

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.578 OF 2013

Smt. Sudha Shrikrishna Kand,
Age 69 years, Occupation Household,
R/o Jivanprem Housing Society,
Panch Pakhadi, Thane (West).

...Appellant
(Original Plaintiff/Appellant)

VERSUS

Shri Pramod Dattatraya Kand,
Age 55 years, Occupation Business,
R/o 111, Renawikarnagar,
Savedi, Ahmednagar.

...Respondent
(Original Defendant/Respondent)

.....

Advocate for Appellant : Mr. M. S. Kulkarni.
Advocate for Respondent : Mr. L. B. Pallod

.....

WITH
SECOND APPEAL NO.581 OF 2013

Pramod Dattatray Kand,
Age 53 years, Occupation Business,
R/o 111, Renawikarnagar,
Savedi, Ahmednagar.

...Appellant
(Original Defendant)

VERSUS

Sudha Shrikrushna Kand,
Age 66 years, Occupation Household,
R/o Jeevanprem Society, Block No.6,
Pachpakhadi Tq. Dist. Thane.

...Respondent
(Original Plaintiff)

.....

Advocate for Appellant : Mr. L. B. Pallod
Advocate for Respondent : Mr. M. S. Kulkarni.

.....

**WITH
CIVIL APPLICATION NO.133 OF 2021
IN SA/581 OF 2013**

Pramod s/o Dattatraya Kand,
Age 62 years, Occupation Service,
R/o Plot No.111, Revikarnagar,
Savedi, Ahmednagar.

...Applicant

VERSUS

Sow. Sudha Krishna Kand,
Age 71 years, Occupation Nil,
R/o Jeevanprem Housing Sosa
B Wing Flat No.5, Second Floor
Pachpakhadi Gurukul Road,
Thane (W).

...Respondent

.....

Advocate for Applicant : Mr. L. B. Pallod
Advocate for Respondent : Mr. M. S. Kulkarni.

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**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 01-02-2021.**

ORDER :

1. Both the appeals are arising out of concurrent Judgments and decrees passed in Regular Civil Appeal No.190 of 2008 and Regular Civil Appeal No.232 of 2008, by learned District Judge-5, Ahmednagar, dated 06-12-2012 by which both the appeals filed by the respective appellants challenging the Judgment and decree passed by learned Civil Judge, Senior Division, Ahmednagar in Special Civil Suit No.55 of 2007 dated 25-06-2008 came to be

confirmed. By the said Judgment and decree the learned Civil Judge, Senior Division, Ahmednagar had partly decreed the suit. Original plaintiff was held to be the owner of half of the suit property i.e. plot No.111 out of land Survey No.8 (new Survey No.11) situated at Savedi admeasuring 3200 square feet. The defendant was held to be the owner of the other half and defendant was restrained from obstructing the enjoyment of the said half of the plot by the plaintiff. It was declared that the Will executed by the father of the defendant on 28-04-1994 in favour of defendant was held to be not binding on the plaintiff. Further Court Commissioner was directed to be appointed for giving possession of half of the suit property to the plaintiff.

2. Before considering the dispute between the parties what is admitted to them is required to be considered. The suit land/ plot was purchased in the name of plaintiff and father of defendant on 24-02-1983. Plaintiff is the sister-in-law (brother's wife) of defendant. A construction was made on the said plot and as such the suit property consisted of a built up house and open space. Father of the defendant expired prior to the suit.

3. With the above said background, the plaintiff had come with a

case that in fact she had incurred all the consideration amount required for the purchase of the suit plot though her father-in-law was shown as joint purchaser of the suit plot. Thereby the plaintiff contended that the suit property is her self-acquired property. She has made construction on the said plot at her own expenses. The father-in-law was fully aware about the said fact and, therefore, executed a consent deed (styled as 'Sammatti Patra') in favour of plaintiff on 10-03-1983. According to the plaintiff by executing the said consent deed the father-in-law had transferred his half share in the suit property in favour of the plaintiff thereby making her as exclusive owner of the suit property. Plaintiff had further come with a case that the father-in-law had no other accommodation so also the defendant was not having and, therefore, by her consent they started residing in the suit property. By taking undue advantage of the old age of the father-in-law, the defendant got executed Will in his favour on 28-04-1994. According to the plaintiff the defendant is trying to obstruct the plaintiff from enjoyment of the property. The defendant is occupying the suit property illegally and, therefore, she filed suit for declaration, possession and permanent injunction.

4. The defendant had resisted the suit by filing written statement.

He denied those contentions which are against his interest. It has been contended that plaintiff's husband, his father and he himself were the members of joint Hindu family. They had agricultural land as well as a Wada at Sakurdi, Taluka Khed (Rajgurunagar) District Pune. His father was getting huge income from the agricultural land. Plaintiff's husband was a government servant. It was then realised that it would not be proper to take immovable properties in the name of that government servant and, therefore, their father i.e. Dattatraya had purchased various properties at Ahmednagar, Nashik, Thane, Brahmangaon. All these properties were purchased from the income of the joint Hindu family property. Plaintiff has equal share in those properties. In order to deprive him of getting his share, the plaintiff has brought a false suit. His father has left a genuine and legal Will bequeathing the property in his favour. He, therefore, prayed for dismissal of the suit.

5. As aforesaid, after the issues were framed, parties have led evidence in the form of documents as well as oral. After considering the evidence on record, the learned Trial Judge has decreed the suit partly. Both the parties preferred separate appeals. It appears that both the appeals were heard together and decided on the same date

by the same Judge, however for the reasons best known to him, two separate Judgments have been given. This Court time and again has given caution to the Judicial Officers that they should avoid writing such Judgments which would create problems and clumsiness. When in both the appeals challenge was to the same decree then both the appeals could have been disposed of by common Judgment. Both the appeals have been dismissed, hence both of them have filed these two second appeals.

6. Heard learned Advocate Mr. M. S. Kulkarni for the appellant and learned Advocate Mr. L. B. Palod for the respondent in Second Appeal No.578 of 2013, and vice versa in Second Appeal No.581 of 2013.

7. It has been vehemently submitted on behalf of original plaintiff that both the Courts below have not considered the evidence properly. The consent deed executed by deceased Dattatraya in favour of plaintiff on 10-03-1983 was duly proved at Exhibit 34. On the basis of said document both the Courts ought to have considered that original plaintiff had become exclusive owner on 10-03-1983 itself. Both the Courts have held that the Will allegedly executed by Dattatraya in favour of defendant on 28-04-1994 is not duly proved

and has no legal effect, under such circumstance, the consequential weightage ought to have been given to the consent deed. In fact the consent deed was executed prior in time in favour of plaintiff and by effect of the said consent deed when the plaintiff had become the exclusive owner of the suit plot then deceased Dattatraya had no right to execute any Will in favour of the defendant. Defendant cannot be said to be the owner of half of the land for the simple reason that he has not contributed to the consideration amount. Plaintiff had proved that she had spent the entire amount of consideration out of her own pocket. Both the Courts below ought to have held that the plaintiff had become exclusive owner of the entire suit plot and accordingly the consequential reliefs ought to have been granted.

8. Learned Advocate for the original defendant vehemently submitted that as regards the consent deed dated 10-03-1983 is concerned, it has been rightly considered by both the Courts below that it has no legal sanctity. It was not a registered document though it is stated that by virtue of the said document the title has been given by the father-in-law to the daughter-in-law. However, both the Courts below had failed to appreciate the evidence in

respect of Will dated 28-04-1994 executed by Dattatraya in favour of defendant. Defendant had examined the wife of attesting witness to the Will. The attesting witness though alive, was suffering from paralytic attack and, therefore, he was unable to appear before the Court. Therefore, by examining the wife of the attesting witness, all the legal formalities have been fulfilled. Further it was a registered document and, therefore, due weightage ought to have been given to the said registered document. Both the Courts below have unnecessarily discarded the Will. If the effect of the Will is given then the defendant would be the exclusive owner of the property and, therefore, the decree deserves to be set aside and it should be held that the defendant is the exclusive owner of the suit plot.

9. It will not be out of place to mention here that by order dated 21-03-2016 both the appeals came to be admitted by passing a detailed order and following substantial questions of law was framed ;

- (i) Whether the Courts below have committed error in not considering material given by the defendant for proof of due execution of the Will ?

In fact apart from the said substantial question of law, further

substantial question of law is also arising in view of the fact that the plaintiff is also challenging the impugned Judgments and decrees and on the basis of the consent deed executed on 24-02-1983 she had become exclusive owner and, therefore, now further substantial question of law is framed.

(ii) Whether both the Courts below were right in discarding the plaintiff's claim that she had become exclusive owner of the suit plot by virtue of consent deed dated 24-02-1983 and that in fact it is the self-acquired property of the plaintiff as she had spent for the entire consideration of the plot ?

10. Perusal of the record would show that the plaintiff had examined herself and she was subjected to detailed cross-examination. She had also examined the wife of the attesting witness to the consent deed (Exhibit 34) by which the plaintiff was saying that she has received the exclusive ownership. If we perused the pleadings as well as affidavit-in-chief of the plaintiff, we could see the contrary facts tried to be canvassed. At the first place she tried to say that she has paid entire amount of consideration. It is not in dispute that the sale deed in respect of suit plot stands in the name of plaintiff as well as her father-in-law. In clear terms it appears that she is not coming with a case that though the name of

the father-in-law has been included in the sale deed, yet he cannot be said to be titled owner as she had spent the entire amount of consideration. But then she cannot do so for the simple reason that she is not allowed to raise a plea that her father-in-law was a Benami holder in view of the prohibition under the Benama Prohibition Act. She has tried to contend that since she had paid the entire amount of consideration, she was the exclusive owner itself, however in order to leave no room for any complain, her father-in-law executed Exhibit 34 on 10-03-1983. If we want to rely on the said document then she will have to accept that her father-in-law was the owner of the half portion. The title of the said half portion could not have been transferred in her name by the father-in-law without executing a legal document. It could have been either only by gift deed, sale deed or Will deed. The said consent deed is neither registered nor it is on a duly stamped paper. Therefore even if we accept that the execution of that document has been proved, yet it cannot be said to be a legal document which could have transferred title of the father-in-law in her favour. Therefore, her contention that she has become absolute owner of the suit plot since 1983 has been rightly discarded by both the Courts below.

11. As regards the Will executed by father-in-law on 28-04-1994 is concerned, the defendant had come with a case that in fact the suit plot was purchased by his father from his own income. Plaintiff's name is taken in the sale deed only to please plaintiff. He has given reason that plaintiff's parents had expired when she was a child and she was brought up by her paternal aunt. Since she could not get the love affection of her parents, the father-in-law had decided to get her name included in the sale deed. He has also come with a case that plaintiff has not contributed to the amount of consideration. Defendant cannot now raise such kind of defence for the same reason that it is prohibited under the Benami Transaction (Prohibition) Act. Further it appears that by way of the said Will dated 28-04-1994, entire property has been bequeathed to the defendant. Even if for the sake of arguments we consider that it is properly proved, yet it can be said that since the father was owner of only half portion, he could not have executed the Will in respect of entire property. Now as regards the suspicious circumstances around the said Will are concerned, they have been considered by both the Courts below correctly. When those doubts or clouds have not been removed by the defendant then both the Courts below were right in discarding the evidence adduced by the defendant in

respect of the same.

12. Taking into consideration these aspects answer to first substantial question of law would be in the negative and the answer to the second substantial question would be in the affirmative. No case is made out by either of the appellants to take a contrary decision than taken by both the Courts below. There is no merit in both the appeals and, therefore, both the appeals are dismissed. In view of dismissal of both appeals, Civil Application No.133 of 2021 stands disposed of. Parties to bear their own costs of the proceedings.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-