

Arjun

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

**SECOND APPEAL NO.30 OF 2022
WITH
CIVIL APPLICATION NO.1092 OF 2019
IN
SECOND APPEAL NO.30 OF 2022**

Smt. Sundarabai Ravoo Chothe ...Appellants/
(Since deceased through legal heirs) Applicants
1A. Maruti Ravoo Chothe
(Since deceased through legal heirs)
a. Smt. Sugandha @ Sunanda Maruti Chothe & Ors.

V/s.

Smt. Shingubai Appayya Manoli ...Respondents
(Since deceased through her legal heirs)
1A. Shri. Basappa Appayya Manoli & Ors.

Mr. Chetan Patil i/b M. G. Bagkar, for the
Appellants/Applicants.

Mr. Vijay G. Desai a/w Mr. Shahajirao B. Desai i/b
Abhijit B. Desai, for Respondent Nos.1A & 1B.

**CORAM : MADHAV J. JAMDAR, J.
DATED : JULY 03, 2023**

P.C.:

1. Heard Mr. Patil, learned counsel appearing for the
Appellants and Mr. Desai, learned counsel appearing for
Respondent Nos.1A and 1B.

2. The Appellants are the original Plaintiffs. By the present Second Appeal, the Appellants are challenging the legality and the validity of the Judgment and Decree dated 30th March 2019 passed by the learned District Judge-1, Gadhinglaj in Regular Civil Appeal No.48 of 2009. By the said Judgment and Decree, the learned First Appellate Court set aside the Judgment and Decree dated 30th June 2009 passed by the learned Civil Judge, Senior Division, Gadhinglaj decreeing Regular Civil Suit No.30 of 1999 and dismissed the said suit.

3. Mr. Patil, learned counsel appearing for the Appellants submits that following substantial questions of law arise in this Second Appeal.

i] Whether entire Appeal abates, as the Appellant No.3 who was original Defendant No.3 passed away during the pendency of the Regular Civil Appeal No.48 of 2009 and his heirs are not brought on record?

ii] Whether the Judgment and Decree passed by the learned First Appellate Court is not in consonance with the decision of the Supreme Court in *Santosh Hazari Vs. Purushottam Tiwari (Deceased) By LR's.*¹?

4. Mr. Patil, learned counsel appearing for the Appellants

¹ (2001) 3 SCC 179

submitted that as the entire Appeal abates resulting into confirmation of the Decree passed by the learned Trial Court and, therefore, the Decree passed by the learned First Appellate Court is not in accordance with law. He pointed out the evidence on record and findings recorded by the learned First Appellate Court and submitted that the evidence is totally different than as held by the learned First Appellate Court and that the Judgment and Decree passed by the learned First Appellate Court is not in consonance with the decision of the Supreme Court in *Santosh Hazari (supra)*.

5. Mr. Desai, learned counsel appearing for the Respondent Nos.1A and 1B submitted that the learned First Appellate Court has discussed the evidence in detail and has held that the will on the basis of which the Plaintiffs i.e. present Appellants are claiming right as beneficiary failed to prove the said will and, therefore, there is no illegality committed by the learned First Appellate Court. As far as the abatement of the entire Appeal is concerned, it is the submission of Mr. Desai, learned counsel that the Plaintiffs could succeed only in the event the will is proved and, therefore, the fact that the Appellant No.3 passed away

during the pendency of the Appeal and his heirs were not brought on record is inconsequential.

6. Before considering the rival submissions, it is necessary to set out certain factual aspects :-

(i) Dundappa, husband of Kashawwa passed away on 23rd February 1972. Said Dundappa and Kashawwa were having three daughters and one son. However, said son is not known for more than 35 years.

(ii) It is the contention of the Plaintiffs that on 1st February 1975, the said Kashawwa executed will and by the said will the suit property is bequeathed in favour of one Arun who is the son of Annapurna.

(iii) Said Kashawwa passed away on 3rd February 1975 i.e. immediately within two days of execution of the alleged will.

(iv) It is the claim of the Plaintiffs (present Appellants are the heirs of original Plaintiffs) that Kashawwa was the original owner of the suit land. The same was bequeathed by Kashawwa by said will dated 1st February 1975 in favour of Arun (Defendant No.6) and said Arun sold the property to the Plaintiffs by registered sale deed dated 26th May 1978 for consideration of Rs.6,500/-. It is the further claim of the

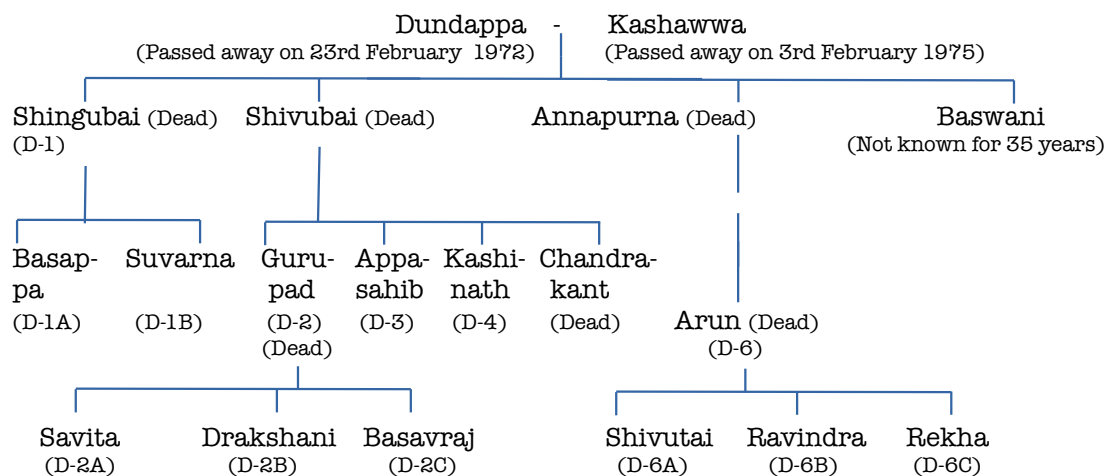
Plaintiffs that the Defendants are trying to obstruct the lawful possession of the Plaintiffs and, therefore, suit is filed for declaration that the sale deed dated 26th May 1978 is legal and valid and for injunction.

(v) The Defendant Nos.1 to 3 filed written statement dated 29th December 1999 and denied the case of the Plaintiffs and contended that they are in possession of the suit property. They also denied the genuineness of the will.

(vi) The learned Trial Court decreed the suit *inter alia* by holding that the said will is proved by the Plaintiffs.

(vii) The learned Appellate Court dismissed the suit by *inter alia* holding that the said will is not proved by the Plaintiffs.

7. The genealogy of the family is as follows :



8. The factual position on record clearly shows that the said Kashawwa was admitted in the hospital when the said

alleged will dated 1st February 1975 was executed. It is also admitted position that the attesting witnesses of the said alleged will have passed away and on behalf of the Plaintiffs scribe of the said will was examined as PW-6. He has been extensively cross-examined by the learned counsel appearing for the Respondents.

9. The learned First Appellate Court while considering the evidence of PW-6 has specifically observed that PW-6 appears to be cooked up witness, as strangely memory of P.W. 6 is unaffected during chief examination, however, during the cross-examination of P.W. 6 he is not in a position to remember anything about the execution of the will. The learned First Appellate Court has also observed that this conduct of P.W.-6 clearly casts suspicion about the Plaintiffs case that Kashawwa executed the will in favour of Defendant No.6.

10. A perusal of the deposition of P.W.-6 clearly shows that PW-6 who claims to be scribe of the will is not stranger. In the evidence affidavit he states that Smt. Kashawwa is the relative. Therefore, it is clear that said P.W.-6 is not stranger to the family. It is further significant to note that in the

evidence affidavit he states that when Kashawwa Dundappa Hidadugi was admitted in the hospital she called him on 1st February 1975. It is significant to note that it is not his case that he received message from some other person and his case is that deceased Kashawwa called him personally. In the evidence affidavit he has stated that the document of will is scribed by him. In the cross-examination he admitted that he was doing business at Goa and the beneficiary under the said will Arun also was at Goa and both of them were in the same school. It is significant to note that during his further cross-examination he stated that he was knowing Dundappa Shivlingappa Hidadugi but he does not remember the name of his wife i.e. said deceased Kashawwa, who allegedly executed the will. It is significant to note that the said alleged will was executed by wife of said Dundappa and as per the claim of P.W.-6 said wife of Dundappa called him in the hospital and still he doesn't remember the name of Kashawwa. It is significant to note that in the evidence affidavit her name is mentioned and in the cross-examination, he has stated that he does not remember the name of the wife, he does not remember the name of

daughters and son of Kashawwa. It is further significant to note that the said alleged will was executed on 1st February 1975 and said Kashawwa passed away on 3rd February 1975 still in the cross-examination, he states that he was not aware when said Kashawwa passed away and whether she was suffering from cancer and that he has not enquired about her death. It is further significant to note that in the cross-examination he states, he does not remember the lane where hospital was located in which deceased was admitted.

11. Mr. Desai, learned counsel is right in pointing out the aspect that the will was scribed on stamp paper which was purchased on 18th May 1975 and the alleged will was executed on 1st February 1975. Therefore, it is very clear that the said alleged will is a fraudulent and fabricated document. The P.W.-6 has also admitted in the evidence affidavit that mother tongue of Kashawwa was Kannad and said alleged will is in Marathi. On the basis of above evidence on record, the learned First Appellate Court has come to the conclusion that the will is not genuine and, therefore, set aside the order passed by the learned Trial Court, by which, it has been held that the will is genuine.

12. In view of above factual position, it is required to be seen whether there is substance in the first substantial question of law raised by Mr. Patil, learned counsel. According to Mr. Patil, learned counsel appearing for the Appellants as the Appellant No.3 has passed away during the pendency of the Appeal before the learned First Appellate Court and, therefore, the entire Appeal has abated resulting into confirmation of the Decree passed by the learned Trial Court. However, the genealogy which has been set out hereinabove clearly shows that Kashawwa was survived by three daughters and one son who are parties to the suit as well as Regular Civil Appeal. The entire claim of the Plaintiffs is on the basis of the said alleged will dated 1st February, 1975. The finding recorded by the learned Trial Court that the will is genuine is challenged in the Appeal. In view of the said will, rights of co-sharers were affected and, therefore, by death of one co-sharer, it cannot be said that the entire Appeal which challenges the Decree that registered sale deed dated 26th May 1978 executed by Defendant No.6 by claiming exclusive ownership on the basis of alleged will in favour of Plaintiffs will bind all the Defendants i.e. all the co-

sharers. At the most it can be said that the same will not bind the share of the Appellant No.3 i.e. Defendant No.3. However, there is one more aspect. It is settled legal position that the finding regarding genuineness of the will operates in rem and, therefore, death of the Appellant No.3 i.e. Defendant No.3 during the pendency of the Appeal will not result in the abatement of the entire Appeal. Therefore, there is no substance in the first substantial question of law raised by Mr. Patil, learned counsel appearing for the Appellants.

13. As far as the second substantial question of law that the Judgment and Decree of the learned First Appellate Court is not in accordance with law laid down by the Supreme Court in the case of *Santosh Hazari (supra)* is concerned, it is true that there are few mistakes which have been committed by the learned First Appellate Court while considering the original evidence. However, the learned First Appellate Court has taken into consideration the circumstances on record which show that the said will is not a genuine will and, therefore, few mistakes committed by the learned First Appellate Court will not have effect of rendering the finding that said will is not proved, the same is fabricated and bogus

as invalid. The learned counsel appearing for the Appellants has not pointed out anything which will have effect of rendering the finding recorded with respect to the alleged will by the learned First Appellate Court as invalid. In view of the above reasons, there is no substance in the second substantial question of law raised by Mr. Patil, learned counsel appearing for the Appellants.

14. For the above reasons, the Second Appeal is dismissed with cost.

15. In view of dismissal of the Second Appeal, nothing survives in the Civil Application and the same is also dismissed.

[MADHAV J. JAMDAR, J.]