

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No.334 of 2006

Satyanarayan Nandlal Pallod (Dyama). .. **Appellant.**

Versus

Parwatibai Vithaldas Kudal
And Others.

.. **Respondents.**

With

Second Appeal No.335 of 2006

Satyanarayan Nandlal Pallod (Dyama). .. **Appellant.**

Versus

Parwatibai Vithaldas Kudal.

.. **Respondent.**

Shri. Santosh B Gastgar, Advocate, for appellant.

CORAM: T.V. NALAWADE, J.

DATE : 14th OCTOBER 2015

ORDER:

1) The appeals are filed against common judgment and decree of Regular Civil Suit No.564/1988 and Regular Civil Suit No.345/1993 which were pending in the Court of

the Joint Civil Judge, Junior Division, Omerga, District Osmanabad. The appeals are also filed against the common judgment and order of Regular Civil Appeal No.3/2005 and Regular Civil Appeal No.8/2005 which were pending in the Court of the Additional District Judge, Omerga. Regular Civil Suit No.564/1988 was filed by Satyanarayan Pallod and the other suit was filed by Parwatibai Kudal. Both the suits were filed for relief of declaration of ownership and injunction in respect of the same properties. relief of declaration of ownership and injunction are given in favour of Parwatibai and so Satyanarayan has challenged these decisions in the present appeals. Heard learned counsel for Satyanarayan.

2) The suits were filed in respect of agricultural lands bearing Gat No.92/1 (admeasuring 3 hectares and 29 R) and Gat No.93/1 (admeasuring 4 hectares and 96 R) situated at village Tawasigad, Tahsil Omerga. These lands were owned by one Dadmat. Dadmat died issueless and at the time of his death his wife was also dead.

3) It is the case of Satyanarayan that Dadmat executed a will on 20-5-1988 in his favour and bequeathed the suit properties to him. It is contended that Dadmat was his cousin and as he had taken care of Dadmat during his last days, Dadmat bequeathed the properties to him. It is contended that after the death of Dadmat, in revenue record, mutations were made in his favour on the basis of the will.

4) It is the case of Parwatibai that she is daughter of real sister of Dadmat. It is her case that in the last days of Dadmat she was living with him and she had taken care of him. It is her case that false record of will was prepared by Satyanarayan. It is her case that after the death of Dadmat her name was entered in the revenue record as successor of Dadmat. She also had contended that Dadmat had executed a will in her favour on 27-8-1988. It is her case that the mutation made in favour of Satyanarayan was cancelled when she applied to revenue authority. Dadmat died on 11-9-1988.

5) In the trial Court both the suits were clubbed together. Issues were framed in both the suits about the aforesaid wills allegedly executed in favour of Satyanarayan & Parwatibai. Both the sides gave evidence. The trial Court held that both sides failed to prove due execution of wills made in their favour. The Courts below have held that Parwatibai, who is daughter of real sister of Dadmat, is entitled to succeed to the properties of Dadmat as she is preferred successor under Hindu law.

6) For proving his case, Satyanarayan has examined himself and he has examined some witnesses to prove execution of two wills. He has deposed that during last days of Dadmat he had taken care of Dadmat and Dadmat was suffering from cancer for 7 to 8 months. He has deposed that under the first will some cash amount was given in favour of a charitable trust by Dadmat and under the second will, landed properties were given to him by Dadmat. He has deposed that some movable properties which include cash amount, gold ornaments and households articles were bequeathed to Parwatibai and she has collected these articles.

7) Satyanarayan has deposed that he was present when both the wills were executed. He produced these two wills in the Court. In the first will nothing was given to him, his name is not appearing in the first will and he did not sign in any capacity on the first will. In the first will, some cash amount which was present in savings account was bequeathed to a charitable trust which was under control of one Satyanarayan Bajaj. It appears that even Parwatibai was not present when the first will was allegedly executed. Both the wills produced by Satyanarayan are shown to be executed in Government Hospital, Ambajogai. The contents of the wills show that Dadmat was living in a room of Satyanarayan Bajaj at Ambajogai. The record does not show that party Satyanarayan was taking care of Dadmat during last days. Satyanarayan Bajaj has given evidence for plaintiff and in his evidence he has stated that Dadmat was indoor patient continuously for 2 to 3 months.

8) The first will, Exhibit 121, is proved in the evidence of bond writer Keshav Chate. He has deposed that he wrote the will as per instructions given to him by

one Advocate Shri. Lohiya and deceased Dadmat. He has deposed that Dadmat had come to the campus of the court at Ambajogai for execution of will and there the will was written. This version of the scribe is not consistent with the version of party Satyanarayan that the will was written in Government Hospital and Dadmat was bed ridden at that time. Vishnukumar Jaju, one attesting witness, is examined to prove the execution of the will, Exhibit 121. His evidence is on the execution only.

9) Exhibit 121 does not mention the name of party Satyanarayan Pallod. If this will is accepted, it can be said that Dadmat was living in the property of Satyanarayan Bajaj from Ambajogai at the relevant time and Dadmat was in touch with a charitable trust which was under control of Satyanarayan Bajaj. It can be said that huge amount, which was in the savings account of Dadmat, was shown to be given to this charitable trust. The evidence of Bajaj shows that this amount was collected by the trust. Though Bajaj has tried to say that gold ornaments, household article and other things were delivered by him to Parwatibai, she has denied that these

articles were delivered to her. Thus Bajaj was interested and he was almost the propounder of the first will.

10) The stamp on which Exhibit 121 was written was purchased by one Advocate Lohiya. The evidence of the two scribes of the wills at Exhibits 121 and 124 show that Advocate Lohiya had played active part in execution of the wills and Bajaj had shown interest. It is not the case of Satyanarayan Pallod that Shri. Lohiya was the Advocate of Dadmat and he was helping him in the past. It was necessary for Satyanarayan to examine Advocate Lohiya as there are many circumstances showing his active participation in the preparation of the two documents. The first scribe has deposed that contents of will were dictated by Shri. Lohiya.

11) The evidence of attesting witness Jaju shows that he signed as attesting witness on both the wills, Exhibits 121 and 124. His evidence shows that on both the occasions Advocate Lohiya and Satyanarayan Bajaj were present. He has given evidence that in his presence the attesting witness and Dadmat signed on the documents.

Govardhan Chate, the scribe of another will Exhibit 124, has given evidence that he had written the will in Government Hospital. His evidence also shows that Advocate Lohiya and Satyanarayan Bajaj were present in the hospital when the wills were prepared. He has given evidence that the will was handed over by him to Advocate Lohiya. The evidence on the record shows that both the wills were probably remained with Lohiya. The wills are produced in the Court by Satyanarayan and no proper explanation is given as to how he came in custody of the wills. Satyanarayan Bajaj was expected to administer the properties of Dadmat as such request was made by Dadmat in Exhibit 121. Parwatibai is denying that anything was given to her and Lohiya had approached her.

12) The stamp on which Exhibit 124 was written was purchased by Satyanarayan Bajaj. He acted as attesting witness on the second will. It is already observed that he was the beneficiary under the first will. He has deposed that after discharge of Dadmat from government hospital, condition of Dadmat deteriorated, he started losing consciousness and he was not able to think

rationally. Thus, the evidence is given probably to show that the will executed in favour of Parwatibai which is of subsequent date cannot be accepted. This evidence cannot be given much importance and it cannot be used for proof of due execution of will as no care was taken by the Satyanarayan Bajaj, by Advocate Lohiya and by the party Satyanarayan Pallod to see that certificate of the doctor is appended to Exhibits 121 and 124. When Dadmat was suffering from cancer, he was bed ridden continuously for 2 to 3 months and he was discharged probably due to circumstance that there was no possibility of improvement and he died due to this disease and there is evidence of aforesaid nature of Bajaj, it was necessary to have certificate of doctor on the will. Such attempt was not made by Satyanarayan Pallod, by Bajaj and by Advocate Lohiya. No explanation is given about it. These circumstances have created serious doubt about due execution of will. These circumstances have created doubt about the competency of Dadmat, whether he was in a fit condition to take decision rationally. These circumstances have created doubt about free consent and clear possibility is created that there was either

misrepresentation or fraud. The Courts below have considered the manner in which the wills are shown to be executed. Thus, there are circumstances creating serious suspicion about the due execution etc. of both wills, Exhibits 121 and 124. The Courts below have rightly held that due execution of the will at Exhibit 124 is not proved. This Court had occasion to consider the relevant provisions in the reported order dated 14th September 2015 in **Second Appeal No.772 of 2013 (Suryabhan v. Bhagirathibai)**. The discussion is at paragraphs 11 to 20 which read as under :

"11) Provision of section 63 of the Indian Succession Act (hereinafter referred to as "the Succession Act") relates to "due execution" of will. It runs as under :-

"63. Execution of unprivileged Wills.-- Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules :-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the will, in the presence and by the direction of the

testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

12) In view of the wording of this provision, even if signature of testator is admitted, that itself will not be sufficient to dispense with the burden of proof of will as provided under section 63 of the Act. This section shows that in addition to proof of execution of will, signature, propounder of will is required to prove following things in a case like present one :

- (i) that at least two attesting witness signed the will and the signatures were made by them after seeing that the testator had signed in their presence, both of them were present when the testator had signed on the will;
- (ii) that both attesting witnesses had signed on the will as the witnesses in the presence of the testator. However, it is not necessary when one attesting witness signs in presence of testator the other was also present there.
- (iii) that signature of testator was so placed that it shall appear that it was intended thereby to give effect to writing as a will.

13) Provision of section 68 of the Evidence Act reads as under :-

“68. Proof of execution of document required by law to be attested.-- If a document is required by law to be attested, it shall not be used as evidence until 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.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered

in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

14) This provision shows that for proof of the execution and also for due execution of a will even if it is registered, one attesting witness needs to be examined. Though it is not necessary that both the attesting witnesses need to be examined but one attesting witness who gives evidence in the Court must satisfy the conditions laid down in section 68 which are mentioned above. The evidence of the attesting witness must establish that aforesaid procedure was followed in respect of the points.

15) Provision of section 59 of the Succession Act runs as under :-

"59. Person capable of making Wills.-- Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1.-- A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2.-- Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.-- A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4.-- No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be

proper that he should make his Will. A cannot make a valid Will.

(ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a Will. This is a valid Will."

16) Explanation 4 of this section shows that when there were circumstances like illness or other cause (underlined) like old age (in the present case age of the testator was 91 years), it becomes necessary to ascertain whether the testator knew what he was disposing i.e. the contents of the will and that he was in a position to understand the consequences of such disposition. Competent understanding is relevant and not condition of body but when there are other circumstances like such old age, it becomes necessary to show that the deceased was active in life and he was in a position to understand the effect of what he was doing. Thus in a case like present one, old age itself can be treated as "other cause" mentioned in explanation 4 to section 59 of the Succession Act.

17) The pleadings in the plaint show that there is allegation of fraud, existence of circumstances similar to fraud. In view of this contention, the provision of section 61 of the Succession Act needs to be seen. Section 61 runs as under :-

"61. Will obtained by fraud, coercion or importunity.-- A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Illustrations

(i) A, falsely and knowingly represents to the testator, that the testator's only child is dead or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such Will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequest a legacy to him. The bequest is void.

(iii) A, being a prisoner by lawful authority, make his Will. The will is not invalid by reason of the imprisonment.

(iv) A, threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence or others, to make a Will yet being so much under the control of B that he is not a free agent, makes a Will dictated by B. It appears that he would not have executed the Will but for fear of B. The Will is invalid.

(vi) A, being in, so feeble a state of health as to be unable to resist importunity, is pressed by B to make a Will of a certain purport and does so merely to purchase peace and in submission to B. The Will is invalid.

(vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition makes his Will in the manner recommended by B. The Will is not rendered invalid by the intercession and persuasion of B.

(viii) A, with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his Will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A."

18) Illustrations (i), (ii) and (vi) are relevant for the present matter.

19) In view of provision of section 102 (illustration b) of the Evidence Act, the burden to prove the fraud is ordinarily on the party who alleges fraud. In a case where the due execution of will is required to be proved, the party against whom there is possibility of existence of aforesaid circumstances is dead and so the suspicious circumstances in that regard need to be explained by the propounder of the will. Illustration (vi) to section 61 also shows that it is sufficient to a party like plaintiff who has no personal knowledge, to show on the basis of some circumstances that a probability as mentioned in illustrations (i), (ii) and (vi) is there. Thus when the point of due execution of will is involved in the matter, the burden which is ordinarily on the plaintiff, as mentioned in section 102 of the Evidence Act is not there and the plaintiff can rely on the circumstances which are appearing on the record and those may be there even without the efforts of the plaintiff.

20) Whether will is surrounded by suspicious circumstances or not is essentially a question of fact. Similarly, testamentary capacity of the testator is also a question of fact. Suspicious circumstances may be with regard to the due execution of will as mentioned in section 63 of the Succession Act or they may be with regard to the testamentary capacity of the testator as mentioned in section 59 of the Succession Act. The suspicious circumstances may be about probability of fraud or absence of voluntariness as mentioned in section 61 of the Succession Act. However, it needs to be kept in mind that when the case fails on the ground of absence of proof of "due execution" as mentioned in section 63 of the Succession Act, the other exercise with regard to the provisions of sections 59 and 61 of the Succession Act becomes unwarranted. So in that sequence the evidence needs to be marshalled and appreciated."

13) Parwatibai did not challenge the decision of the trial Court when the trial Court had held that due execution of will is not proved by Parwatibai. As this

decision was not challenged, there is no need to discuss other evidence of Parwatibai. Admittedly Parwatibai is daughter of real sister of Dadmat. In view of the provisions of Sections 8 and 9 of the Hindu Succession Act and Schedule I annexed to the Act, Parwatibai needs to be preferred to Satyanarayan and so there was no need for Parwatibai to prove the will. For this reason also there is no need to discuss the remaining evidence.

14) The Courts below have considered all aforesaid circumstances and few such specific circumstances are as follows :-

(i) Two wills were shown to be executed by Dadmat in Government Hospital within a span of 3 days;

(ii) In the first will there is no reference of other property like immovable property of Dadmat but in the first will Dadmat had expressed that he was giving some amount to a charitable trust but he had intention to give remaining property to Parwatibai. There was no reference of Satyanarayan Pallod in the first will;

(iii) When in the first will Satyanarayan Bajaj was shown as person who was to administer the property, he took active part in execution of the second will in favour of Satyanarayan Pallod, the cousin of the deceased. He purchased stamp paper on which the will was written;

(iv) There are inconsistencies in the evidence of the scribe of first will and the evidence of attesting witness. Scribe deposed that Dadmat had come to the court campus and there the will was written when the evidence given by other witnesses is that Dadmat was lying on death bed in government hospital;

(v) When Dadmat died due to cancer and prior to the date of execution of will he was admitted in hospital for 2 to 3 months no care was taken to obtain certificate of doctor regarding fitness of Dadmat for execution of will. In this case due to this lacuna suspicion is created regarding fitness of Dadmat and also probability is created about use of fraud and misrepresentation against Dadmat;

(vi) No specific reason is shown in the second will Exhibit 124 as to why Dadmat was preferring his cousin, Satyanarayan Pallod to Parwatibai who was daughter of real sister of Dadmat and when in the first will he had expressed that he wanted to give everything to the real sister.

15) In view of the aforesaid discussion this Court holds that there is no material on the record on the basis of which substantial questions of law can be formulated.

16) In the result, both the second appeals stand dismissed.

Sd/-
(T.V. NALAWADE, J.)

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