

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.404 OF 2014

Vishal s/o Narayan Mude

-vs-

Suresh s/o Dadaji Mude

WITH

SECOND APPEAL NO.423 OF 2014

Vishal s/o Narayan Mude & Anr.

-vs-

Suresh s/o Dadaji Mude & Ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri K. R. Lule, Advocate for appellant in both the
appeals.

Shri A. K. Waghmare, Advocate for respondent No.1.

Shri H. N. Potbhare, Advocate for respondent No.5 in
S.A.No.423/2014.

CORAM : A.S.CHANDURKAR J.

DATE : FEBRUARY 16, 2015.

Both these appeals arise out of common judgment dated 10/07/2014 whereby the appeals preferred by original defendant Nos.1 and 3 came to be dismissed and the decree passed by the trial Court came to be confirmed.

The subject matter of the suit between the parties is field Survey No.7(1/A) admeasuring 1 H 25 R at mouza Nimboli, Tah. Seloo, Dist. Wardha. According to the plaintiff in RCS Nos.252 of 2008 and 253 of 2008, in the year 1990 there was a partition between the members of joint family including the sons of one Dadaji. The plaintiff in RCS No.252 of 2008 was the second wife of said Dadaji and according to her, in the said partition, the suit

property was retained by Dadaji and was to come to her share after the death of her husband Dadaji. According to the plaintiff, the defendants obstructed the possession of the plaintiff on the basis of a Will dated 15/07/1997. Hence a suit came to be filed for permanent injunction restraining the defendants from obstructing the possession. Similarly, RCS No.253 of 2008 came to be filed for declaration that said Will dated 15/07/1997 was null and void and not binding on Yamunabai.

According to the defendant, ownership was claimed on the basis of registered Will dated 15/07/1997. It was his stand that after the death of Dadaji on 15/03/2000, the defendant had become full owner of the property in question.

The trial Court decided both the suits together on the basis of common evidence led by the parties. It held that the Will dated 15/07/1997 did not give any entitlement to the defendant. It therefore granted declaration that said Will was null and void and not binding on the plaintiff. It therefore held that the plaintiff had 1/8th share in the suit property as per the partition deed.

The first appellate Court after re-appreciating the evidence on record, affirmed the findings recorded by the trial Court and dismissed both the appeals filed by the original defendant.

Shri K. R. Lule, learned counsel appearing for the appellant in both the appeals submitted that in the plaint in RCS No. 252 of 2008, the plaintiff had specifically come up with the case that a Will had been executed by Dadaji on the basis of which the defendant was claiming ownership. He submitted that said Will dated 15/07/1997 was also produced on record by the plaintiff. This fact was further fortified in the evidence of PW-1 Suresh Mude. Hence according to him, execution of said Will having been admitted, the provisions of Section 58 of the Indian Evidence Act

1872 (for short, the said Act) were applicable and hence said fact of execution of the Will was not required to be proved. He submitted that both the Courts applied provisions of Section 68 of the said Act while examining the Will in question. In this regard he relied upon decisions in *Valluri Jaganmohini Seetharama Lakshmi & Anr. vs. Kopparthi Ramachandra Rao & Ors. AIR 1994 Andhra Pradesh 284, Koppula Koteswara Rao & Anr. Vs. Dr. Koppula Hemantha Rao 2002 AIHC 4950 and M.B. Ramesh (D) by Lrs. vs. K. M. Veeraje (D) by Lrs. & Ors. 2013(3) ALL MR 962(S.C.)*. He further submitted that aforesaid Will being a registered document, it was not open for the plaintiff to plead a different case than the recitals of the said Will. He then submitted that construction of the Will if found erroneous, the same can lead to raising a substantial question of law and hence the matter can be examined under Section 100 of the Code of Civil Procedure.

On the other hand Shri A.K. Waghmare, learned counsel appearing for respondent No.1 and Shri H. N. Potbhare, learned counsel appearing for respondent No.5. supported the impugned judgment. They urged that the evidence on record justified the findings recorded by the trial Court. There was no evidence regarding the state of health of Dadaji when the Will came to be executed. It was further submitted that the defendant himself was not aware about execution of the Will and did not lead any evidence in that regard. It was also submitted that execution of the Will was not admitted as contemplated by Section 58 of the said Act and hence the burden of proving the same was rightly placed on the defendant. It was therefore submitted that no substantial question of law arises in second appeal.

As regards applicability of provisions of Section 58 of the Indian Evidence Act is concerned, it is to be noted that in the

plaint, there is reference to the right being claimed by the defendant on the basis of alleged Will deed. The averments are that the defendant had got a Will deed executed from Dadaji fraudulently. Even in the deposition of PW-1 it has been stated that by taking advantage of his old age, a Will had been got executed. Under Section 58 of the Indian Evidence Act, those facts that are admitted by a party are not required to be proved. In the present case, there is no such admission that a Will was got executed in favour of the defendant. The pleadings and the evidence on record indicate that it is a specific case of the plaintiff that a Will was got executed fraudulently from Dadaji. Aforesaid admission, as alleged, is not one which is contemplated by Section 58 of the said Act. Both the Courts have therefore rightly applied provisions of Section 68 of the said Act requiring proof of the Will in question from the defendant.

As regards the reliance placed on the decision in ***Valluri Jaganmohini*** (supra) it is to be noted that in the said case the plaintiff had admitted execution of the Will and he had contested the same only on legal aspects. In such situation, it was held that provisions of Section 68 of the said Act were not applicable. In the present case, when it is a specific stand of the plaintiff that the Will was got executed fraudulently, it cannot be said that there is any admission regarding execution of the Will. Hence ratio of aforesaid decision cannot be made applicable to the facts of the present case. Similarly by requiring the defendant to prove the Will, cannot be said to be a case of misplacing the burden of proof on him. Hence the decision in case of ***Koppula Koteswara Rao*** (supra) is also not applicable to the facts of the present case.

As regards the finding recorded that Will dated 15/07/1997 has not been duly proved, it is to be noted that defendant's witness No.2 who was the son of Dadaji has categorically stated in his evidence

that the physical and mental condition of Dadaji was not good when the Will was executed. Similarly, even the attesting witness DW-3 did not depose about the physical condition of Dadaji. In this background, both the Courts have recorded a finding that the Will had not been duly proved by removing suspicious circumstances. Hence even assuming that execution of a Will and the manner of proving the same can raise a substantial question of law as held in ***M.B.Ramesh***(supra), in the facts of the present case, the evidence on record clearly indicates that execution of said Will had not been duly proved. Findings in that regard as recorded cannot be said to be perverse requiring interference in second appeal.

In view of aforesaid, no substantial question of law arises for consideration in second appeal. Hence both the appeals stand dismissed with no order as to costs.

JUDGE