

Sequeira

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

***SECOND APPEAL NO.100 OF 2016
Along with
CIVIL APPLICATION NO. 153 OF 2016***

Smt.Godabai Ramu Tippanna .. Appellant
Vs
1. Smt.Indubai Ramu Tipanna
(Deceased)
2. Sou.Shakuntala Baburao Chougule
and ors. .. Respondents

Mr.Tejpai Ingale, for the Appellant & Applicant.

Mr.Kuldeep Nikam, for Respondent Nos.2, 6 and 7.

***Coram : N.M.Jamdar, J.
Date : 4 April 2017.***

Oral Order :

The Appellant has challenged the judgment and orders passed by the learned Civil Judge Senior Division, Ichalkaranji in Regular Civil Suit No.423 of 2005 and learned District Judge, Ichalkaranji in Civil Appeal No.62 of 2012, decreeing the Suit of the Respondents-Plaintiffs and dismissing the Appeal of the Appellant.

2. The ancestral properties were owned by Bala Satappa Tipanna who expired on 18 December 1971. He was survived by his son

Ramu Bala Tipanna and daughters Akkatai Bapu Chougule and Sundarabai Balu Khot. The first wife of Ramu Tipanna is the Plaintiff No.1 and their daughter Shakuntala, is the Plaintiff No.2. Second wife of Ramu Tipanna is Godabai-Defendant No.1, present Appellant. Son of Ramu and Godabai is Tatyasaheb. The Respondents-Plaintiffs filed a Suit No.423 of 2005 seeking partition of the suit property. When the suit was instituted by the Plaintiff Indubai and Shakuntala, stand was taken by the Appellant, that on 3 March 1983, a Will was executed by Ramu in favour of Tatyasaheb, who expired on 16 November 2002 whereby the suit properties were bequeathed to him and therefore, there was no question of partition of the suit property. The learned Civil Judge disbelieved the theory of Will and declared that the Plaintiffs are entitled to 4/18th share in the suit property. The learned Civil Judge held that the Will executed by Ramu was suspicious and not duly proved. The Appeal No.62 of 2012 was filed by the Appellant in the District Court, Ichalkaranji. The learned District Judge held that the Will was duly executed and however, came to the conclusion that Ramu could not have bequeathed the suit property by way of Will and thereby not placing the reliance on the Will it was held to be proper.

3. The learned counsel for the Appellant submitted that having accepted the factum of the Will the learned District Judge erred in not giving effect to it. It was submitted that Ramu had executed the Will since almost for twelve years after the death of Bala Tipanna.

Akkatai and Sunderabai never made any claim regarding the suit property. It was submitted that even if it is to be accepted that Akkatai and Sunderabai had share in the suit properties, the Will could have been held to be binding as regards the share of Ramu Tipanna. This submission cannot be accepted. Merely because Akkatai and Sunderabai did not take any steps after the death of Bala Tipanna, their right admittedly in the ancestral property does not go away unless specifically relinquished. Therefore, it is clear that Ramu had only 2/3rd share in the suit property.

4. Perusal of the Will will show that it is executed on the premise that Ramu is the owner of the entire properties. There is no reference to his 2/3rd undivided share. If the Will itself is based on incorrect premise of complete ownership, effect thereto cannot be given and therefore, the learned District Judge was right in considering the fact that Ramu was not absolute owner of entire property.

5. The learned counsel for the Appellant then submitted that even assuming Will is kept aside from consideration, the grant of shares is incorrect. The Respondents-plaintiffs are not entitled to 4//18th share as Tatyasaheb was entitled to 1/3rd share and consequently, the Appellant. This submission also cannot be accepted, as the learned District Judge has rightly noted that the marriage between Ramu and Godabai was during the subsistence of his first marriage and therefore, Tatyasaheb son of Ramu and Godabai, was an illegitimate son. That being the position Tatyasaheb being illegitimate son could

not have a share in the ancestral property. The position of law as of today is that such share is not available to illegitimate children. That being the position, the learned District Judge rightly granted 4/18th share. In these circumstances, the arguments advanced do not give rise to any question of law. Second Appeal is accordingly dismissed.

6. In view of the dismissal of the Second Appeal, the Civil Application also stands disposed of.

(N.M.Jamdar, J.)