

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

**Second Appeal No.224 of 2012
With
Civil Application No.4098 of 2012**

Sharad s/o Vasantryao Kulkarni,
Since deceased through his legal
representatives :
Shalan w/o Sharad Kulkarni
And Others.

.. Appellants.

Versus

Damyantibai w/o Sudhakar
Ratnaparkhe & Others.

.. Respondents.

Shri. Rajendrraa Deshmukkh, Advocate, for appellants.

Shri. N.V. Gaware, Advocate, for respondent Nos.1,2 & 7.

Shri. A.R. Devakate, Advocate, for respondent No.3.

CORAM: T.V. NALAWADE, J.

DATE : 19th JULY 2016

ORDER:

1) The appeal is filed against the judgment and decree of Special Civil Suit No.9/1995 which was pending in the Court of the Civil Judge, Senior Division, Beed and also against the judgment and decree of Regular Civil Appeal No.70/2008 which was pending in the Court of the Principal District Judge, Beed. It appears that initially the

suit was pending in the Court of the Civil Judge, Senior Division and due to enhancement of pecuniary jurisdiction of the Court of the Civil Judge Junior Division, the matter was allotted to the Court of the Civil Judge, Junior Division and then the number of the suit was changed to make it as Regular Civil Suit No.561/2000. Both the sides are heard.

2) The suit was filed by the present appellant for relief of partition and separate possession of the properties which were owned by the father of mother of the plaintiff and some of the defendants. Defendant No.5 Yamunabai is the widow of Narharrao, father of mother of the plaintiff-Sharad. No son was born to Narharrao and defendant No.5. Relief of partition was claimed in respect of three agricultural lands and three house properties. Relief of setting aside the gift deed made in favour of defendant Nos.1 and 3 by Narharrao was also claimed.

3) Defendant Nos.1 to 6 filed joint written statement. First they denied everything. Then they contended that Narharrao had gifted one agricultural land in favour of defendant Nos.1 and 3 and they have become

absolute owner of this property due to the gift made in their favour and as the possession was also given to them. They denied the allegation that Narharrao was not mentally fit when the gift was made. It is contended that the plaintiff had tried to create some false record in the office of the city survey but the city survey office disposed of the said matter. It was contended that other two agricultural lands are owned by defendants and in that regard Civil Court has already given decision in their favour.

4) Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. Gift deed was proved by defendants by examining attesting witness. It is registered gift. The trial Court gave decree in respect of house properties only. The first appellate Court has confirmed this finding of the trial Court. So, the point, if any, which can be argued is in respect of validity of the gift deed (Exhibit 85) executed in favour of the defendants who are daughters of widow of the deceased. There was no challenge to the decision given in respect of two other agricultural lands in the past.

5) It is pleaded by the plaintiff that the defendants exercised undue influence or played fraud on the deceased, he was not mentally fit and so the gift is not valid. In view of nature of allegations about execution of gift deed, burden was on the plaintiff to prove that either fraud was played on the deceased or undue influence was used.

6) Plaintiff - Shalan, widow of original plaintiff has given evidence to prove the case. She has given evidence that deceased was aged about 80 to 90 years at the relevant time, he had serious health problems including problem of kidney. She has given evidence that he was unable to hear and his brain was not functioning properly due to lack of sufficient circulation of blood. He was under treatment of some doctors. She produced some record of the doctors of treatment but no doctor was examined. In the evidence she admitted that defendant Nos.1 and 3 were taking care of the deceased during those days and they spent for the treatment. She has given evidence that after few days of the execution of the gift document, she learnt about the same and when she

made inquiry with defendant No.5, mother, she realized that even defendant No.5 had no knowledge about the gift document and so objection was taken against entering names of defendant Nos.1 and 3 in revenue record on the basis of gift document. She has deposed that when proceeding was withdrawn by defendant No.5, appeal was filed against the said order of revenue authority.

7) The nature of the evidence of the widow of the plaintiff, Shalan shows that she has no personal knowledge regarding the affairs of the family of defendant Nos.1 and 2 where Narharrao was living. Plaintiff has examined one Vinayak Deshmukh, who is cousin brother of defendant Nos.1 and 3 to give evidence that Narharrao had desire to give entire property to Sharad, the plaintiff. This is altogether different story. However, evidence is given that 2 years prior to the death, Narharrao was sick and he was bed ridden.

8) In rebuttal, defendant Damyanti has given evidence. It is as per the pleadings in the written statement. She has given evidence even on execution of

the gift document. They examined one Sakharam Kute, attesting witness on the gift document. He has given evidence that one Advocate Salve had helped Narharrao for execution of the document but the contents were narrated by Narharrao when the draft was prepared. He has given evidence that the wife of Narharrao was also present when the document was executed. He has denied that Narharrao was not in fit state of mind at the relevant time. Shri. Salve, legal practitioner, has given evidence as a person who had drafted the contents. Evidence is given that defendant No.1 was present when the document was executed. It is not disputed that on the basis of gift document entries came to be made in the revenue record. Thus, evidence is also on giving effect to gift, on giving possession.

9) The contents of gift document at Exhibit 85 show that property Gat No.24 was given equally to two daughters like defendant Nos.1 and 3. The document bears signatures of aforesaid witnesses.

10) Learned counsel for the appellant argued in respect of one circumstance that before revenue authority widow of Narharrao had given application that the said document is not binding on her and it was probably got executed by exercising fraud or by using undue influence. The record produced shows that in the revenue proceeding statement of the widow was recorded on oath and she submitted that she had no objection to make entires in the revenue record on the basis of gift document. The so called admission of defendant No.5 was not confronted to defendant No.5 and she had denied in written statement that she had made such application before the revenue authority.

11) The decision is given in favour of the defendants in respect of other lands on the basis of decree given in Suit No.58/1955, copy of which is produced at Exhibit 49. It appears that the suit was filed by the daughters of Narharrao. Narharrao had admitted the claim ownership of the daughters in the said suit and this decision was never challenged. The decision was given in the year 1958. The present suit was filed in the year 1995.

In view of these circumstances and as the case in respect of gift document was not proved by plaintiff, the suit in respect of the property which came to the defendants under the judgment and decree of previous suit and under the gift document is dismissed by the Courts below. No substantial question of law as such is involved in the matter. There was virtually no evidence with the plaintiff to prove the allegations of fraud or undue influence. In the result, the appeal stands dismissed. Civil application stands disposed of.

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

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