

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

**Second Appeal No.465 of 2012
With
Civil Application No.7905 of 2012**

Madhukar S/o. Ramchandra Wani
Since deceased through his legal
representatives
And Others.

.. Appellants.

Versus

Sulochanabai W/o. Gopalkrushna
Wani, Deceased through legal
representatives & Others.

.. Respondents.

Shri. L.V. Sangit, Advocate, for appellants.

Shri. P.R. Patil, Advocate, holding for Shri. Sandesh R
Patil, for respondents.

CORAM: T.V. NALAWADE, J.

DATE : 20th OCTOBER 2015

ORDER:

1) The appeal is filed by the original defendants of Special Civil Suit No.439 of 1998 which was pending in the Court of the Civil Judge, Senior Division, Jalgaon. The defendants have challenged the judgment and decree of the trial Court and also the judgment and order of Regular

Civil Appeal No.351 of 2001 which was pending in the District Court. Both sides are heard.

2) The suit was filed by present respondents in respect of ground floor portion of House bearing CTS No. 1697/A/33/K situated at Bhawani Peth, Jalgaon. It is the case of the plaintiff that this house property was owned by Ramchandra, father of plaintiff No.1 and defendant No.1 and 2. It is contended that the plaintiff No.2 is son of deceased daughter of Ramchandra. It is the case of the plaintiffs that entire house property was gifted by Ramchandra under registered gift deed of the year 1950 to his wife Parwatibai. Parwatibai was the mother of plaintiff No.1 and defendant Nos.1 and 2. It is the case of the plaintiffs that Parwatibai bequeathed the entire house property under a will and this will was registered by her. It is contended that Ramchandra had given his other properties to defendants Nos.1, 2 and other sons.

3) It is the case of the plaintiffs that out of love and affection Parwatibai had allowed defendant Nos.1 and 2 to use ground floor portion of the aforesaid house. It is

contended that defendant Nos.1 and 2 had agreed to vacate the premises on demand. It is contended that after the death of Parwatibai when plaintiffs were in need, they asked the defendants to vacate the premises and even notice was given in that regard. It is contended that the defendants have refused to vacate the premises so the suit is required to be filed.

4) The defendants admitted the relationship with plaintiffs. They denied that Ramchandra was absolute owner of aforesaid house. They denied that Ramchandra had gifted this house to Parwatibai. They denied that Parwatibai bequeathed the house to the plaintiffs under will and she had registered it. They have contended that Parwatibai used to sign and as there is thumb impression on the will and not signature, the document is a forged document. They contended that the house is the ancestral and joint Hindu family property of the plaintiffs, the defendants and other brothers of defendants and so it was necessary for the plaintiffs to file a suit for partition and the suit in the present form is not tenable.

5) On the aforesaid pleadings issues were framed. Both the sides gave evidence. The trial Court gave finding that it was the property of Ramchandra and Ramchandra had gifted the entire house to his wife Parwatibai. The trial Court has further held that plaintiffs have proved due execution of will executed by Parwatibai. As all relevant findings are given in favour of the plaintiffs, relief of possession is given by the trial Court. These findings and decision are confirmed by the First Appellate Court.

6) Learned counsel for the appellants, defendants submitted that some vital admissions about the execution of will appearing in the evidence of the scribe are ignored by the Courts below and due to that there is perversity in the decision of the Courts below. Learned counsel for the appellants submitted that provisions of Hindu Law and Succession Act with regard to the will are not correctly applied and due to that there is perversity in the decision. Learned counsel for the appellant submitted that the circumstance that appellants have been in possession of the suit property for about 60 years and they have become owner due to adverse possession is not correctly

considered by the Courts below and due to that there is perversity in the decision. Learned counsel for the appellants submitted that on the aforesaid grounds, substantial questions of law need to be formulated.

7) The judgments of the Courts below and the record show that original gift deed which is registered document was produced by the plaintiffs. This document is produced from proper custody. The document was executed in the year 1950 and original document was produced in Court in 1998, after more than 30 years. In view of provision of section 90 of the Evidence Act, the trial Court gave exhibit to this document. This document is registered document and as there are other circumstances the contents are read in evidence.

8) The record of city survey of the aforesaid house is produced by the plaintiffs. It is not disputed that Parwatibai was paying house tax and the house was standing in the name of Parwatibai on the record of local body and also in the city survey record. The record shows that entry was made on the basis of gift document of the

year 1950. The defendant Nos.1 and 2 have been living in the same house, in the ground floor and their case shows that they were living with Parwatibai. In the evidence, they have given admission that Parwatibai was paying the property tax. In view of these circumstances, there was no room for both the defendants to challenge the document of gift made in favour of Parwatibai by her husband unless there was some record to show that it was joint Hindu family property of Ramchandra.

9) Plaintiff No.2 gave evidence in respect of the gift document and the will but he has no personal knowledge in respect of the gift document. His evidence shows that he came to the suit property and started living there with Parwatibai as his mother died in the year 1967 when plaintiff No.2 was aged about 7 years. The defendants are not disputing that since then plaintiff No.2 has been living there. They have admitted that on the date of the suit, defendant No. 2 was occupying first floor of this building. This evidence can be considered as a circumstance in favour of the gift and the case of the plaintiffs that it was absolute property of Ramchandra.

10) Defendant No.2 has given vital admissions in the cross examination. On the date of the evidence he was aged 70 years and from the record it can be said that he was major on the date of the gift. He has deposed that the suit house was in the name of Ramchandra though he tried to say that the house was purchased from the income of Ramchandra and his sons. Both the Courts below have held that the house was purchased probably in the year 1932. In that year no son of Ramchandra was major. There is no evidence given to show that Ramchandra was having some ancestral property with him. Ramchandra was self made man and he was in business of selling pulses. The Courts below have considered the circumstances like age of the defendants and other sons of Ramchandra and the date of purchase of the suit property and the Courts below have rightly held that the property was purchased by Ramchandra from his own income, it was self acquired property of Ramchandra. As there is virtually no evidence on nucleus no error can be found in the findings given by the Courts below on this point.

11) In Exhibit 117, the gift document, Ramchandra had specifically mentioned that the house property was his self acquired property. The description is given as two storeyed building. Defendant No.1 has given admission that construction was made by Ramchandra. This evidence is more than sufficient to prove that the property was absolute property of Ramchandra and he had gifted the property to Parwatibai. The gift document further shows that Ramchandra was not sure about the conduct of his two sons who had become major and he had fear that they may not take care of his wife. By expressing this fear Ramchandra gifted the property to his wife. This gift was acted upon as already observed.

12) So far as the will is concerned it can be said that plaintiff No.2 was aged 18 years on the date of execution of will. He has not signed in any capacity on this will. Though he has tried to say that will was executed in his presence, not much importance can be given to his evidence for proving the execution of will. The due execution of the will is proved by the plaintiffs by examining two attesting witnesses and also the scribe.

13) Gopal Wani, husband of plaintiff No.1, can be said to be interested in the matter as the property is given to his wife also. He has given evidence that as Parwatibai called him, he went to Parwatibai and he helped her in execution of the will. He signed the document as attesting witness. He has given evidence that in his presence Parwatibai put thumb impression on the will and he signed in the presence of Parwatibai. The other witness Joshi is examined for proving the execution and his evidence is consistent with the record. There is other evidence like endorsement on the will showing that it is Parwatibai who had presented the will for registration in the office of Sub Registrar. Parwatibai was identified by the scribe before the Sub Registrar. The will is exhibited at Exhibit 76. The scribe Vithal Bari is examined to prove the contents and further there is original will on the record. Bari has given evidence that he wrote the contents of the will as per instructions given by Parwatibai. He has given evidence that he had identified Parwatibai in the office of Sub Registrar when she gave thumb impression before Sub Registrar on the will. Though in the cross examination the scribe has given some answers which can

be called as vague, it needs to be kept in mind that he is a bond writer and he writes many documents every day. His evidence needs to be consistent only with the record and it cannot be expected from him that he needs to remember all the incidents in respect of each and every document. His evidence was given after about 21 years of the date of execution of the will.

14) The will was executed in the year 1979 by Parwatibai and she died in the year 1984 due to old age. No specific defence is taken by defendants that in the year 1979 she was not fit to execute the will. The three witnesses examined by the plaintiffs have not given any admission creating probability that Parwatibai was not understanding the things, she was not fit to execute the will. The aforesaid circumstances show that Parwatibai handed over the gift document to the propounder of will. In the year 1995 entry was made in record of city survey of the suit property on the basis of this will.

15) The defence of the defendants that Parwatibai used to sign and she was not using thumb impression is

proved to be false. Defendant No.2 has admitted in his evidence that partition was effected amongst sons of Ramchandra and other properties left behind by Ramchandra were partitioned by them amongst themselves. The document created after the partition which is at Exhibit 107 is not disputed by this defendant and this document shows that in the year 1950, after the death of Ramchandra, the other house properties of Ramchandra were partitioned. Defendant No.1 got Rs.2000/- as his share and other sons got portions in different house properties. This document further shows that Parwatibai had acted as guardian of defendant No.1 as he was minor at that time and she had put her thumb impression for him on the memorandum of partition. There is mention about this partition in the will left behind by Parwatibai. Thus, Parwatibai was using thumb impression and in the year 1950 also she had used thumb impression.

16) There was reason for Parwatibai for giving suit property to the plaintiffs who are daughter and son of deceased daughter of Parwatibai. In view of the evidence

already discussed, plaintiff No.2 was in need of shelter. When he was aged about 7 years, shelter was given to him by Parwatibai and it is admitted that plaintiff No.2 was living in the house till death of Parwatibai. It can be said that due to circumstance that other properties were given to the sons and there were circumstances like above, the suit property was given to the plaintiffs by Parwatibai under the will. Thus there is nothing which can be called as suspicious about the will.

17) As regards the defence of limitation taken by the defendants there is no specific pleading in that regard. It is admitted that defendants were living with Parwatibai in this house and the record is sufficient to prove that she was owner. Defendants were there as sons of Parwatibai and after death of Parwatibai it was up to the plaintiffs to take decision for allowing or not allowing the defendants to continue the permissive possession. There is record to show that by giving notice, plaintiffs asked defendants to hand over possession and when they refused, suit came to be filed. The suit was filed on the basis of title and so there was no other alternative before

the Court than to give relief of possession.

18) Learned counsel for the appellants placed reliance on a case reported as **2005 (1) Mh.L.J. 293 (Zarina v. Shapur)**. He took this Court through the observations made in paragraph 23. Facts and circumstances of each and every case are always different. Whether a will is surrounded by suspicious circumstance is a question of fact. Both the Courts below have given finding in favour of the propounder of will in this regard and there is no room to frame substantial question of law on this point. All the aforesaid material is considered by the Courts below. There is nothing on the basis of which substantial questions of law can be formulated on any other point.

19) In the result, the appeal stands dismissed. Civil application stands disposed of.

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

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