

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 467 OF 2018

- APPELLANTS:** 1] Urmiladevi Satyanarayan Raju
(Ori. Plffs/Appellants) Chilguri, Aged about 76 years,
R/o Potkhir East Godavari,
Andhra Pradesh.
- 2] Lalita Bhaskar Raju Ithakuri,
Aged about 74 years,
R/o Bellary, Karnataka.
- 3] Hemlata Subbarju Perichena,
Aged about 70 years,
R/o Rhimanoram, District- East
Godavari, Andhra Pradesh.
- 4] Premlata Satyanarayn Raju
Samantpubi, Aged about 66 years,
R/o Singarayapalam, District-West
Godavari, Andhara Pradesh.
- 5] Krishnakumari Balaram Krishnamraju
Alluri, Aged about 57 years,
R/o Bellary, Karnataka.
- 6] Vijjavathi Sitaramraju Alluri,
Aged about 57 years,
R/o Bhimavarum, District – West
Godavari, Andhra Pradesh.
- 7] Vijayabharati Satyanarayan Raju
Rudraraju, Aged about 67 years, R/o
Sironcha, District – Gadchiroli.

8] Suryanarayan Raju Satyanarayan Raju
Rjdraraju, Aged about 41 years,
R/o Sironcha, District Gadchiroli.

..V E R S U S..

RESPONDENT : Pericharla Ramavati Suryanarayan
(Ori. Deft/Rspdt.)Raju, Aged about 70 years,
R/o Near Old Rice Mill, Besides State
Bank of India, Delta @ Mandalam,
Gannavaram, District-East Godavari,
Andhra Pradesh.

Shri Rohit Joshi, counsel for the appellants.

CORAM : ANIL S. KILOR, J.
DATE : 08th DECEMBER,2021

ORAL JUDGMENT :

1. This is an appeal arising out of the judgment and decree dated 08/06/2018 passed in Regular Civil Appeal No. 34/2016 by the District Judge-1, Gadchiroli maintaining the judgment and decree dated 31/3/2016 passed by the learned Civil Judge, Junior Division, Sironcha, dismissing the suit filed by the appellants/plaintiffs for declaration and permanent injunction.

2. The brief facts of the present case are as under:

(the parties are referred to as per their status before the trial Court).

3. The plaintiff nos. 1 to 6 and defendant are daughters, plaintiff No.7 is daughter in law and plaintiff no. 8 is a grandson of late Rudraraju Balsuryanarayan Raju and late Smt. Rudraraju Gopamma Balsuryanarayan Raju. Plaintiff No.8 is son of the plaintiff No. 7.

4. Late Rudraraju Balsuryanarayn Raju during his lifetime, owned and possessed movable and immovable properties in and around village Sironcha. Late Rudraraju Balsuryanarayan Raju during his lifetime executed a Will on 01/09/1973 in favour of late Smt. Gopamma. He bequeathed his entire self acquired agricultural lands situated at village Amradi, Glassford Petha, Venkatapur and within Abadi of Sironcha in favour of late Smt. Gopamma. After the death of late Rudraraju Balsuryanarayan Raju, on the basis of Will late Smt. Gopamma became the absolute owner of all the properties described in the Will.

5. The plaintiffs further averred that the defendant used to come at Sironcha and look after late Smt. Gopamma. The defendant deceived late Smt. Gopamma and got registered a Gift deed in respect of suit property on 05/03/2005. It is further case of plaintiff that the defendant got the Gift of the suit property by exerting undue influence on late Smt. Gopamma. At that time, late Smt. Gopamma was frail and in advanced age with health problems. She was not in a mental state to execute any such document due to her age related health problems. The defendant fraudulently got mutation of her name in revenue records on the basis of fraudulently obtained Deed of Gift without the notice of plaintiffs. The defendant is asserting her ownership over the suit property on the basis of revenue documents.

6. The plaintiffs further averred that after obtaining the Gift the defendant left late Smt. Gopamma to feed for herself. Thereafter, the plaintiff no. 8 along with other plaintiffs took care of late Smt. Gopamma. The defendant failed to comply with the terms of Gift. The defendant never

accepted the Gift. Therefore, late Smt. Gopamma executed a registered Will Deed on 19/6/2008 in favour of the plaintiffs. She stated in the Will Deed that, defendant deceived her for getting the Gift. Late Smt. Gopamma also stated that she does not intent to gift the suit property as per Deed of Gift dated 05/03/2005 to the defendant. Late Smt. Gopamma died on 05/08/2008. the plaintiffs succeeded to the suit property as per Will dated 19/6/2008. The plaintiffs became the absolute owners of the suit property.

7. The plaintiffs further averred that, due to the instrument of registered Deed of Gift which stands in favour of the defendant, the revenue authorities are refusing to recognize them as owners of the suit property on the basis of Will Deed. Therefore, the cancellation of the Deed of Gift dated 05/03/2005, which fraudulently got in favour of the defendant is sought in the suit. So also, for a declaration that by virtue of Will Deed dated 19/6/2008 executed by late Smt. Gopamma, the plaintiffs became the absolute owners of the suit property.

8. In response to the suit summon defendant appeared and submitted her written statement (Exh.16) and resisted the contents in the plaint. The defendant submitted that, late Smt. Gopamma has seven daughters and one son. At that time late Smt. Gopamma had no good relations with her son. The son of late Smt. Gopamma was residing separately from her. He acquired sufficient land from his father. All the daughters except the defendant received financial aid from late Smt. Gopamma. The defendant used to look after and maintain late Smt. Gopamma during her lifetime. Therefore, due to love and affection late Smt. Gopamma executed the registered Deed of Gift on 05/03/2005 in her favor without any consideration. Late Smt. Gopamma gifted the suit property and handed over the possession of the suit property to the defendant by virtue of Deed of Gift. Since then the defendant is in continuous and peaceful possession of the suit property and the name of the defendant mutated in the revenue records in respect of the suit property on the basis of Deed of Gift. Late Smt. Gopamma helped the defendant in mutating her name in revenue records.

9. The defendant further averred that the plaintiffs want to grab the suit property by executing false and fabricated documents of Will Deed. The Will Deed is a bogus document. At the time of execution of Will Deed late Smt. Gopamma was frail and in advanced age with health problems. She was not at all in the mental stage to execute any such document due to her age related health problems. The defendant is the owner of the suit property. The Will Deed is not valid without the consent of the defendant. The defendant further averred that the suit is barred by limitation. Accordingly, the defendant prayed to dismiss the suit with heavy costs.

10. The learned trial Court after considering the evidence as well as documentary evidence placed on record by both the parties was pleased to dismiss the suit vide judgment and decree dated 31/3/2016 which was assailed in Regular Civil Appeal No. 34/2016 by the plaintiffs and dismissal of the said appeal vide judgment and decree dated

06/12/2016, is under challenge in this appeal.

11. I have heard learned counsel for the appellant. None for the respondent though served through paper publication.

12. This Court on 07/09/2018 while issuing notices to the respondent has framed the following substantial question of law :-

“Whether the appellate Court was legally justified in deciding the appeal in absence of proper opportunity to the appellants ?”

13. Shri Rohit Joshi, learned counsel for the appellants submit that on the date, when the appeal was fixed for judgment, the learned counsel for the appellant appeared and he moved an application for adjournment. However, the same was rejected and the Court insisted the advocate for the plaintiffs to argue the appeal, as he was not in a position to argue the same. The appeal came to be decided on merit by referring to the written notes of argument. It is submitted

that when the advocate for the plaintiffs had shown his inability to argue the matter his mere physical appearance before the Court cannot be considered as his presence.

14. Shri Rohit Joshi, learned counsel for the appellants further submits that, after showing inability by the advocate of the plaintiffs to argue the appeal. The learned Lower Appellate Court ought to have dismissed the appeal for want of prosecution and in that eventuality, the plaintiffs could have got an opportunity to restore the appeal and argue the same on merits. According to him, the mode adopted by the learned Lower Appellate Court in proceeding with the appeal and deciding the same on merit without hearing the learned advocate for the appellants/plaintiffs is nothing but denying justice to the party for the mistake of the lawyer.

15. Lastly, he has drawn the attention of this Court to the facts of the case to show that the denial of opportunity in the given facts and circumstances, will cause great prejudice to the plaintiffs. More particularly, because there are arguable

grounds available to the plaintiffs. To demonstrate that arguable points are available to the appellant which are not considered and the decision in the appeal is contrary to the well settled principles of law, he placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of *Krishna Mohan Kul alias Nani Charan Kul and another V/s Pratima Maity and others*¹. It is submitted that the burden has wrongly been casted on the plaintiffs in this matter proving the absence of fraud, misrepresentation or undue influence. By arguing so, Shri Rohit Joshi, learned counsel for the appellants submits that this is a fit case for remand of the matter and to give a complete opportunity to the plaintiffs to putforth their case, to show how the learned trial Court erroneously passed the judgment and decree dated 31/03/2016, dismissing the suit filed by the plaintiffs.

16. To consider the rival contentions raised by the appellants, I have gone through the record and also perused the judgments and decree of both the Courts below.

1 (2004) 9 SCC 468

17. The record shows that on the date of judgment, the learned counsel for the plaintiffs appeared before the First Appellate Court and moved an application for adjournment and thereby he had shown his inability to argue the matter. The learned First Appellate Court rejected the said application and proceeded with the matter to decide on merit.

18. From the above-referred fact, one thing is clear that the appellants/plaintiffs did not get the opportunity to argue the case. Hence, I find substance in the argument made by the learned counsel for the appellants that mere physical appearance of the lawyer cannot be considered as his appearance unless he is in a position to effectively argue the case and to assist the Court as an officer of the Court in the adjudication of the issues involved in the matter.

19. Moreover, after going through the law laid down in the case of *Krishna Mohan Kul alias Nani Charan Kul and another* (supra), I am convinced that some arguable points

are available to the plaintiffs which are not considered and need to be considered in first appeal while adjudicating the rights of the plaintiff involved in the present matter.

20. Furthermore, the learned Lower Appellate Court had an option available to dismiss the appeal for want of prosecution on rejection of application moved by the learned counsel for the appellant, for adjournment after showing his inability to argue the case. However, the learned Lower Appellate Court proceeded in the matter on merit and decided the appeal.

21. After considering the above factors, I have reached to a conclusion that in the given facts and circumstances of the present case, this matter needs to be remanded back to the learned Lower Appellate Court and therefore, I do not want to comment on merits of the matter in this appeal.

22. The respondent though served through paper publication, nobody appeared in this matter to point out how

the judgment and decree impugned in this appeal was passed after giving a complete and proper opportunity to the appellant/plaintiffs to put forth their case.

23. Accordingly, I have answered the substantial question of law and pass the following order:-

ORDER

(i) The appeal is allowed subject to deposit of costs of Rs. 25,000/- (Rs. Twenty Five thousand only) to be paid in the account of High Court Bar Association Library, Nagpur, within two months from today.

(ii) The First Appeal shall be restored to its original number.

(iii) The matter is remanded back to the First Appellate Court for decision afresh.

(iv) The plaintiff/appellant shall appear before the

First Appellate Court on 04/02/2022, thereupon the learned First Appellate Court may proceed with the matter and after hearing both the parties to decide the same expeditiously and in any case before 30/07/2022. No order as to costs.

[ANIL S. KILOR, J.]

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