

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 127 OF 2017**

Shablo Govind Gaude & 2 Others ... Appellants

Versus

Kashinath Govind Gaude & Another ... Respondents

Shri Gaurish Nagvenker, Advocate for the Appellants.

Shri Ashwin D. Bhobe, Advocate for the Respondents.

Coram : C.V. BHADANG, J.

Date : 14th JUNE 2018

ORAL ORDER:

The challenge in this appeal, is to the concurrent findings of the Courts below, decreeing the suit of the respondents/plaintiffs.

2. The respondents filed Regular Civil Suit No. 56/2009/A, before the learned Senior Civil Judge at Ponda, against the appellants, for declaration and consequential reliefs. The respondents sought declaration that the Deed of Gift dated 09.11.2004, the Will dated 25.11.2002 and the decree dated 03.11.2007, passed by the learned Senior Civil Judge, Ponda in Regular Civil Suit No. 87/2005/A, is null and void and for a consequential direction to the registration authority to cancel the said documents namely, the Deed of Gift and the Will.

3. Respondent No. 1-Kashinath Gaude and the appellant no. 1-Shablo Gaude, are the sons of Govind Gaude and his wife Smt. Yamuna Gaude. Govind Gaude died on 27.04.2006, while his wife, Yamuna Gaude died on 18.04.1995. Respondent no. 2 is the wife of respondent no. 1. The appellant no. 2 is the son of appellant no. 1, while the appellant no. 3 is the wife of the appellant no. 2. The appellant no. 1 and the respondent no. 1 had a brother by name Vithal Gaude. Admittedly, Vithal Gaude was not made a party to the suit filed by the respondents.

4. The material case made out in the plaint was that the appellants, taking undue advantage of old age of Govind Gaude, fraudulently got executed the two documents, namely, the Gift Deed and the Will. Insofar as the decree is concerned, the same was obtained on the basis of the Deed of Gift. Admittedly, in Regular Civil Suit No. 87/2005/A (in which the decree is passed), the respondents were not made parties. Admittedly, the said suit was filed against some third parties.

5. Be that as it may, the respondents resisted the suit, claiming that the Deed of Gift and the Will, have not been voluntarily executed by Govind Gaude and the suit as framed and filed, was not maintainable.

6. On the basis of the rival pleadings, the learned Trial Court framed as many as eight issues, apart from an additional issue pertaining to the Deed of Gift. The parties led oral and documentary evidence. On behalf of the respondents, Kashinath Gaude examined himself as (PW-1) along with one Tilu Borkar (PW-2), Ramdas Gaude (PW-3) and Santosh Madkaikar (PW-4). The appellant no. 2, Rajendra Gaude examined himself as DW-1.

7. The learned Trial Court on appreciation of the evidence, decreed the suit by judgment and decree dated 28.07.2015. The appellants, feeling aggrieved, challenged the same before the learned District Judge in Regular Civil Appeal No. 116/2015. The learned District Judge framed the following points for determination:

1. Whether late Govind Vithu Gaude could give entire undivided property by executing a Will in favour of defendant no. 2 ?
2. Whether late Govind Vithu Gaude could gift entire undivided property by way of a Deed of Gift in favour of defendant no. 1 ?
3. Whether the defendants no. 1 and 2 could enter their names in survey records in respect of property bearing survey no. 186/0 of village Gaune, Bandora, Ponda, Goa on the basis of a judgment and decree obtained in Regular Civil Suit No.87/2005/A ?
4. Whether the impugned judgment and decree passed by the learned Trial Judge is arbitrary and perverse and is required to be quashed and set aside ?

8. The learned District Judge answered all the points in the negative and dismissed the appeal vide judgment and decree dated 31.05.2016. Hence, this appeal.

9. I have heard Shri Nagvenker, the learned Counsel for the appellants and Shri Bhobe, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the impugned judgment of the Courts below.

10. Shri Nagvenker, the learned Counsel for the appellants has raised three contentions. Firstly, it is submitted that Vithal Gaude, the third son of Govind Gaude, not being made a party to the suit, the suit could not have been decreed. It is submitted that the respondents had sought a declaratory relief, in which, Vithal Gaude was one of the co-owners, as such, he was a necessary party. Secondly, it is contended that the Appellate Court has not framed proper points, which is, in breach of Order XLI, Rule 31 of the Code of Civil Procedure (CPC, for short). Lastly, it is submitted that the Courts below could not have declared the Gift Deed, the Will and the decree (passed in some other suit), as null and void. It is also submitted

that if, it was found that the Gift and the Will was in excess of disposable quota, it could have been restricted to such disposable quota of the testator/donor.

11. Shri Bhobe, the learned Counsel for the respondents has supported the impugned order. It is submitted that the ground about Vithal Gaude, being a necessary party was not raised before the Trial Court and the judgment of the Appellate Court also does not show that it was raised in appeal, during the course of hearing. It is submitted that Vithal Gaude cannot be said to be a necessary party, in as much as, he was not a party to the Gift Deed, the Will or the decree in Regular Civil Suit No. 87/2005.

12. It is submitted by the learned Counsel for the respondents that the Courts below have rightly decreed the suit on appreciation of evidence and the concurrent findings of fact so reached, cannot be interfered with in a second appeal. It is submitted that the Appellate Court has framed the necessary points and the appellants have not demonstrated any prejudice, on account of failure to frame any particular point by the first Appellate Court.

13. I have carefully considered the rival circumstances and the submissions made and I do not find that the appeal raises any substantial question of law.

14. At the outset, it is necessary to note that the ground about non-joinder of Vithal Gaude, as party defendant in the suit, was not raised before the Courts below. Even otherwise, the suit was for declaration of the Deed of Gift, the Will and the decree as null and void, which were entirely in the favour of the appellants, to which, Vithal Gaude was not a party. Thus, in my considered view, it cannot be accepted that Vithal Gaude could be said to be a necessary party to the suit.

15. Even insofar as the points, which are framed by the first Appellate Court, are concerned, the points as set out above, would show that the necessary issues/points have been framed by the Appellate Court.

16. This Court in the case of **Vatsalabai wd/o Vishwanath Nakhate & Others Vs. Madhaorao Laxmanrao Thakare & Another, 2005(1) Mh.L.J. 980** has held that failure of the first Appellate Court to formulate the questions, as required under Order XLI, Rule 31 of CPC, would in deed

constitute a substantial question of law. However, when the appeal is heard on merits and the High Court is required to examine the question of reversal of the decree, on any such grounds, the Court has to examine as to whether, the failure of the first Appellate Court to formulate the question, as required under Order XLI, Rule 31 of CPC, has resulted into miscarriage of justice. This Court has further found that in a situation of the present nature, the provisions of Section 99 of CPC cannot be lost sight of. Section 99 of CPC *inter alia* provides that no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any error, not affecting the merits of the case or the jurisdiction of the Court. Now the question whether the failure to frame such points or proper points, has resulted into any miscarriage of justice or has affected the merits of the case, would depend upon facts and circumstances of each case. In the present case, I do not find that there is any miscarriage of justice, which has resulted, affecting the merits of the case, within the meaning of Section 99 of CPC.

17. Coming to the last ground, I have carefully gone through the compilation of the evidence produced by the learned Counsel for the appellants and the findings recorded by the

Courts below and I do not find that they suffer from any infirmity and they cannot be said to be perverse, so as to require interference with in a second appeal.

18. The contention that the Gift Deed and the Will could be restricted to the disposable quota, cannot be accepted. This is for the reason that the Gift Deed or the Will, could be restricted to the disposable quota (if in excess of disposable quota), if such Will or Gift Deed is found to be genuine. It will not apply to a case where they have been found to be null and void. To put it otherwise, if a disposition by the Gift Deed or the Will is found to be otherwise valid, but, in excess of the disposable quota, then such Gift or Will can be restricted to such disposable quota and not otherwise. Therefore, the contention in this regard, in my considered view, cannot be accepted. The appeal is without any merit and is accordingly dismissed with no order as to costs.

C.V. BHADANG, J.

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