

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 15 OF 2015**

- 1] Mr. Damodar Vassant Parulekar
Aged 66 years, and his wife
- 2] Mrs. Rupali Damodar Parulekar,
Aged 53 years,
Both residing at H-12 Hill View
Madhuban CHS Ltd., S. Ines,
Panaji, Goa 403 002. **... Appellants.**

Versus

- 1] Ravindra Vassant Parulekar
Aged 64 years, Physician
and his wife
- 2] Mrs. Smita Ravindra Parulekar
Aged 61 years, both residing
At H.N.9/179/B, Baina,
Vasco Da Gama, Goa 403 802 **... Respondents**

Mr. M. B. Da Costa, Senior Advocate for the appellants.

Mr. Sudin Usgaonkar, Senior Advocate for the respondents.

Coram : C. V. BHADANG, J.

Date : 8th July, 2015.

ORDER :

By this appeal the appellants – plaintiffs are challenging the judgment and decree dated 5th December, 2014 passed by the learned District Judge-2, South Goa, Margao in Regular Civil Appeal No.107/2014. By the impugned judgment, the appeal filed by the respondents – defendants has been allowed, thereby dismissing Regular Civil Suit No.65/2012/A filed by the appellants.

2] Brief facts are that the appellant No.1 and the respondent No.1 are brothers. The appellant No.2 is the wife of the appellant No.1, while the respondent No.2 is the wife of respondent No.1. The dispute pertains to a Will dated 25th August, 1994 (Exh.22) executed by Premabai, the mother of the appellant No.1 and the respondent No.1. The appellants had filed the suit for declaration that the Will (Exh.22) dated 25th August, 1994 drawn by the Notary Ex-officio at Vasco in the book of Wills bearing No.34, is null and void. According to the appellants, the respondent No.1 had gone to Bombay for further studies and was staying at Bombay till the year 1984. The appellants were staying in Goa. The respondent No.1 happens to be a medical practitioner. It was contended that the respondents had virtually imprisoned Premabai. She was not having any liberty to talk to the appellants. Premabai passed away on 22nd December, 2001 at Goa Medical College, on account of multiple organ failure. After about three months, the appellant No.1 requested the respondent No.1 to fix a meeting between them, to discuss how the partition of the estate of Premabai is to be effected. The respondent No.1 kept avoiding the same on one pretext or the other. Sometime in 2009, the respondent No.1 informed the appellant No.1 about the Will executed by Premabai. Thereupon, the appellant No.1 requested for a copy of the Will. The appellant No.1 obtained a

certified copy of the Will from the office of the Sub-Registrar, when for the first time the appellants learnt that there was a will dated 25th August, 1994 executed by deceased Premabai. According to the appellants, the deceased was being treated and attended by the respondent No.1 during her illness, as a Physician besides being her son staying with her. Thus, the respondent No.1 had undue influence on the deceased and on account of the same, the Will was got executed. It was contended that Premabai did not know English and only knew reading Marathi.

3] It was also contended that in the year 1994, Premabai had written a letter to the appellants complaining that she was not allowed to talk to the appellants, and she was also prevented from making any phone calls. She claimed that a nurse was kept on her watch in the absence of the respondents. The appellants claimed, that only because Premabai was unable to write with ease, she dictated the letter to someone, who wrote it for her and she signed the said letter, “probably in a hurry in which she signed on the top of the letter instead of at the bottom”. It was also claimed that she sent the letter through a messenger along with Rs.5,000/-, for the appellants' son and the amount was delivered in the house of the appellants in their absence.

4] The respondents appeared and resisted the suit. All the adverse allegations were denied. It was contended that Premabai was staying with the respondents. Out of her own freewill, she had executed the Will before the Notary, in the presence of three witnesses, as per law. It was thus denied that the Will was the result of an undue influence exercised by the respondents on Premabai.

5] The learned trial Court framed the following three issues :

- (i) Whether the Will dated 25.08.1994 was executed by Smt. Premabai Vasant Parulekar under undue influence of defendant No.1 ?
- (ii) Whether it is proved that Smt. Premabai Vasant Parulekar did not know that the document is a Will ?
- (iii) Whether it is proved that Will dated 25.08.1994 is null and void ?

6] On behalf of the appellants, the appellant No.1 examined himself apart from PW-2 Sadanand Patel, PW-3 Dr. Edwin Gomes, PW-4 Kamalini Prabhu and PW-5 Nalini Samant. While the respondent No.1 examined himself along with DW-2 T. T. Krishnan, DW-3 Adv. Albino Vales and DW-4 Prashant Samant. The learned trial Court came to the conclusion that Premabai had executed a Will Exh.22, under undue influence of the respondent No.1 and thus, decreed the suit. The appeal filed by the appellants was allowed

thereby dismissing the suit. The First Appellate Court framed a solitary point namely, whether the Will dated 25th August, 1994 executed by Smt. Premabai, is null and void, having been executed under undue influence of the respondent No.1, which was answered in the negative.

7] It is submitted by Mr. M. B. Da Costa, the learned senior counsel for the appellants that the execution of the Will is clearly against the provisions of Article 1912, 1913, 1918 and 1919 of the Portuguese Civil Code ('Civil Code' for short). Reliance is placed on the Notarial Laws into decree No.8373 in order to submit that a public Will as contemplated under Article 1911 of the Civil Code, has to be declared / executed before any Notary and three competent witnesses. It is submitted that under Article 1913 of the Civil Code, the Notary and the witnesses should be satisfied that the testator was in perfect senses and wholly free from any coercion. It is submitted that under Article 1918 of the Civil Code, all the formalities attached to the declaration / execution of the Will, have to be carried out continuously and faithfully. Mr. Da Costa, the learned senior counsel referred to the evidence of DW-3 Albino Vales, who is one of the attesting witness to the Will, in order to submit that the said witness had admitted that he reached the office of the Sub-Registrar after the

writing of the Will had started. It is submitted that this witness reached five minutes thereafter (after the writing of the Will had started). It was thus urged that all the formalities, which are required under Law for the execution / declaration of the Will in presence of three attesting witnesses, cannot be said to be complied with in this case. The learned Senior Counsel has also taken me through the evidence of this witness in order to show that when he has admitted that no draft of the Will was given to the Notary in his presence. He also submitted that the DW-3 has admitted that Premabai spoke to the Sub-Registrar in Konkani and there was no one present to translate the narration in Konkani into English or to translate the contents to Will in Konkani to Premabai. The learned senior counsel has referred to a recital at the end of the Will namely “draft of this Will was furnished by the party”, in order to submit that it is not clear, as to who has submitted the draft. The learned senior counsel has also referred to some other aspects about the signature of Premabai on the subject Will, in order to submit that it is shown to be, both in Devnagari and English, while DW-3 Albino Vales has stated that she had signed in Gujarathi. It is thus submitted that the impugned judgment of the Appellate Court reversing the finding of the trial Court, is not legal and proper.

8] On the contrary, it is submitted by Mr. Usgaonkar, the learned senior counsel for the respondents that this being a second appeal, the scope of examination is essentially limited. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Santosh Hazari V/s Purushottam Tiwari (deceased) by LRs. reported in (2001) 3 Supreme Court Cases 179***, in order to submit that for a question of law to be substantial question of law, there must be first a foundation for it laid in the pleadings. It is submitted that the appellants cannot make out a entirely new case for the first time before the High Court. He submitted that the appellants went before the trial Court on the sole ground that, the will was vitiated on account of it being the result of the undue influence exercised by the respondent No.1. He submitted that the said ground has rightly been negatived by the Appellate Court and that finding of fact not being demonstrated to be perverse, does not call for any interference. The learned senior counsel has taken me through the evidence of PW-3 Dr. Edwin Gomes, in order to point out that the said witness has in fact stated that he reached Sub-Registrar's office five minutes before the writing of the Will started. It is submitted that in the matter of a public Will as provided under Article 1911 of the Civil Code, sufficient safe-guards are taken wherein the Will has to be declared before a Notary and three competent witnesses. He submitted that the

ground based on non-compliance with the provisions of Article 1912, 1913, 1918 and 1919 cannot be raised for the first time before this Court, in a second appeal. He therefore urged that the appeal be dismissed.

9] I have considered the rival circumstances and the submissions made. It is apparent that the appellants went before the trial Court challenging the Will on the ground that Premabai was under the undue influence of the respondent No.1, as he was treating her both as a Physician and as a son, and Premabai was practically imprisoned in the house and was not allowed to talk or interact with others. Thus, the only ground with which the appellants approached the trial Court challenging the Will was that it was vitiated by undue influence.

10] The First Appellate Court has framed a solitary issue to that effect and has went upon considering the evidence in order to find out, whether the same stands proved. It is not in dispute that Premabai was about 67 years of age at the time of execution of the Will and was staying along with the respondent No.1. Incidentally as the appellant No.1 also happens to be a medical practitioner, he must be treating Premabai during her illness and looking after her. The

Appellate Court has found in Para.57 of the Judgment that there was no material to suggest that Premabai was being ill-treated or was not in a fit state of mind, at the time of execution of the Will. The discussion in Para. 57 shows that it was argued before the Appellate Court that Premabai was under depression due to successive deaths in the family, which was found to be contrary to the case of the appellants as found in the plaint.

11] It would be necessary at this stage to reproduce the substantial question of law, which according to the appellants arise in this appeal as under :

- 1) *Whether the will was drawn in contravention of Articles 1912, 1913, 1918 of the Civil Code and, therefore the consequences provided in Article 1919 ensued, that is, the will is of no effect .*
- 2) *Whether there has been a misconstruction of Articles 1912, 1913, 1918 and consequently of Article 1919 of the Civil Code.*
- 3(a) *the Notary, ex facie, failed to faithfully record in terms of Article 1918 that the witness Albino Valles had walked into his cabin 5 minutes after he had started to record the will and that he was not there at the inception, that is, at the time when the law requires that the notary as well as the witnesses should ascertain whether the testatrix was in her perfect senses and free from any coercion or undue influence.*

- 3(b) *the Notary, ex facie, failed to record that the witness Valles got to know the state of the mind of the testatrix by the manner she spoke to the Notary when he walked into his cabin 5 minutes after the Notary had started to recording the will.*
- 3(c) *the Notary, ex facie, did not record the true facts, in that the will records that the testatrix appeared along with three witness when factually witness Valles admits that he reached 5 minutes after recording of the will had started.*
- 3(d) *the Notary, ex facie, did not record the facts faithfully when he records that the three witnesses ascertained that the testatrix was in her perfect senses and free from coercion before she stated her wish when factually the witness Valles admits that he was not present when the Notary started recording the will and further admits that he did not know before the testatrix started her narration whether she was in her proper senses or without undue influence or coercion.*
- 3(e) *the Notary, ex facie, did not record the facts faithfully in that the Notary records that the draft of the will was furnished by the party (without stating whether that 'party' is the beneficiary or the testatrix and without recording at what point of time the draft was furnished) when the witness Valles states that the draft referred to in the will was not given in his presence.*

Thus, it can be seen that grounds in Para.3(a) to (e) are all based on the assumption that PW-3 has stated that the writing of

the Will was started five minutes before he reached the office of the Sub-Registrar. However, the evidence is otherwise.

It may be mentioned that DW-3 in his cross-examination has stated thus :

“I am unable to say whether I was not having any matters in Court on 25th of August, 1994, as I do not have that diary. The execution of the will took about half an hour. I do not recollect who wrote the will, in the office of the Sub-Registrar. The writing of the will was started about 5 minutes after I entered the cabin of the Registrar. I do not remember who was the Notary Public Ex-Officio at the time of the execution of the will”.

(emphasis supplied)

Faced with this situation, the learned Senior Sounsel had sought time for verifying the certified copy of the evidence. After verification it was not disputed that this witness has stated that the writing of the Will was started about five minutes “after he entered the cabin of the Sub-Registrar”. Thus the grounds as set out in Para.3(a) to 3(e) would not survive.

12] Insofar as the grounds based on Articles 1912 to 1919 of the Civil Code are concerned, they were not raised before the trial

Court. Be that as it may on perusal of the evidence as also the judgment of the Appellate Court, it cannot be said that any of the formalities as required under Article 1912 to 1918 have not been followed. Article 1919 only speaks about the liability of the Notary, when it provides that when any of the formalities are lacking, not only the Will shall be of no effect, but the Notary shall be held liable for damages and shall lose his job. Even, as regards the recital in the Will namely the draft of the Will being furnished by the “party”, it is nobody's case that the beneficiary was present before the Sub-Registrar. Thus, merely because the Will recites that the draft of the Will was furnished by the party (and does not specifically say that it was furnished by the testator Premabai) would be of no consequences. The Hon'ble Apex Court in the case of ***Santosh Hazari*** (supra) has held thus :

A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law “involving in the case” there must be first a foundation for it laid in the

pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not ; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

13] On consideration of rival circumstances and the submissions made, I do not find that the appeal raises any substantial question of law.

14] In the result, the appeal is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

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