

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**REVIEW PETITION NO. 02 OF 2018
WITH
SECOND APPEAL NO. 179 OF 1993**

Lalasaheb Tukaram Dhabugade @

Namdeo Tukaram Dhabugade

(Since decd.) Through LRs. & Ors.

... Petitioners

V/s.

Yeshwant Balu Shelke

... Respondent

- Mr.S.G. Deshmukh, Sr. Counsel a/w. Mr.Kirankumar Phakade & Mr.Ashok Dhabugade for the Petitioners.
- Mr.Manoj A. Patil i/b. Mr.Sachin K. Hande for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 13th JUNE, 2018.

P.C. :

1] Heard learned counsel for the Review Petitioners and learned counsel for the Respondent.

2] This Review Petition is filed by the original Appellants seeking Review of the judgment and order dated 11/06/2015 passed by the Single Judge of this Court (R.K. Deshpande, J.) in Second Appeal No.179 of 1993. The said Second Appeal was preferred against the judgment and decree dated 27/01/1993 in Regular Civil Appeal

No.414 of 1987 passed by the 3rd Additional District Judge, Sangli. By the said judgment, the First Appellate Court has set-aside the judgment and decree passed by the trial Court in Regular Civil Suit No.70 of 1982 on 27/08/1987 decreeing the said suit and directing the defendant to hand over the possession of the suit property to the Plaintiff.

3] The Second Appeal was admitted mainly on the substantial question of law, as to, when the evidence shows that the Respondent i.e. the Plaintiff is in fiduciary relations 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. The other questions of law were also framed incidental thereto.

4] This Single Judge of this Court has, with the assistance of learned counsel appearing for both the parties, after going through the judgments delivered by both the Courts below, the pleadings and the evidence brought on record, findings of fact recorded by the First Appellate Court held that, this Court does not find any assertion in written statement that the Plaintiff was in fiduciary relationship with Smt. Bhagubai and there was absolutely no evidence to show such a

relationship between the Plaintiff and Smt. Bhagubai. It was further held that the fiduciary relationship has not at all been established. In view thereof, the trial Court has committed an error in holding that the burden of proof was upon the Plaintiff to establish that the sale-deed at Exhibit-33 was not induced by undue influence. It was further held that the burden was not upon the Plaintiff to prove that the sale-deed was uninfluenced by undue influence. Ultimately, it was held that the Appellate Court has at any rate taken a possible view of the matter and therefore, no interference was warranted in the judgment of the First Appellate Court.

5] While seeking review of these observations in the judgment of the Single Judge of this Court, the submission of learned counsel for the Appellant is that in the plaint the Plaintiff has not disclosed the fact that he is the real grand son of Bhagubai, being the son of Bhagubai's daughter Kondabai and therefore, the real brother of defendant, who was also the son of Kondabai. This fact was brought on record by the defendant and there was no challenge to it. According to learned counsel for the Appellant therefore the fiduciary relationship between the Plaintiff and deceased Bhagubai is clearly established and in the light of this fiduciary relationship, it was necessary to cast the burden on the Plaintiff to prove that the sale-deed was executed

without any undue influence. It is submitted that the Appellate Court has, however, held that such fiduciary relationship was not established and it was done without looking into evidence. This Court has confirmed the same finding and held that the burden was upon the defendant to prove that the sale-deed was not a valid document. Hence, according to him, it is an error apparent on the face of record, which needs to be corrected.

6] At the outset, however, it has to be stated that this being a Review Petition, the scope of the same is very limited. Unless some factual error is brought on record, which has resulted into miscarriage of justice or failure of justice, this Court cannot enter into review of the judgment. Especially in the present case, the observations made paragraph No. 5 of the judgment go to show that, “with the assistance of learned counsel for both the parties”, this Court has gone through the judgments delivered by both the Courts, pleadings and the evidence brought on record. The judgment passed by Single Bench also shows that both the learned counsels were heard at length. In such situation, it becomes difficult to accept that any factual error has crept in the judgment. It was brought before this Court the nature of relationship between the Plaintiff and deceased Bhagubai. It was also not disputed on record that Bhagubai was the grand-mother of the

Plaintiff. It was also not disputed that defendant also adopted as son by her by registered adoption deed. The only question for consideration is whether merely because she was the grand-mother of the Plaintiff, whether she was in fiduciary relationship in the sense, which is contemplated under Section 16 of the Indian Contract Act, 1872.

7] Section 16 of the Indian Contract Act, 1872, defines “undue influence” as follows:-

“16. “Undue influence” defined. —

(1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or

permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)."

8] Perusal of this Section makes it clear that only where one person is in a position to dominate the will of another or holding a real or apparent authority over the another or whether he stands in a fiduciary relationship to the another or where he makes a contract with the person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, then only the burden will shift on the person who was in such a position to dominate the will of another.

9] Here, in the case, even if it is established that there was

relationship between the deceased Bhagubai and the Plaintiff, deceased Bhagubai being his grand-mother, other ingredients of Section 16 were not satisfied. There is nothing on record, as observed by the Appellate Court and which observation is not disturbed by this Court in its judgment that, Bhagubai was in any way mentally incapacitated to take decision of her own or the transaction was of such a nature that it was unconscionable. This Court and the Appellate Court have also found that merely because of the allegation in the written statement that Bhagubai was an old lady of 90 years, it cannot be presumed that she was mentally debilitated, so that her decision making capacity was affected. Absolutely no evidence was brought on record to that effect by the defendants. No suggestions to that effect are, even for the sake of it, given to the Plaintiff or his witness. No medical evidence to that effect is also filed on record.

10] Under these circumstances, it becomes difficult to accept that the transaction, which was a registered sale-deed, which was admittedly executed before the Sub-Registrar on the payment of consideration of Rs.500/-, paid before the Sub-Registrar and proved through the evidence of attesting witness to the said sale-deed, can be vitiated, merely because Bhagubai was the grand-mother of the Plaintiff.

11] As held by the Appellate Court, the plea of the transaction being vitiated by undue influence is required to be taken with adequate and sufficient details and proved by the cogent evidence. Here, in the case, as observed by the Appellate Court the plea which is taken in the written statement is of the Plaintiff playing fraud on Bhagubai; whereas now the plea which was advanced before the Appellate Court and this Court is of the sale-deed being executed under undue influence. On both these pleas, sufficient material, particulars or evidence being not pleaded or adduced and after going through the detailed judgment of the First Appellate Court on this aspect, as this Court has confirmed the finding of the Appellate Court, in Review Petition, I do not find any reason to interfere with the same.

12] The Review Petition therefore stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]