the last Will of the testator.*

5. *It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasizes that in determining the question as to whether an instrument produced before the court is the last Will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances that court has to be satisfied fully that the Will has been validly executed by the testator.*

6. *If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own*

*free Will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”*

22. The requirement of Section 68 of the Evidence Act is to prove the execution of document and its attestation and not the contents of it. Section 63 of the Indian Succession Act requires that testator shall sign or affix his mark to the Will. It should be attested by two attesting witnesses. Section 3 of the Transfer of Property Act defines the term “attested”. And attesting witnesses is one who signs the document in presence of the executor after seeing the execution of the document and after receiving a personal acknowledge from them as regards the execution of the document.

23. It is well settled that the Court who examines the proof of Will is also duty bound to see whether dispossession under the Will is unnatural, improbable or unfair in the light of relevant circumstances. The duty is cast upon the propounder to remove all doubts regarding suspicious circumstances. To satisfy the test of the prudent person, there must be satisfactory reason

for denied benefits to those who are also entitled to the estate of testator as they had similar relations with him or her.

24. A will is a solemn document by which a dead man entrusts to the living the carrying out of his wishes. It is an instrument by which a person makes a disposition of his property to take effect after his death. Will obstruct natural inheritance and therefore while examining the Will the Court is required to see whether the testator signed the Will, after understanding the nature and effect of the disposition in the Will, condition of mind of the testator, his mental capacity as well as whether the testator was in sound state of mind while executing the Will. The Court for examining proof of Will is also duty bound to see whether disposition under the Will is unnatural, improbable or unfair in the light of relevant circumstances. These aspects are to be looked into while considering the Will. Admittedly, there is important feature which distinguishes Wills from other documents. Unlike other document the Will speaks for 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 solemn decision regarding the genuineness of the document. In dealing with the proof of Wills Court has to inquire regarding the suspicious circumstances.

25. In the present case, the evidence on record shows that defendant Nos.1 and 2 driven the plaintiff No.1 out of the house. They have also filed civil suit against her bearing No.209 of 2003. The plaintiff No.1 has taken shelter at the house of plaintiff No.2. Plaintiff No.1 filed complaint against the defendant Nos.1 and 2 at the Police Station admitted by the defendant No.1 is sufficient reason for the plaintiff No.1 to revoke the Will executed in favour of defendant Nos.3 and 4. As far as the allegation of the defendants is concerned regarding the mental health condition, it is submitted by the learned Counsel for the defendants that evidence of the plaintiff No.1 could not be recorded as she was unable to answer properly. Admittedly,

the Will was executed in favour of plaintiff No.2 on 10.02.2003 and her evidence before the Court was recorded in the year 2009 which is after six years. The plaintiff No.1 has attended the various proceedings during the said period. Therefore, the contention of the defendants that her mental condition was not good is not sustainable. The evidence of PW-4 Ram Keshavrao Bhide states that her mental condition was good. There was no reason for him to be deposed falsely. It came in the cross-examination that evidence of the plaintiff No.1 was recorded on 22.01.2009 i.e. after six years of the execution of the Will. Therefore, the contention of the defendants that in the year 2003, her mental condition was not good is baseless and without any evidence.

26. The plaintiff No.1 is entitled to revoke her Will in view of Section 62 of the Succession Act. In view of Section 62, a Will is liable to be revoked or altered by the maker of it at any time when he/she is competent to dispose of his property by Will. Revocability is the salient feature of Will. The Single

Bench of this Court in *Manilal Sundarji Doshi .V/s.. Kamal Manilal Doshi*, reported in *2013(4) ALL MR 600* held that it is implicit in a testamentary disposing that the person making it has got the full right, privilege and authority to revoke it and to make another Will specially if circumstances in his life changed impelling him to revoke the earlier legacy and to alter that legacy or make a wholly new bequest. This is the salutary legal provision granting the proprietary right to the fullest to the person having ownership and hence complete and unfettered dominant over his property. It is statutorily granted under Section 62 of the Indian Succession Act. It is further observed that indeed it would be implicit in the right to life itself. It would impelling upon the freedom of an individual to deal with his properties freely and fully if he would not be entitled to deal with them during his/her lifetime *inter vivos* by selling, alienating or gifting it as he wish, or upon his/her death by a testamentary deposing, bequeathing it to whoever he/she chose.



27. In view of the above discussion, it is crystal clear that deceased Ruth has bequeathed her property to the plaintiff No.2 by revoking her earlier Will in the change circumstances that she was driven out of the house by defendant No.1 to whom she has given shelter in her own house. Deceased Ruth was driven out of the house which was owned by her and she compelled to file the complaint and took the shelter at plaintiff No.2 which made her to revoke the earlier Will. Thus, on the basis of the said Will, plaintiff No.2 became the owner of the suit property. The Trial Court as well as the First Appellate Court have appreciated these facts and rightly come to the conclusion that in view of the said Will plaintiff is entitled for the possession of the suit property. Both the Courts have rightly come to the conclusion regarding the legality of the Will. I do not find any error committed by the First Appellate Court. Thus, the appeal is devoid of merits and liable to be dismissed. Hence, the first appeal is dismissed and disposed of with no order as to costs.

(URMILA JOSHI-PHALKE, J.)