

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

**SECOND APPEAL NO.792 OF 2016
WITH
CIVIL APPLICATION NO.1565 OF 2016**

Mehboob Yusuf Shaikh and Ors. ... Appellants
versus
Rajubi Allabux Fakir and Ors. ... Respondents

Mr. Chetan Patil, for Appellants and for Applicant in CAS No.1565 of 2016.
Mr. Rahul Kulkarni, for Respondent No.1 in SA.

CORAM: S.J. KATHAWALLA, J.

DATE: 26th JULY, 2017

P.C.:

1. Heard the learned Advocates for the parties. Respondent Nos. 2 and 4 though served are absent. Respondent No. 2 Khatunbi Yusuf Shaikh has expired during the pendency of the proceedings. However, her heirs and legal representatives are already on record of the present appeal.

2. By the present appeal the judgment and decree dated 28th October, 2015 passed by the learned District Judge No.1, Jaisingpur arising out of the judgment and decree dated 11th January 2013 passed by the learned Civil Judge, Sr. Dn., Jaisingpur in Reg.Civil Suit No. 23 of 2010, is challenged.

3. One Yusuf alias Isub Sharif Shaikh by way of registered Will bequeathed all

his properties to his son and two grandsons. Yusuf Shaikh thereafter expired on 31-12-2004. His daughter i.e. Respondent No.1 herein filed a suit being Reg. Civil Suit No.23 of 2010 in the Court of Civil Judge, Senior Division, Jaisingpur thereby seeking decree for partition and mesne profit.

4. The learned Trial Court though held that the execution of the Will is duly proved under Section 68 of the Indian Evidence Act, recorded a finding that as Yusuf Shaikh has bequeathed his entire property to his son and two grandsons the entire Will stands vitiated and thus decreed the suit filed by Respondent No. 1 herein and allotted the shares in the property of Late Yusuf Shaikh to his heirs as if Yusuf Shaikh had died intestate.

5. The Appellants herein who are the son and grandsons of Yusuf Shaikh and the legatees in the aforesaid Will filed appeal being Reg. Civil Appeal No. 12 of 2013 in the Court of Additional District Judge, Jaisingpur. The learned District Judge 1, Jaisingpur has vide judgment and decree dated 28th October, 2015 dismissed the appeal thereby concurring with the findings passed by the learned Trial Court but modified the shares granted to the heirs of late Yusuf Shaikh.

6. The learned Counsel appearing for the Appellants has submitted that as per the provisions of Mohammedan Law, a muslim person can bequeath upto one third share of his property to strangers without the consent of his heirs and therefore the will to the extent of 1/3rd share of the property in favour of strangers is valid. In the

present case Appellant Nos. 2 and 3 herein who were the grandsons of Late Yusuf Shaikh were not his heirs and hence the bequest of the property in their favour up to one third share of the property belonging to late Yusuf Shaikh is valid and that both the Courts below have seriously erred in invalidating the entire Will executed by late Yusuf Shaikh. In support of his submissions the learned Counsel appearing for the Appellants has relied upon the judgment in the case of *Damodar Kashinath Rasane Vs. Shahajadibi wife of Bapubhai Momin and others*¹. The learned Counsel appearing for Respondent No. 1 has not disputed the ratio laid down in the said case, which supports the submission made by the learned Counsel appearing for the Appellants.

7. Thus the registered Will dated 18th July 2000 executed by late Yusuf Shaikh is held to be valid to the extent of bequest of one third share of his properties in favour of his grandsons i.e. Appellant Nos.2 and 3 herein. In this view of the matter the judgment and decree passed by both the learned Courts below are modified to that extent. The matter is remanded back to the learned District Judge No.1 Jaisingpur for re-quantifying the shares of the parties on the basis of the aforesaid finding. The learned Counsel appearing for the Appellants has informed the Court that the matter is compromised between Respondent No.3 herein viz. Haseena Rafiq Bargir and the Appellants during the pendency of the appeal before the Ld. Lower Appellate Court at Jaysingpur. In view of the said compromise the Respondent No.3 herein viz. Haseena

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Rafiq Bargir has given her consent to the will dated 18-07-2000 executed by late Yusuf Shaikh in favour of the Appellants and has also completely relinquished her share in the suit property in favour of the Appellants. The compromise pursis dated 9-4-2013 executed between the Appellants and Respondent No.3 herein viz. Haseena Rafiq Bargir was presented before the Ld. Lower Appellate Court and the same was duly taken on record by the Court. In view of the aforesaid submission made by the learned Counsel appearing for the Appellants the learned District Judge No.1 Jaisingpur, while quantifying and allotting the shares, will take into account the compromise pursis executed between the Appellants and the Respondent No.3 herein. The learned Counsel appearing for the Appellants further submits that deceased Respondent No.2 has during her life time gifted her share in the property in favour of Appellant Nos. 2 and 3 and that the Appellant Nos.2 and 3 have accepted the said gift. Since Respondent No. 1 does not accept this contention, she is at liberty to challenge the same by filing a civil suit. If the Respondent No.1 fails to file a civil suit and obtain any interim relief in the suit within a period of twelve weeks from today, the learned District Judge No.1 Jaisingpur, while quantifying and allotting the shares, will take into account the aforesaid Gift executed by deceased Respondent No.2 in favour of Appellant Nos. 2 and 3. However the share in the suit property allotted to Appellant Nos. 2 and 3 herein in pursuance of the aforesaid gift will be subject to the final outcome of the suit, if filed by Respondent No.1. 5

8. In view of the above the Second Appeal stands disposed of with no order as to costs. The Civil Application is also disposed of.

All concerned to act on an ordinary copy of this order duly authenticated by the P.A. of this Court.

(S.J.KATHAWALLA, J.)