

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

6. SA/138/2015
With
CA/3867/2015 In SA/138/2015

BHARATSING RAMBHAU PARDESHI LRS MATHURABAI AND ANOTHER
V/S
GAJARABAI BALCHAND PARDESHI LRS AMBERSING

Mr. D.B.Thoke, Advocate for appellants.

Mr. S.P. Brahme, Advcoate for respondent.

CORAM : T.V. NALAWADE, J.
DATED : 26th October, 2015.

ORDER :

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 43/2004, which was pending in the Court of Principal District Judge, Jalgaon. The appeal was filed by present respondent, who was plaintiff of Regular Civil Suit No. 12/1976, which was pending in the Court of Civil Judge, Junior Division, Pachora, District Jalgaon. The suit was filed for the relief of declaration and possession. The Trial Court had dismissed the suit, but the first appellate Court has set aside the judgment and decree of the trial Court and the suit is partly allowed. Both the sides are heard.

2) The suit was filed by Smt. Gajrabai Balachand Pardeshi in respect of some agricultural lands and house

properties. The agricultural lands are bearing Survey No. 67/1B (area 3 Acres 7 Gunta), Survey No. 108/1 (area 8 Acres 34 Gunta), Survey No. 67/1A (2 Hectors 83 R.), Survey No. 108/2 (Area 90 R.) and house property bearing house No. 185, open space bearing No. 368 and house property bearing No. 191. Agricultural lands and house properties are situated at village Galan, Tahsil Pachora. It was the case of plaintiff that her deceased husband Balachand had three brothers and in the partition, these properties had come to the share of Balachand, and they were his ancestral and joint family properties.

3) It was contended that the first three agricultural lands bearing 67/B, 108/1, 67/1A were given to plaintiff by Balachand about 25 years prior to the date of suit and so, she had been cultivating the said lands personally since then. It was the case of plaintiff that defendant Bharatsing is grandson of brother of Balachand namely Gokhru. The legal heirs Mathurabai and Rajendra are widow and son of Bharatsing. It was contended that the defendant deceived Balachand and plaintiff and on 24.3.1971 they obtained their thumb impressions on some documents for grabbing the properties of Balachand. It was contended that plaintiff and her husband learnt that there was a will and so, on 20.5.1972 plaintiff published notice in newspaper

and she gave notice through advocate to defendant on 11.5.1972 and informed that the so called will was revoked. It was contended that Balachand was illiterate and he was sick during his last days and defendant misused this circumstance.

4) It was the case of plaintiff that after revocation of the will, during her temporary absence, defendant again took away Balachand with him and he had intention to get executed one more document. It was contended that even when the previous will was revoked, the defendant illegally got prepared another will dated 31.1.1973 and in that will, he tried to show that two more properties were bequeathed to him. It was contended that Balachand was sick and was deceived. It was contended that during the last days of Balachand, false criminal cases were filed against plaintiff by defendant to see that she was kept away from Balachand. She contended that to prevent the defendants from grabbing the properties, she had filed Civil Suit No. 140/1972 also, but as Balachand was alive and he was under influence of defendant, the suit was required to be withdrawn.

5) It was the case plaintiff that she had learnt that some other documents like sale deed and gift deed were got executed by the defendant.

6) It was the case of plaintiff that aforesaid transactions are not binding on the plaintiff. Gajarabai executed will on 17.1.1979 in favour of Ambarsing, who is grandson of Gokhru, other real brother of Balachand. It is the case of Ambarsing that he has become owner of all the properties due to this will.

7) Ambarsing contended in the plaint that the properties like Survey Nos. 108/1, 108/2 and house property bearing No. 191 were in his possession till August 1984 and after that the defendant obtained possession forcibly of these properties. The suit was filed in the year 1976 and aforesaid amendment was made by Ambarsing. Balachand died on 15.8.1973. Gajarabai died on 24.3.1984 and after that Ambarsing came on the record. Reliefs were claimed for declaration that the aforesaid two wills shown to be executed in favour of defendant are null and void and further declaration was claimed that the will executed by Gajarabai in favour of Ambarsing in 1979 is binding on defendant and due to that plaintiff Ambarsing has become the owner of suit properties. Ambarsing had claimed the relief of possession of Survey No. 108/1 and 108/2 and house property bearing No. 191. He had prayed for relief of declaration that the gift document dated 20.5.1972 made in respect of

house No. 191 and sale deed dated 21.6.1972 made in respect of Survey No. 108/1 are null and void and they are not binding on him.

8) The defendant Bharatsing filed written statement and he contested the suit. After his death, his widow and his son came on record as legal representative. They admitted the relationship of Gajarabai and Balachand with them and they did not dispute relationship with Ambarsing.

9) The defendants contended that Gajarabai was not entitled to succeed to the property of Balachand. They denied that the property was given by Balachand to Gajarabai prior to his death. They denied that by deceiving Balachand and Gajarabai, the first will dated 24.3.1971 was got executed. It is contended that the will was executed in favour of defendants due to love and affection towards them and due to their relationship and as Balachand had no issue. They denied that the will was revoked during the lifetime of Balachand. They contended that thumb impression of Balachand was obtained by plaintiff and others by deceiving him and it was used for giving notice of revocation of will.

10) Defendants contended that on 31.1.1973 Balachand executed one more will and in the second will, he confirmed first will and in addition to that, he gave two more properties to defendants in the second will. It is contended that the second will was never revoked and as in the second will, the first will was confirmed by Balachand, the defendants got the properties under these wills.

11) The defendants denied that Balachand was sick. They contended that plaintiff, Gajarabai was attending the matters in the Court right from the beginning and so, her case that she was also deceived when the first will was got executed, is false. They contended that Balachand was never living with plaintiff Gajarabai and he was living with his brother Gokhru and Ramchandra, son of Gokhru.

12) It is the case of defendants that Balachand had made arrangement for maintenance of Gajarabai and so, there was no reason for Gajarabai to have grievance regarding wills. The defendants contended that Balachand executed a gift deed in respect of house No. 185 on 20.5.1972 and possession of the house was given to the defendants. It is contended that plaintiff attempted to take possession of this house forcibly and so,

criminal case was required to be filed against her. It is contended that another house property bearing No. 191 was also given under the gift deed. It is contended that Balachand executed sale deed in respect of land Survey No. 108/1 for consideration of Rs. 11,000/- in favour of Ramchandra, son of Gokharu and possession of this land was given to Ramchandra. It is also contended that Balachand had executed general power of attorney in favour of Ramchandra s/o. Gokharu on 17.4.1972. They have contended that the public notice given in newspaper Saptahik Pachore on 23.6.1972 was not given by Balachand and Gajarabai had given this notice out of anger. It is contended that there was one suit between Balachand and his brother Koka and in the written statement filed in that suit, Balachand had made the things clear. It is contended that one proceeding was filed by Gajarabai to see that Balachand comes to her, but Balachand gave statement before the Magistrate on 5.3.1973 and he had expressed that he wanted to live with Ramchandra s/o. Gokhru.

13) It is the case of defendants that Balachand had given Survey No. 67/1A and 67/1B to Gajarabai for her maintenance and she was expected to enjoy the properties till her lifetime. It is their case that Gajarabai illegally sold Survey No. 67/1A to her nephew Shankar s/o. Koka on 8.6.1972, but Survey No. 67/1B is

with Gajarabai and defendants are entitled to get that property also. They have denied that Survey No. 108/2 was owned by Balachand. It is their case that this land was owned by Nathu s/o. Koka. They have contended that house property No. 185 was illegally taken in possession by Gajarabai, but the other two house properties bearing Nos. 368 and 191 are in possession of defendants. It is contended that Gajarabai is acting at the instance of heirs of Koka and other persons of village, who have strained relations with the defendants.

14) On the basis of aforesaid pleadings, issues were framed by the trial Court. The trial Court held that plaintiff failed to prove that the will dated 24.3.1971 was revoked by Gajarabai and Balachand. The trial Court held that thumb impression of Balachand was obtained by deceiving him by some person for publishing notice of revocation of will and so, there was no revocation of will. The trial Court held that the plaintiff failed to prove that two wills were got executed by deceiving Balachand and Gajarabai. However, the trial Court held that Ambersing has proved that Gajarabai executed will in his favour on 17.1.1979. The trial Court refused the relief of possession and declaration. The first appellate Court has set aside the aforesaid findings given against plaintiff. The first appellate Court held that the

burden to prove the due execution of the will was on the propounder, on the defendants. The first appellate Court held that the wills of 1971 and 1973 shown to be executed in favour of defendants are not legal and valid. However, the first appellate Court held that the properties shown to be transferred under gift deed and sale deed of 1972 are transferred to the defendants and these transactions are binding on the plaintiff. The relief of declaration in respect of aforesaid two wills of 1971 and 1973 is given by the first appellate Court. The properties shown to be transferred under the sale deed and gift deed are protected, but the declaration is given in favour of Ambarsing that he has become owner under will dated 17.1.1979 and relief of possession of one property like Gat No. 108/2, which is at present in the possession of defendants, is given to Ambarsing.

15) The learned counsel for original defendants, appellants submitted that substantial questions of law need to be formulated on the basis of grounds mentioned in the appeal memo and particularly the following grounds.

- (i) Whether the first appellate Court has committed the error in not appreciating the revenue record in respect of the suit properties and due to that there is perversity in the judgment of first appellate Court ?

(ii) Whether the first appellate Court has committed error in holding that the will of 1971 was revoked by Balachand and Gajarabai, when in the second will again the first will was confirmed and no complaint as such was made by Balachand after the will of 1973 and due to that there is perversity in the judgment of the first appellate Court ?

(iii) Whether the first appellate Court has committed error in holding that the wills of 1971 and 1973 are not legal and valid when Ambarsing has no personal knowledge about the execution of two wills and due to this circumstance, the decision of the first appellate Court is perverse ?

(iv) Whether the first appellate Court has committed error in not appreciating the circumstance that defendants were in possession of most of the properties and this circumstance supports the execution of wills of 1971 and 1973 and due to such approach of the first appellate Court, there is perversity in the decision ?

16) Under the first will dated 24.3.1971 the properties like agricultural lands Survey Nos. 67/1B, 67/1A, 108/1 and house properties bearing Nos. 191 and 185 were shown to be bequeathed to defendant Bharatsing. Defendant has given evidence by examining witnesses for proving execution of the will, but there is evidence given by plaintiff's side on revocation of will. From the pleadings appearing in the written statement, it can be said that Bharatsing wanted to prove that Balachand was deceived by his wife, plaintiff and the record of revocation was created. He wanted to prove that the thumb impression of Balachand was obtained on some papers and false record like issuing of notice in newspaper of revocation was created. The defendants did not show courage to step in to witness box. On the other hand, the widow of Balachand had come to the Court and she was signatory to this will and it is her case that the will was revoked.

17) In respect of the first will, it can be said that defendant was not sure of getting anything on the basis of first will and so, the first will, the original document was not produced. There is clear possibility that it was revoked and so, defendant was not in possession of the first will. As defendant

has not examined himself, adverse inference needs to be drawn against him in respect of this circumstance.

18) Gajarabai, plaintiff was also signatory as testatrix to will of 1971 and so, her conduct is important. Witnesses are examined to show that Gajarabai had approached advocate and for her, the advocate had prepared draft of revocation and the draft was published in newspaper. One witness from newspaper Saptahik Pachora is examined to prove that public notice of Gajarabai was published in respect of will of 1971. This notice was drafted by Advocate Shri. Adhav and he had given evidence that he had given the notice for publication to the newspaper on the basis of instructions of the lady. The relevant record is proved as Exh. 71 (71A and 71B). This evidence and the record is more than sufficient to prove that during the lifetime of Balachand, Gajarabai had separately revoked the will of 1971. Witnesses are examined to prove that Balachand had also revoked the will. One employee of newspaper Shri. Vikas is examined in that regard and Advocate Shri. Thepde is examined. According to this advocate, Balachand had come to him with instruction for publishing the notice of revocation of will and he had prepared the draft and he had given notice for publication to this newspaper. The relevant record is proved as Exhs. 73 and

73-A. Thus, there is convincing evidence to prove that both Gajarabai and Balachand had approached advocates, the advocates had prepared the revocation notices for these two persons and the notices were actually published in the newspaper. In view of the pleadings in written statement, which is already quoted, it was necessary for defendant to give evidence in rebuttal, but no such evidence is given. It needs to be mentioned that no permission was obtained to lead secondary evidence in respect of the will of 1971 and thus, it was not possible for defendant to prove that the aforesaid properties were bequeathed by Balachand and Gajarabai to him. In written statement, it is further contended that Survey No. 67/1A and 67/1B were given to Gajarabai for her maintenance. But, those properties are also mentioned in the will of 1971. Thus, there were not only the suspicious circumstances surrounding the will, but there is convincing evidence to prove that two persons were signatories to the will, had revoked this will.

19) In the will of 1973, an attempt is made to show that the record of revocation of the first will was created by deceiving Balachand. Balachand is not there and defendant has not stepped in witness box. On the other hand, there is aforesaid

conduct of Gajarabai. So, not much importance could have been given to such mention in the will of 1973 even if the defendant was able to prove the due execution of second will.

20) Under the will of 1973, the land Gat No. 108/1 and house property No. 368 were shown to be bequeathed to defendant Bharatsing. One witness Chinda Pardeshi, who signed as attesting witness is examined to prove the execution of this will, Exh. 133. He has deposed that in his presence, Balachand had put his thumb impression on the will and this will was subsequently registered in the office of Sub-Registrar. This witness is maternal uncle of defendant and he is interested witness. In the cross examination, he has tried to say that at the relevant time, Gajarabai was living with Balachand. This evidence is not consistent with the case of defendant and further, there are aforesaid circumstances showing the conduct of Gajarabai. Further, when under the will Survey No. 108/1 was shown to be bequeathed to defendant, the sale deed of this property was shown to be executed in favour of father of defendant. This circumstance again creates doubt about the due execution of the will. It can be said that this will was not used for any purpose. Though other property like house No. 368 is shown to be bequeathed after the death of Balachand, the

name of Gajarabai was entered in the assessment record of this property. The Courts below have held that Gajarabai was in possession of this house property. Thus, the second will is surrounded by suspicious circumstances and there is finding in that regard of the fact finding Court, the first appellate Court.

21) So far as Survey No. 108/2 is concerned, this property was neither shown in the first will nor in the second will. Ambarsing, the grandson of other brother Lalchand, has prosecuted the matter on the basis of will executed by Gajarabai in his favour. This property is in possession of defendant, but as it is not the case of defendant that this property was bequeathed or in any way transferred in his favour and as there is the will in favour of Ambarsing, the trial Court has given the decree in favour of Ambarsingh in respect of this property.

22) The will of Gajarabai of 1979 executed in favour of Ambarsing is duly proved by examining attesting witnesses. These witnesses have given evidence that the will was prepared on the basis of instructions given by Gajarabai. This will was registered and it is at Exh. 57. Bhimrao and Onkar are attesting witnesses and nothing could be brought on the record to create suspicion about the due execution of this will. As the suit was

filed by Gajarabai against Bharatsing and relations between Gajarabai and Bharatsing were strained, it was not possible that Gajarabai would have left the property behind her to which succession could have been claimed by Bharatsing. It appears that both Bharatsing and Ambarsing are similarly placed and they would have got equal share in absence of will of Gajarabai. Gajarabai's will is duly proved and in this will, Gajarabai has bequeathed all her properties which were standing in her name and in the name of her deceased husband, Balachand. The aforesaid discussion shows that all the material is considered by the first appellate Court which is the last fact finding Court. No error can be found in the decision given by the first appellate Court. Thus, no substantial question of law can be formulated in the present matter.

23) In the result, the appeal stands dismissed. Civil Application stands disposed of.

[T.V. NALAWADE, J.]

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