

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

**SECOND APPEAL NO. 716 OF 2019
WITH
CIVIL APPLICATION NO.41 OF 2018
IN
SECOND APPEAL NO. 716 OF 2019**

Mahiboob Ibrahim Mulla Appellant.
V/s
Abdul Sattar Ibrahim Mulla & Ors. Respondents.

Mr. Vishwasrao S. Deokar for the Appellant.
Mr. R.S. Datar for the Respondent No.9
Mr. Somnath Thengal i/b Prasad Kulkarni for Respondent No.8.

CORAM: NITIN W. SAMBRE, J.

DATE: OCTOBER 11, 2022

P.C.:-

1. Heard.
2. Deceased Ibrahim was owner of the suit property to which Appellant alongwith his other 7 siblings succeeded in interest. Power of Attorney was executed by all the siblings on 3.8.2007 in favour of their mother Jahirabai Ibrahim Mulla/original Defendant No.1. Based on the aforesaid Power of Attorney, Sale Deed dated 29/09/2010 came to be executed in favour of the original Defendant No.9 for a consideration of Rs.25,90,000/-.
3. Appellant/Plaintiff initiated suit being RCS No. 307 of 2012 alleging that mother and other siblings has got the Power of Attorney executed by

using undue influence. It is further claimed that Appellant had no intention to execute the Power of Attorney in favour of mother as he intended to enjoy the property in question. As such, suit with a prayer for cancellation of Power of Attorney, declaration of having share in the suit property came to be initiated.

4. The suit was dismissed by the Court of Joint Civil Judge, Senior Division, Solapur vide judgment and order dated 17/09/2014. The said judgment was confirmed in Appeal at the behest of present Appellant by the learned District Judge vide judgment and order dated 22/2/2017. As such, this Second Appeal.

5. Mr. Deokar, learned Counsel for the Appellant would invite attention of this Court to the judgment and decree dated 14/1/2020 delivered in RCS No.553 of 2007 initiated by Salim, Defendant No. 7 to this suit. According to him, fact that present Appellant is having share in the property to the extent of 1/8th i.e. 12.5% is already adjudged in the aforesaid judgment and decree came to be passed in RCS No.553 of 2007. He would also urge that provisions of Section 16 of the Indian Contract Act which defines "undue influence" are very much applicable to the facts of the present case, as mother in whose favour Power of Attorney dated 3/8/2007 was allegedly executed is in dominant position alongwith other siblings. He would as such urge that the Power of Attorney which was orally revoked on 14/1/2009

and also by issuing news-paper publication on 3/10/2009 ought not to have been formed to be the basis for execution of Sale Deed dated 29/09/2010 in favour of Respondent. He would further urge that Appellant has specifically discharged the burden of demonstrating that such Power of Attorney was executed under undue influence.

6. Mr. Datar, learned Counsel for Respondent would support the judgment impugned. He would claimed that not only the Appellant has failed to satisfy requirement under Section 16 of the Indian Contract Act, but has also failed to demonstrate that Power of Attorney was terminated considering very scheme of Section 182 read with Section 202 of the Indian Contract Act. He would also urge that concurrent findings recorded by both the courts below are, after having taken into account rival pleadings and evidence on record. As such, he would urge that second appeal is liable to be dismissed.

7. The appellant/plaintiff so has established the case for undue influence and justified that the defendant no. 1-mother was in dominant position has come out with the pleadings of emotional blackmailing as he has stated that his other siblings emotionally blackmailed him and no specific attributions against mother. The appellant's claim was supported by defendant nos. 2 & 3, who are his siblings.

8. The fact remains that the signature on the power of attorney dated

03/08/2007 is not denied or disputed by the appellant. His only contentions are the defendant no. 1-mother, 3 to 7 have emotionally blackmailed and got the power of attorney executed.

9. If we consider the issue of undue influence, particularly having regard to the provisions of section 16 of the Indian Contract Act, it is incumbent for the appellant / plaintiff to specifically plead the nature, the manner and circumstances in which undue influence was exerted so as to have power of attorney executed in favour of the defendant no. 1. The aforesaid pleadings if are considered, it cannot be said that the appellant has discharged his burden of establishing that there was undue influence.

10. The consistency of law on the issue of satisfaction required in case of undue influence is, whether the person i.e. defendant no. 1 was in a position to demonstrate the will of the plaintiff and the defendant nos. 2 & 3 so as to procure the power of attorney.

11. The fact remain that such issue is question of fact and not the question of law as the findings on the said question are to be recorded upon appreciation of pleadings and the evidence on record. The reliance can be placed in support of the aforesaid observation in the matter of *Satgur Prasad vs Har Narain* reported in *AIR 1932 PC 89*.

12. The law of undue influence as embodied in section 16 of the Indian Contract Act requires the burden to be discharged by the appellant who is

executor of the power of attorney. The appellant though has proved the relationship and execution of the documents, however, merely because the defendant no. 1 was in a position to demonstrate the will of appellant, it cannot be said that the transaction was unconscionable.

13. The appellant herein has failed to discharge his initial burden. There is no rule of presumption of undue influence in case of one which is pleaded by the appellant unless it discharge his initial burden then only the burden will shift on the respondent / defendant no. 1. In support of the aforesaid observations, reliance can be placed on the judgment of Apex Court in the matter of Afsar Shaikh and another vs. Soleman Bibi reported in (1976) 2 SCC 142.

14. Apart from above, it is the case of the Appellant that he has resisted the issue of non-cancellation of Power of Attorney by demonstrating before both the Courts that orally on 14/01/2009 Respondent-mother was informed about cancellation of Power of Attorney.

15. Both the Courts below while appreciating the aforesaid submissions has not only observed that alleged notice dated 3/10/2010 issued by Respondent/Defendant purchasers of the property has failed to prove the same, so also present Appellant has equally failed to demonstrate that notice dated 3/10/2010 issued by him thereby cancelling the Power of Attorney.

16. Even if, the RCS No. 553 of 2007 preferred by the defendant no. 9 to the present suit for relief of declaration, perpetual injunction and partition was decreed, however, the fact remains that the suit of the appellant which is of 2007 was neither stayed nor dealt with in the judgment under challenge. The claim in the suit was decreed to the extent of plaintiff's share and possession thereof and the appellant herein is restrained by the perpetual injunction from causing obstructions.

17. Apart from above, the said Court has not recorded any findings on the issue of undue influence as regards the power of attorney dated 03/08/2007 and as such there are conflicting findings on the said issue. As such the said judgment will not have any bearing over the claim put forth in the present appeal.

18. Fact remains that Power of Attorney has to be considered an act of agency, appointing agent to do the act on behalf of principal. Support to the above observation can be drawn from the provisions of Section 182 of the Indian Contract Act. Such an act of appointing agency can be terminated by express terms, provided that such an agency is appointed by a document. In the case in hand Power of Attorney dated 3/8/2007 is by virtue of a document and such contract of agency can be terminated having regard to the provisions of Section 202 of the Indian Contract Act i.e. by express terms. The Appellant has failed to satisfy the above compliance.

19. That being so, no case for interference is made out in second appellate jurisdiction. Appeal as such fails and same stands dismissed. As a consequence, pending Application(s), if any, stands rejected.

20. Needless to clarify that right of the Appellant to the extent of having share in the suit property which is adjudicated by judgment and decree dated 14/1/2020 passed in Regular Civil Suit No.553 of 2007 is not gone into.

(NITIN W. SAMBRE, J.)