

Judgment

Received on : 13/09/2012

Registered on : 25/09/2012

Decided on : 05/12/2015

IN THE COURT OF THE CIVIL JUDGE, JR.DIVISION PETH
VADGAON, AT PETH VADGAON
(Presided over by Shri. U.J. More)

Reg.Civ.Suit No.354/2012

Sayajirao Baburao Ghorpade)
Age – 43 yrs., Occu. - Agri.,)- Plaintiff
R/o.- Toap, Tal. - Hatkangale,)
Dist. - Kolhapur)

Vs.

01. Balasaheb Baburao Ghorpade)
Age – 53 yrs., Occu. - Agri.,)
R/o.- Toap, Tal. - Hatkangale,)
Dist. - Kolhapur)
02. Baburao Dattajirao Ghorpade)- Defendants
Age – 70 yrs., Occu. - Agri.,)
R/o.- Toap, Tal. - Hatkangale,)
Dist. - Kolhapur)
03. Sau.Shashikala Baburao Ghorpade)
Age – 65 yrs., Occu. - Household,)
R/o.- Toap, Tal. - Hatkangale,)
Dist. - Kolhapur)

Suit for mandatory and
perpetual injunction

Appearance :-

Advocate for the plaintiff - Shri. M.J. Joshi
Advocate for defendant No.1- Shri. A.P. Chowgule
For defendant Nos.2 and 3 - No w.s.

J U D G M E N T

(Delivered on 05/12/2015)

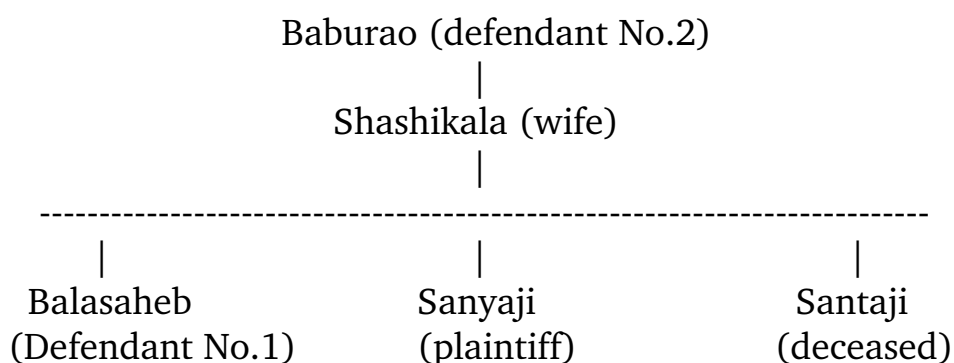
Judgment

Plaintiff has filed this suit for permanent and mandatory injunction.

02. The brief facts giving rise to this suit can be summarized as follows :-

- 1a) Maoje Toap, Tal. - Hatkangale, Dist. - Kolhapur Gat No.1135a Hissa No.3, area 1 H 97 R, plus Potkharab 0.05 R, Aakar Rs.19.10 Ps land including pipeline and house property,
- 1b) Will deed dated 10/09/2007 executed in favour of defendant No.1 by deceased Santaji Baburao Ghorpade brother of plaintiff and defendant No.1 and son of defendant Nos.2 and 3.

Hereinafter it is called as “suit properties”. Suit property 1a is ancestral property of plaintiff and defendants. The genealogy of their family is as under -



03. Plaintiff further contends that suit property is not partitioned between them. Father of plaintiff and defendant No.1 i.e. defendant No.2 and Baburao entered name of defendant No.1 to suit property as he is handicap and as defendant No.1 is minor name of his

Judgment

mother is entered. As defendant No.3 gave application to enter name of plaintiff and Santaji to suit property 1a accordingly vide mutation entry No.55 their names were entered to 7/12 extract to the extent of 5 Anne 4 Ps share each.

04. He further contends that by taking disadvantage of Santaji's insanity defendant Nos.1 to 3 in collusion with each other got executed will deed dated 10/09/2007 from Santaji in favour of defendant No.1. Santaji has 1/3rd share in the suit property however defendants shown half share of Santaji. Santaji died on 25/08/2010.

05. He further contends that after demise of Santaji defendant No.1 entered his name to 7/12 extract of suit property 1a vide mutation entry No.4048. Defendant No.1 got entered his name to whole suit property 1a by avoiding 1/3rd share of plaintiff.

06. He further contends that recently he knew that defendant No.1 is trying to alienate suit property 1a. On 25/07/2012 he visited defendant No.1 and told him not to alienate suit property 1a as he has share in it. However defendant No.1 denied his share. Therefore, he has filed present suit and prays to allow it with costs. He also prays that will deed executed by Santaji in favour of defendant No.1 dated 10/09/2007 is illegal and it be cancelled. He also prays that defendants themselves or through their agents be permanently restrained from disturbing his peaceful possession over the suit property.

Judgment

07. Defendant No.1 has filed his say at Exh.19 and denied all contentions of the plaintiff. He contends that Santaji is not insane. He is bachelor, weak in health and having sexual fobia. He is physically and mentally fit. He is residing with them. Name of Santaji was having on 7/12 extract. He was taking care of health of Santaji and also defendant Nos.2 and 3. For taking care of defendant Nos.2 and 3 Santaji bequeathed his share in suit property and house property situated in CS No.577 at Maoje Toap in favour of defendant No.1. Santaji has legal right to execute such type of will deed. Will deed dated 10/09/2007 is legal.

08. He further contends that suit property 1a is in his possession and his name was shown in crops column. He has taken loan of Rs.1,50,000/- on suit property from Toap Gramin Vikas Sheti Sahakari Patsanstha Maryadit. He is doing all his duties as Karta of the joint family. Defendant No.2 has also share in ancestral suit property.

09. He further contends that plaintiff by taking disadvantage of his name to ancestral suit property Gat No.1135a total area 4 H 47 R Potkharab 0.11 R Aakar Rs.46.05 showing partition of suit property out of said land showed 2 H 23.5 R potkharab 0.05.5 Aakar Rs.23.25 Ps excess area and shown defendant No.1 and deceased Santaji having 1 H 11 R 75 kharab 0.02.05 Aakar Rs.11.63 Ps each and accordingly partition document was executed. Plaintiff has deliberately not mentioned said partition deed dated 02/08/2004.

Judgment

Suit is not properly valued and stamped. Hence, suit of plaintiff is dismissed with costs.

10. Defendant Nos.2 and 3 though appeared failed to file their written statement hence suit to proceed without written statement against them.

11. My learned predecessor has framed following issues at Exh.20. My findings thereon with reasons thereto are as follows -

<u>Issues</u>	<u>Findings</u>
01. Whether suit property is properly described in the plaint ?	- In affirmative -
02. Whether suit is properly stamped and valued at ?	- In affirmative -
03. Does the plaintiff prove that the will deed executed in favour of defendant No.1 dt.10/09/2007 is illegal and liable to be set aside ?	- In affirmative -
04. Whether plaintiff is entitled to the relief of permanent injunction as sought ?	- In affirmative -
05. Whether plaintiff is entitled to the relief sought ?	- In affirmative -
06. What order and decree ?	-Suit is allowed -

REASONS

Judgment

12. Heard learned Advocate Shri. M.J. Joshi for the plaintiff. In support of its suit plaintiff has examined himself at Exh.22 and filed documentary evidence alongwith list Exh.3. At Exh.24 death certificate of Santajirao Ghorpade, 7/12 extract of Gat No.1135/a/3 of Maoje Toap at Exh.6, diary extract of mutation entry No.4048 at Exh.7, diary extract of mutation entry No.676 at Exh.8, diary extract of mutation entry No.55 at Exh.9 and 7/12 extract of Gat No.2051/a at Exh.10.

Admitted facts -

13. It is not disputed that the plaintiff and defendant No.1 are real brother. It is not disputed that deceased Santaji was real brother of plaintiff and defendant No.1. It is not disputed that suit property 1a is ancestral. It is not disputed suit property 1a is in the name of plaintiff, defendant No.1 and deceased Santaji for mutation entry purpose.

14. This suit is filed for declaration that the will deed dated 10/09/2007 in favour of defendant No.1 be illegal with ancillary relief to set aside said document. Therefore, burden is on the plaintiff to prove under the purview of preponderance of probability that the said document itself is null and void. One more relief seek by the plaintiff which is injective relief considering that the plaintiff is in possession over suit property.

15. Let us have glance on the provision of definition of will

under Section 2h of the Indian Succession Act, 1925 -

“Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death”.

It is expected that the will was executed by person in sound and disposing state of mind and the testator has executed will of his own free will meaning thereby, he was free agent when he executed the will. Moreover, the owners of proof is on the person who propounded the will in such cases. This can be of two types -

- 1) To discharge the burden as regards the legal and valid execution of the will
- 2) To remove the suspicious circumstances surrounding the execution of the will so as to satisfy the conscience of the Court.

The difference between transfer and will in nutshell has been discussed in *N. Ramaiah Vs. Nagaraj (2001) 4 Kar.L.J. 12* (Division Bench). Transfer is conveyance of existing property by one living person to another. (i.e. transfer inter vivos). On the other hand, a will does not involve any transfer, nor effect any transfer inter vivos, but is legal expression of the wishes and intention of person in regard to his properties which he desires to be carried into effect after his death. In other words, a will regulates succession as per personal law, on testamentary succession. The concept of transfer by a living person is wholly alien to will. When a person makes a will, he provides for testamentary succession and does not transfer any property. While transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a will is revocable and comes into operation only after death of testator.

Judgment**As to Issue Nos 1 and 2**

16. As these issues are interlinked with each other discussed commonly to avoid repetition. It is stated in the body of the plaint by mentioning para 1 with description of the suit property in sub para -

- 1a) Maoje Toap, Tal. - Hatkangale, Dist. - Kolhapur Gat No.1135a Hissa No.3, area 1 H 97 R, plus Potkharab 0.05 R, Aakar Rs.19.10 Ps land including pipeline and house property,
- 1b) Will deed dated 10/09/2007 executed in favour of defendant No.1 by deceased Santaji Baburao Ghorpade brother of plaintiff and defendant No.1 and son of defendant Nos.2 and 3.

So this description is supported by copy of 7/12 extract of disputed suit property. Therefore, I am of the opinion that there is no disputable pleading regarding description of the property and in actual sense the description mentioned in the pleading is just and proper.

17. Let us have glance on the para 10 of plaint which is valuation of the suit. It is specifically contended as the suit is filed for declaration that will deed dated 10/09/2007 in made in favour of defendant No.1 by registered deed No.5185 is null and void and be declared as cancelled. Therefore, it is valued for court fee purpose Rs.1,000/- with sufficient stamp and for injunctive relief against the alienation of suit property it is valued Rs.1,000/- with sufficient stamp duty as per Bombay Court Fees Act, 1958.

Judgment

18. The valuation as described which also reflects in the prayer of suit does not vitiate the suit or bar on the grounds of any objection under the Order 7 rule 11 of CPC and, therefore, suit is properly valued with proper court fee stamp. Accordingly, I answer Issue Nos.1 and 2 in affirmative.

As to Issue No.3 -

19. The plaintiff has come with case that the defendant No.1 is a real brother. The genealogy reflects that Baburao is original ancestor having wife Shashikala with three sons respectively by name Balasaheb (defendant No.1), Sayaji (plaintiff), Santaji (deceased son of Baburao). Plaintiff's story put forth by pleadings connotes that suit property is ancestral suit property. For family arrangement it was transferred in the name of deceased Santaji who was mentally unsound. Accordingly, mutation entry was recorded in the name of Santaji. The benefit of this position has been taken by defendant Nos.1 to 3 by executing the said will deed at Exh.24.

20. The law settled by Hon'ble Supreme court "Arms Chair: rule that while making decision in case of will the judge presumed to sit in the chair of a maker of will to verify the authenticity of will deed. In short he has to verify authenticity of will whether it is properly made out. In short this is also called as Arm Chair rule. Let us see the document i.e. will deed at Exh.24. It transpires that will deed is made by deceased Santajirao Baburao Ghorpade in favour of defendant No.1 Balasaheb Baburao Ghorpade. It is contended that he

Judgment

has sexual fobia and he is not having good health and, therefore, he is executing will deed of ancestral agricultural property i.e. Gat No.1135a, Hissa No.3, area 1 H 97 R, Potkharab 0.05 R, Aakar Rs.19.10 Ps. out of this property his half share (8 anne hissa) alongwith well pipeline, farm house with half share (8 anne) . It further contends house property CS No.577 i.e. Grampanchayat house No.837/1, area 279.7 with 1/3rd share . In short he has bequeathed half share from suit property and 1/3rd share in CS No.577 in favour of his brother i.e. defendant No.1 in exclusion of this plaintiff. The said will deed is registered will deed before Sub Registrar Hatkangale consented by father and mother i.e. defendant Nos.2 and 3 and witnessed by two persons by name Vasant Ganapat Patil R/o.- Toap, and Khanderao Shivajirao Jagdale R/o. Shirol. To counter blast the pleadings WS is filed at Exh.19 by defendant No.1 only.

21. It also reflects from the pleading of defendant No.1 that the deceased Santaji was residing with defendant Nos.1 and 2 permanently. He was physically and mentally fit. Defendant Nos.1 and 2 were maintained for medical service, residential service by defendant No.1 only not by plaintiff. Deceased Santaji was having legal right to make will deed. The will deed is registered will deed and subsequently Santaji expired on 25/08/2010. Defendant No.1 is in possession over suit property having crops in the suit property in his name with encumbrances of Toap Gramin Vikas Sheti Sahakari Patsanstha of Rs.1,50,000/-.

Judgment

22. Defendant No.1 is cultivating agricultural suit property. Deceased Santaji has executed will deed towards his share only which was in his possession also. Defendant No.1 was exercising his responsibility as a joint family Karta (ए.कु.भा.) which is not done by plaintiff. Plaintiff as well as defendant No.2 have share in ancestral property. The plaintiff has cheated Santaji and deceased defendant No.1 by showing alleged partition of suit property which is originally Gat No./1135a, area 4 H 47 R potkharab 11R Aakar Rs.46.05, he has shown 2 H 23.5 R alongwith potkharab 0.05.5 R Aakar Rs.23.25 Ps. land towards his possession, 1 H 11 R 75 potkharab Aakar 0.02.25 Rs.11.63 Ps. each towards defendant No.1 and deceased Santaji on the base of alleged partition deed dated 02/08/2004. He has intentionally keep mum in his pleading regarding alleged partition deed dated 02/08/2004. To grab the more property he has make mutation entry of excess property in his name at 7/12 extract with malafide intention.

23. To support the pleadings this defendant has not examined any witness or produce oral as well as documentary evidence. It was also bounden duty of defendants especially defendant No.1 to prove will deed in his favour by sufficient and corroborative piece of evidence by examining the scribe of will deed, witnesses of will deed and also consented parties i.e. defendant Nos.2 and 3 to disprove plaintiff's case. In this particular case the propounder of will is defendant No.1 i.e. brother of testator Santaji. Declaration made by testator in will that whatever right, title and interest subsisted in him

Judgment

in suit property had been transfer to defendant No.1 and shall vest in him after his death. The declaration by a person must have subsisting right, title and interest therein on date of making such declaration. The second thing is as to unnatural disposition made by the testator in favour of the legatee Balasaheb Ghorpade by depriving right of plaintiff. More so in the face of the facts that in leave of the service rendered by him no medical bill of deceased Santaji is filed on record. No genuineness of will shall otherwise be established by law. There is no an iota of evidence that testator has ever looked after by defendant No.1. On behalf of defendants none of the near relatives nor any of the friends, either of testator or of the defendants were examined to show that the testator has looked after even for small period during these years by any of the family members or near relatives of the testator.

24. Again once a will is proved to have been duly executed by executor with his sound disposing mental capacity the recitals made therein will have some evidentiary value. Unless prove in evidence that such will was created by undue influence or coercion which is not the case here. In spite of sufficient opportunity defendant has failed to prove the will which support the case of plaintiff. Instead plaintiff's evidence which is repetition of pleading supported by 7/12 extract at Exh.6, mutation entry No.4048 at Exh.7, mutation entry No.676 at Exh.8, mutation entry No.55 at Exh.9 and 7/12 extract at Exh.10. In short there is no dispute regarding the nature of suit property which is ancestral property as it is admitted in the will deed itself. Therefore,

Judgment

execution of will deed of ancestral property of deceased Santaji without any corroborative evidence and evidence about its suspicion supported by plaintiff's testimony make will deed suspicious. Therefore, I am of the opinion that will deed No.5185 dated 10/09/2007 executed in favour of defendant No.1 is null and void. As the suit property is ancestral property the original ancestor Baburao who is having 3 sons as per Schedule I they are equally entitled for 1/3rd share. Accordingly, I answer Issue No.3 in affirmative.

As to Issue Nos.4 and 5 -

25. The testimony of plaintiff Sayajiao is that suit property is ancestral property and it was not partitioned. Plaintiff alongwith defendant is in possession of suit property with 1/3rd share. As far as regarding possession, plaintiff has filed documentary evidence. 7/12 extract of suit property which transpire common possession in cultivation column. The will declared null and void therefore suit property is ancestral property where possession of co-sharers to be protected.

26. Per contra evidence adduced by the plaintiff is no where challenged by defendant by adducing any corroborative piece of evidence and, therefore, without partition it is the plaintiff whose possession is required to be protected with relief of injunction to his share. Accordingly, I answer Issue Nos.4 and 5 in affirmative.

Judgment

As to Issue No.6 -

27. In view of answer to Issue Nos.1 to 5, I pass following order -

ORDER

01. Suit is decreed with costs.
02. The will deed No.5185 dated 10/09/2007 executed by deceased Santaji in favour of defendant No.1 is null and void and it be treated as cancelled.
03. Defendants themselves or through their agents are permanently restrained from obstructing peaceful possession of the plaintiff over the suit property.
04. Costs of suit is saddled on defendant Nos.1 to 3.
05. The decree be drawn accordingly.

Sd/-

Date : 05.12.2015

(U.J. More)
Civil Judge, Jr. Division,
Peth Vadgaon