

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)**

SECOND APPEAL NO. 179 OF 1993

Shri Lalsaheb Tukaram Dhabugade
@ Namdev Tukaram Dhabugade,
Since deceased through his L.Rs
and representatives.

1.a) Smt. Indubai Namdev Dhabugade,
age 65 years, Occ. Household,

1.b) Anandrao Namdev Dhabugade,
age 41 years, Occ. Agriculturist

1.c) Ravindra Namdev Dhabugade,
age 38 years, Occ. Private service,

All R/o. Tasgaon, Tal. Tasgaon,
Distt. Sangli.

1.d) Sau. Chhaya Baban Yadav,
age 43 years, Occ. Household,
R/o. Hajarwadi, Tal. Palus,
Distt. Sangli

..

**APPELLANTS/
Org. Defendts**

.. **Versus** ..

Yeshwant Balu Shelke,
aged about 42 years, Occ. Agriculturist,
R/o. Tasgaon, Distt. Sangli

..

RESPONDENT

...

Mr. Rahul S. Kate, Advocate, for appellants.
Mr. A.B.Vagyani, Advocate for Respondent

**CORAM : R.K.Deshpande, J.
DATED : 11th JUNE, 2015.**

ORAL JUDGMENT

Regular Civil Suit No. 70 of 1982 filed by the plaintiff for possession of the suit property on the basis of the registered sale deed dated 04.07.1983 (Exh.33) executed by one Smt. Bhagubai, the real owner of the suit property was dismissed by the trial Court by its judgment and order dated 27th August, 1987. In Regular Civil Appeal No. 414 of 1987, the learned 3rd Additional District Judge at Sangli has set aside the judgment and decree passed by the trial Court and the suit filed by the plaintiff has been decreed on 27.01.1993 directing the defendant to hand over the possession of the suit property to the plaintiff. Hence, the defendant is in this second appeal before this Court.

2] The matter was admitted on 07.04.1993 stating there ground nos. (g), (h) and (i) constituting substantial questions of law. The said grounds in the memo of appeal are reproduced below;

- (g) *When the evidence shows that the Respondent is in fiduciary relation with the deceased Bhagubai who was pretty old lady and when the Appellant is disputing the legality and genuineness of the document, the burden lies on the Respondent to show that the deed in question was not obtained under undue influence and fraud.*
- (h) *Looking to the fact that parties are real brothers inter-se and that the Respondent was residing in the*

house of Appellant and Bhagubai who is an illiterate lady, reasonable inference can be drawn that the respondent was in a position of dominating the will of the deceased Bhagubai, onus lies on the Respondent to prove otherwise.

- (i) *At any rate the document in question is bogus as no consideration was paid as the evidence shows that the deceased Bhagubai was intending to transfer the suit property as her heirs and the price was not the consideration.*

3] Undisputedly, Smt. Bhagubai was the owner of the suit property and it was her self acquired property. Both the courts below have recorded the concurrent finding of fact that the sale deed executed by Smt. Bhagubai in favour of the plaintiff on 04.08.1972 at Exh. 33 has been proved. The trial Court recorded the finding that the plaintiff was in the fiduciary relationship with Smt. Bhagubai, who was aged about 90 years at the time of execution of the sale deed and was bed-ridden. The trial Court relying upon Section 16 of the Indian Contract Act has held that the burden was upon the plaintiff to establish that the sale dated 04.08.1973 was not induced by undue influence. The trial court further held that there is no evidence on record brought by the plaintiff to establish that consideration of Rs.500/- was paid for purchase of the suit property by the plaintiff. The trial Court has also held that the sale deed at Exh. 33 is a bogus document without paying any consideration to Smt. Bhagubai and it will not transfer any title in favour of the plaintiff.

4] The appellate Court considered the findings recorded by the trial Court and has held that it was a case where the burden of proof was on the defendant to establish that the sale deed at Exh.33 was influenced by undue influence and fraud. The appellate Court went through the pleadings of the parties and has held that the findings recorded by the trial Court are not supported by any pleadings and evidence on record. The appellate Court has further held that the defendant has failed to establish undue influence or fraud on the part of the plaintiff in obtaining such a sale deed. The appellate Court, therefore, reversed the finding recorded by the trial Court and passed a decree for possession on the basis of title proved by the plaintiff.

5] With the assistance of the learned counsel appearing for the parties, I have gone through the judgment delivered by both the courts below, the pleadings and the evidence brought on record. The case of the defendant was that he is the adopted son of Smt. Bhagubai in the year 1960 and Smt. Bhagubai was staying with him at Mumbai. The plaintiff was staying at Sangli. Subsequently in the year 1970, the plaintiff came to Mumbai after leaving the job and started residing

along with the defendant, his wife and also the brother Pandurang and the deceased Smt. Bhagubai. The plaintiff states in his oral evidence that Smt. Bhagubai was his maternal grant-mother.

6] I have gone through the written statement filed by the defendant and I do not find any assertion in the written statement that the plaintiff was in a fiduciary relationship with Smt. Bhagubai. There is absolutely no evidence to show such a relationship between the plaintiff and Smt. Bhagubai. Smt. Bhagubai was throughout staying with the defendant and the plaintiff was staying at different place. Subsequently the plaintiff started residing with the defendant and his wife, brother and Smt. Bhagubai. The fiduciary relationship has not at all been established. In view of this, the trial Court committed an error of law in holding that the burden of proof was upon the plaintiff to establish that the sale deed at Exh.33 was not induced by undue influence. The burden was, therefore, upon the defendant to establish that the sale deed was influenced by the undue influence. The appellate Court has at any rate taken a possible view of the matter. The substantial question of law in ground nos. (g) and (h) reproduced above are, therefore, answered accordingly.

7] The sale deed was executed on 04.08.1973. Smt. Bhagubai died on 12.12.1979 and the suit in question was filed by the plaintiff upon his dispossession, claiming restoration of the possession on the basis of title in the year 1980. The defendant did not challenge such sale deed from the year 1973. The appellant Court has considered the pleas of the defendant and has held that the findings recorded by the trial Court are not supported by the pleadings and the evidence on record. Once the sale deed is proved and in the absence of any specific pleadings regarding fraud and undue influence as are required under Order VI, Rule 4 of C.P.C., no fault can be found with the view taken by the appellate court that the defendant has failed to establish undue influence and fraud in execution of the sale deed. I have also gone through the pleadings and I do not find any specific pleading in written statement to the effect that the sale deed was bogus without any consideration. In view of this, the substantial question of law no. (i) framed by this Court is answered accordingly.

8] In view of above, second appeal is dismissed. No order as to cost.

(R.K.Deshpande, J.)