

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

**SECOND APPEAL NO.13 OF 2022
WITH
CIVIL APPLICATION NO.201 OF 2020
WITH
INTERIM APPLICATION NO. 17285 OF 2022
IN
SECOND APPEAL NO.13 OF 2022**

Dhanaji Ganpati Khade

... Appellant

Vs.

Sushil Dattatraya Apke & Ors.

... Respondents

Mr. Manoj Patil for the appellant.

Mr. Amol L. Dhumal for respondent No.1.

Mr. Jotiram Jadahv for respondent Nos.2 to 4

CORAM : NITIN W. SAMBRE, J.

DATED : 14th OCTOBER, 2022

P.C.:

1. This appeal is by defendant no. 3 for partition and separate possession.
2. Ganpati, father of the plaintiff and defendant nos. 1 to 4 expired in 2001. Defendant No. 5-Tanubai, wife of Ganpati and mother of plaintiff and defendant nos. 1 to 4 expired on 21/09/2009. The Defendant No. 5-Tanubai since was residing with the present applicant-defendant no. 3 executed will dated 16/09/2009 (Exhibit 112).

3. Based on the aforesaid will, shares were demarkated by the Trial Court in spite of the fact that the illegality of will was questioned by the plaintiffs.

4. D.W. Nos. 4 & 5, the witness and scribe of will, duly proved the execution of will.

5. In the aforesaid background, based on the will the share of the appellant/defendant no. 3 was determined by the Trial Court.

6. In appeal, the learned District Judge while re-appreciating the entire evidence has lost sight of the effect of the will (Exhibit 112) on the rights of the appellants i.e. his entitlement to the share of defendant no. 5 his mother by virtue of (Exhibit 112) a will is specifically issue to that effect was framed and answered by the Trial Court.

7. In the aforesaid background, the contentions of learned counsel for the appellant are, the question of law which warrants consideration is, whether the Appellate Court committed error in ignoring the effect of the will (Exhibit 112) executed by defendant no. 5-Tanubai.

8. With the assistance of respective learned counsels, I have gone through the judgments of both the Courts below.

9. The Trial Court while dealing with the challenge by the

plaintiff to the legality of the will (Exhibit-112) has appreciated the evidence of D.W. No.4-Latif, D.W. No. 5-Belekar and also the oral evidence of the parties. The Trial Court noticed that the execution of the will was duly proved. Accordingly, the Trial Court proceeded to the determine the shares of each of the parties. The appellant/defendant no. 3 accordingly was given share based on the will in question.

10. Whereas the lower Appellate Court while appreciating the evidence has completely ignored the effect of will (Exhibit 112) and based on undisputed factual matrix about the status of the suit property being ancestral, and relations between the parties proceeded to modify the decree.

11. Rightly so pointed out by learned counsel for the appellant/defendant no. 3 that the Appellate Court while dealing with shares has failed to consider the legal effect of will (Exhibit 112) on the share of the appellant, so also the right of executant of will to bequeath her share from its family property.

12. As such, there appears to be a substance in the question of law which is addressed by learned counsel for the appellant referred above.

13. That being so, the impugned judgment dated 26/04/2017

delivered in Regular Civil Appeal No. 75 of 2012 is hereby set aside.

14. It is directed that the Appellate Court shall decide the appeal afresh after considering the effect of Exhibit 112 i.e will executed by defendant no. 5 in favour of the defendant no. 3-present appellant.

15. Since the decree is already executed, the parties hereto are directed to maintain status quo till the decision of the appeal.

16. We direct that the Appellate Court to conclude the hearing of the appeal in any case within period of six months from the date of production of this order.

17. The second appeal as such stands disposed of.

18. In view of the disposal of the appeal, both the applications also stand disposed of.

(NITIN W. SAMBRE, J.)