

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

SECOND APPEAL NO. 583 OF 2015

Ashok Mangilal Sarda ... Appellant

Versus

Smt. Kasturbai Mangilal Sarda ... Respondent

Mr. S. M. Railkar for Appellant.

Mr. Ashutosh M. Kulkarni for Respondent No.1.

***CORAM : N. M. Jamdar, J.
DATE : 16 January, 2018.***

ORAL ORDER

. Heard learned Counsel for the parties.

2. Admit, on the following substantial question of law :

“Whether both the courts were right in giving declaration as regard the validity of the Will and on the merits of the rival contentions,

once the court had concluded that the suit was not maintainable ?”

3. The Second Appeal is taken up for hearing forthwith.

4. Filing of paper book is dispensed with.

5. The Appellant/Plaintiff filed a Regular Civil Suit No. 197 of 1996 for a declaration that the Appellant was the only legal heir of deceased Kasturibai Mangilal Sarda being her adopted son. That suit was filed on 4th April 1996. The Respondent/Trust appeared in the suit and sought to place on record a Will dated 20th December 1993. According to the Respondent, Deceased Kasturibai Sarda had bequeathed her estate in favour of the Trust.

6. The learned Civil Judge, Junior Division, Sangli framed the issues as regard the claim of the Appellant being the only legal heir of the deceased Kasturibai, as an adopted son and whether the Respondent proved the factum of the Will. The learned Civil Judge dismissed the suit by the order

dated 30th September 2004. The Appellant filed Regular Civil Appeal No. 115 of 2006 in the District Court, Sangli. The learned District Judge, Sangli dismissed the Appeal holding that the suit was not maintainable and the Will was proved.

7. The learned Counsel for the Appellant submitted that if the suit is not maintainable, then there was no question of giving a declaration regarding the claim of the Defendant/Respondent. The learned Counsel for the Respondent, on the other hand, contented that the Appellant has admitted the factum of the Will.

8. As regard the maintainability of the suit, nothing is shown as to how this finding is incorrect. The learned Counsel for Appellant has infact advanced submission on this basis. Therefore, the parties are ad-idem regarding the maintainability of the suit. Both the courts have concurrently held that the suit was not maintainable. Once the suit was not maintainable, it was not necessary to enter into the merits of the rival contentions and proceed to declare that the Respondent had proved that the valid Will

was executed. That being the position, the question of law framed will have to be answered accordingly. Once the finding that the suit was not maintainable is rendered by both the courts is confirmed, the suit will have to be dismissed as not maintainable. In the circumstances, the observations rendered by both the courts on merits of the rival contentions will have to be ignored as they have been rendered in the non-maintainable suit. It will be open to the parties to adopt appropriate legal proceedings as may be permissible in law.

9. It is needless to state that the suit as instituted was not maintainable, if any proceedings are instituted in future, they will be decided on its own merits. All contentions on merit are kept open.

10. The Second Appeal is accordingly dismissed with the above clarification.

11. No order as to costs.

(N.M. Jamdar, J.)