

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.502 OF 2014
ALONG WITH
CIVIL APPLICATION NO.1200 OF 2014

Yashwant Genu Jachak	 Appellant-Applicant
V/s.	
Vishnu Genu Jachak (Since Deceased),	
Through LRs.:-	
Narmadabai Vishnu Jachak & Ors.	 Respondents

Mr. Girish R. Agrawal for the Appellant-Applicant.

Mr. Pravartak Pathak for Respondent Nos.5 and 6.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 1ST AUGUST, 2018.

P.C. :

1. Heard Mr. Agrawal, learned counsel for the Appellant-Applicant, and Mr. Pathak, learned counsel for Respondent Nos.5 and 6.

2. This Second Appeal takes an exception to the 'Judgment and Decree' dated 19th December 2013 passed by the District Judge-1, Nashik, thereby dismissing Regular Civil Appeal No.104 of 2007, which was preferred against the 'Judgment and Decree' dated 17th February 2007, passed by the Joint Civil Judge, Senior Division, Nashik, in Regular Civil Suit No.456 of 1997.

3. The said Suit was filed by the Appellant herein challenging the execution of the 'Will' dated 4th August 1994 and for a declaration that, the said 'Will' is illegal and void and for injunction that, the Respondents be restrained from entering their names into the 'Record of Rights' on the strength of the said 'Will' and from alienating the property mentioned therein.

4. As per the Appellant, who is brother of Respondent Nos.1, 2, 3 and 4, the suit lands were the ancestral joint family properties of him and Respondents. Their father 'Genu Jachak' had executed a 'Will' on 4th August 1994, bequeathing the suit properties in favour of the Respondents. At the time of execution of the 'Will', his father 'Genu' was, due to old age and illness, residing with the Respondents and taking disadvantage thereof, the said 'Will' has got executed; therefore, the said 'Will' is null and void.

5. Respondents have resisted the said contention of the Appellant that, the 'Will' was executed by exercising undue influence and taking the advantage of old age and illness of 'Genu'. It was also denied that the suit properties are the ancestral joint family properties of Genu.

6. In support of his case, the Appellant examined himself; whereas the Respondents have examined Respondent Nos.2 and 3 and led the evidence of the attesting witness to the said 'Will'.

7. On appreciation of the entire evidence on record, both the Trial Court and the first Appellate Court were pleased to hold that, the execution of the 'Will' is properly proved and there is no reason to hold that the 'Will' was got executed by exercising undue influence or practicing fraud. Both the Courts below have further held that, at the time of execution of the said 'Will', 'Genu' was in a fit physical and mental condition. Therefore, there was no question of such 'Will' being declared as illegal, null or void. Even as regards the properties, which were bequeathed under the said 'Will', it was found by both the Court below that, the said properties were the self-acquired properties of 'Genu', as he was having his own independent income. He was running the Flour Mill and was also in the Dairy business.

8. While challenging these findings of the fact recorded by the Trial Court and confirmed by the first Appellate Court, the submission of learned counsel for the Appellant is that, both the Courts below have not cast the burden of proving the suit properties on the Respondents. It is urged that, when the onus is wrongly placed on the party, which is not required to discharge the same, it is a substantial question of law. For this purpose, reliance is placed on the Judgment of the Hon'ble Apex Court in the case of *Krishna Mohan Kul @ Nani Charan Kul and Anr. Vs. Pratima Maity and Ors.*, 2003(2) Apex Court Judgments 368 (S.C.), to submit that, the burden of proof is on the party, which alleges fraud,

misrepresentation or undue influence. However, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position. Here in the case, it is submitted that, as per admitted position on record, deceased Genu was taking the meals in the house of the Respondents. Thus, he was dependent on them. He was also running the age of 94 years; therefore, it was for the Respondents to prove that the 'Will' is not the outcome of any fraud, misrepresentation or undue influence.

9. Learned counsel for the Appellant has then also placed reliance on the Judgment of the Hon'ble Apex Court in the case of *Apoline D'Souza Vs. John D'Souza*, AIR 2007 SC 2219, wherein the Testatrix was 96 years old lady. The scribe of the 'Will' was not proved by examining the attesting witness and in that backdrop, it was held that, there were suspicious circumstances surrounding the 'Will' and it was necessary for the propounder of the 'Will' to remove those suspicious circumstances.

10. Learned counsel for the Appellant has also placed reliance on the Judgment of the Hon'ble Apex Court in the case of *Krishna Mohan Kul alias Nani Charan Kul and Another Vs. Pratima Maity and Others*, AIR 2003 SC 4351, to advance the same proposition.

11. However, in my considered opinion, on facts, this case stands on different footing, as the facts of the present case clearly go to prove that, deceased Genu was not ill and bed-ridden in any way, but he was, except for some injury to his leg, in sound physical and mental state. This fact is proved not only by the Respondents, but also by the attesting witness to the said 'Will', namely, 'Pandurang', who has been examined by the Respondents. His evidence clearly goes to show that, deceased Genu himself has approached him for execution of the 'Will'. There is also the 'Scribe' of the 'Will', who has scribed the 'Will', as per the dictation and as per the instructions of deceased Genu. Deceased Genu himself, along with the attesting witness, had got the said 'Will' registered. Thereafter, he has kept it with the 'Scribe'. This evidence on record goes to prove that, deceased Genu was very much in proper state of mind and also physically and mentally sound, so as to approach the attesting witness for execution of the said 'Will' and he has executed the said 'Will' of his own free will. Merely because he was taking meals in the house of the Respondents, it cannot be accepted that the Respondents were in a dominating position to get executed the 'Will' of deceased Genu and practice fraud by taking advantage thereof. It is pertinent to note that, the 'Will' was also kept in the house of the 'Scribe' and not with the Respondents in any way. The evidence on record also goes to prove that, the Respondents were not even aware of the 'Will' till the death of Genu. After the death of Genu, the 'Scribe' informed the Respondents about the

said 'Will'. Here in the case, all the alleged suspicious features about execution of the 'Will' were clearly not there and if at all they were there, they are properly removed by the Respondents, by adducing evidence of the attesting witness and the scribe.

12. Apart from that, as held by both the Courts below, there was nothing unnatural if deceased Genu had bequeathed the suit property in favour of his grand-children, as the evidence on record shows that his all the three sons were addicted and not providing attention to him. They were not even giving him the food and he has to go to the house of his daughter for meals. Therefore, if in a sound state of mind, at the age of about 89 years, before his death, Genu had executed the 'Will', bequeathing his property in favour of his grand-children, then from the contents of the 'Will' also, it cannot be said that there is any reason to be suspicious of the said 'Will', so as to declare it null and void. Hence, there is no question of any of the Courts below wrongly placing the onus on the wrong party.

13. As regards the status of the properties also, the evidence on record also goes to prove that, deceased Genu was having his own income from the Flour Mill as well as the business of Dairy products and the suit properties were purchased by him from his own earnings. Both the Trial Court and the first Appellate Court have, accordingly, recorded the concurrent finding of fact and there is no reason to disturb the same.

14. In such situation, in the Second Appeal, the finding of facts arrived at by both the Courts below, which is after proper appreciation of the evidence on record, cannot be disturbed. The Second Appeal, therefore, holds no substantial question of law; hence, stands dismissed.

15. In view of dismissal of the Second Appeal, the Civil Application therein does not survive and the same stand disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]