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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 323 OF 2022
WITH
INTERIM APPLICATION NO. 4457 OF 2023**

Ananda Yashwant Mali ... Appellant/Applicant
vs.
Sarla Yashwant Mali and Others ... Respondents

**WITH
SECOND APPEAL NO. 36 OF 2022**

Ananda Yashwant Mali ... Appellant
vs.
Sarla Yashwant Mali ... Respondent

Mr. Sandeep S. Koregave for the Appellant.

CORAM: GAURI GODSE, J.

RESERVED ON: 21st AUGUST 2024

PRONOUNCED ON: 15th OCTOBER 2024

ORDER:

Second Appeal No. 36 of 2022

1. This Second Appeal is preferred by the plaintiff to challenge the concurrent judgments and decrees dismissing his suit to challenge the will executed by Shirmabai bequeathing her undivided share to her daughter, i.e. defendant.

2. The plaintiff in the present Second Appeal is the original defendant no. 1 in the Second Appeal No. 323 of 2022. In the present Second Appeal, Yashwant's son is the plaintiff, and Yashwant's daughter Sarla is the defendant. Sarla is the original plaintiff in the Second Appeal No. 323 of 2022, who had filed a suit for partition and separate possession. Sarla, being the daughter of Shirmabai, i.e. defendant no. 2 in the suit for partition, claimed Shirmabai's undivided share based on the will executed by Shirmabai. Hence, Ananda, i.e. Yashwant's son, filed a suit to challenge the will executed by Shirmabai in favour of Sarla. The said suit was dismissed by accepting the validity of the will. Dismissal of the suit is confirmed by the First Appellate Court in an appeal preferred by Ananda. Hence, this Second Appeal.

3. Learned counsel for the appellant submitted that the will was not proved as required under Section 68 of the Indian Evidence Act, 1872. He submitted that the suspicious circumstances, as shown by the plaintiff, were not considered by both the courts. He submitted that Shirmabai had no legal right to execute the will bequeathing her share to her daughter. He further submitted that both the courts failed to

properly appreciate the evidence of the attesting witness. He submits that the correct appreciation of the evidence on record would indicate that suspicious circumstances surrounded the will, and it could not be accepted as a valid will. He thus submits that the second appeal raises substantial questions of law on the validity of the execution of the will.

4. I have perused the papers and considered the submissions made on behalf of the appellant. Both the courts have thoroughly examined the pleading and evidence on record. Both the courts have concurrently accepted the evidence of the attesting witness in support of the will. Both the courts correctly held that Shirmabai, being the widow of Yashwant, was entitled to share in the suit property. In view of Section 8 of the Hindu Succession Act, Yashwant's share will devolve upon his widow and children. Hence, Shirmabai was entitled to bequeath her undivided share to her daughter by executing her will.

5. The First Appellate Court has also examined the pleadings and evidence on record and particularly considered the objections regarding suspicious circumstances. The First Appellate Court has

categorically held that the evidence of Sarla, i.e., the defendant and the attesting witness, remained unshaken. The First Appellate Court also referred to the admission given by Ananda, i.e. the plaintiff, where he admitted that Shirmabai was not suffering from any ailment before her death, and she was able to perform her daily pursuits. The medical certificate attached to the will is also held in favour of the validity of the will.

6. A perusal of the reasons recorded by both courts indicates that both courts examined the entire evidence to accept the validity of the registered will. I do not find any illegality or perversity in the reasons recorded in the impugned judgments. Hence, in view of the concurrent findings recorded by the courts, the grounds raised on behalf of the appellant would not require any consideration by this court.

7. The Second Appeal does not raise any substantial question of law. Hence, the Second Appeal is dismissed.

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8. This second appeal is preferred by defendant no. 1 (Ananda) to challenge the concurrent judgments and decrees granting a decree for

partition and separate possession. The trial court had granted one-fourth share each to the plaintiff, defendant nos. 1, 3 and 4. The First Appellate Court has modified the decree and granted one-fifth equal share to the plaintiff and defendant nos. 1 to 4.

9. The plaintiff has claimed partition and separate possession of the suit property through Yashwant, i.e. father of the plaintiff, defendant nos. 1, 3 and 4. Defendant no. 2 (Shirmabai) was the second wife of Yashwant. The plaintiff (Sarla) and defendant nos. 3 and 4 are defendant no. 2's daughters from Yashwant. Defendant no. 1 is the son of Yashwant and his first wife.

10. The First Appellate Court has referred to defendant no.1's challenge to the execution of the will by Shirmabai in favour of the plaintiff (Sarla). Defendant no. 1 objected to the plaintiff's right to seek Shirmabai's share based on the will as he had filed a suit challenging the will. Though the suit was dismissed, it was defendant no.1's contention that he had filed First Appeal, and the same was pending.

11. The First Appellate court declared that the plaintiff and defendant nos. 1 to 4 are entitled to $\frac{1}{5}^{\text{th}}$ equal share. However, the First

Appellate Court held that till the decision in the defendant no. 1's challenge to the will, Shirmabai's 1/5th share cannot be allotted to the plaintiff. Thus, the First Appellate Court clarified that the devolution of Shirmabai's 1/5th share to the plaintiff shall depend upon the final outcome in the appeal filed by defendant no. 1, challenging the dismissal of his Regular Civil Suit No. 564 of 2011. The first appeal filed by the appellant against the dismissal of his Regular Civil Suit No. 564 of 2011 was dismissed. By this common order, the Second Appeal challenging the dismissal of Regular Civil Suit No. 564 of 2011 and the first appeal by the appellant is dismissed. Hence, the validity of the will executed by Shirmabai in favour of the plaintiff, i.e. Sarla, stands confirmed.

12. Thus, in view of the dismissal of the Second Appeal No. 36 of 2022, the plaintiff, i.e. Sarla, would be entitled to claim Shirmabai's share as clarified by the First Appellate Court in Regular Civil Suit No. 113 of 2012.

13. In view of the amendment of 2005 granting coparcenary rights to the daughters, this second appeal raises the following substantial

questions of law:

- (a) In view of the amendment of 2005 to the Hindu Succession Act, granting coparcenary rights to the daughters, whether the plaintiff and defendant nos. 3 and 4 would be entitled to equal shares as coparceners along with Yashwant and defendant no. 1 ?
- (b) Whether in view of Section 8 of the Hindu Succession Act, Yashwant's share would devolve upon the plaintiff and defendants equally ?
- (c) Whether the plaintiff and defendant nos. 1, 3 and 4, being coparceners, are entitled to 1/5th equal share along with Yashwant, and whether 1/5th share of deceased Yashwant would devolve upon the plaintiff and defendants equally in view of Section 8 of the Hindu Succession Act ?”

14. Hence, issue notice for final disposal of the second appeal on the aforesaid questions of law. Office is directed to issue notice along with copy of this order.

15. Notice is made returnable on 9th December 2024.

16. In addition to court notice, the learned advocate for the appellant shall serve the respondents by private notice along with copy of this order and file service affidavit before the returnable date.

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17. Rule on interim relief in terms of prayer clauses (a) and (b) is made returnable on 9th December 2024.

18. In addition to court notice, the learned advocate for the appellant shall serve the respondents by private notice file service affidavit before the returnable date.

19. Till the next date, by way of ad-interim relief, there will be a stay only to the actual handing over of the physical possession.

20. The parties shall not create any third party interest in the suit property till the next date.

[GAURI GODSE, J.]