

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO.817 OF 2017**  
**WITH**  
**CIVIL APPLICATION NO.1612 OF 2017**  
**IN**  
**SECOND APPEAL NO.817 OF 2017**

Anandrao Maruti Chougale

...Appellant/  
Applicant

**Versus**

Dhondiba Doulu Vanganekar

...Respondent

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Mr. Rajesh B. Parab for the Appellant/Applicant.

Mr. Raturaj P. Pawar for the Respondent.

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**CORAM : SHARMILA U. DESHMUKH, J.**

**DATE : FEBRUARY 6, 2024**

**P. C. :**

1. Being dissatisfied by the judgment dated 14<sup>th</sup> September, 2016 passed by the Appellate Court in Regular Civil Appeal No. 47 of 2005 by which the Appeal of the Defendant came to be dismissed confirming the judgment and decree of the Trial Court dated 27<sup>th</sup> August, 2004, passed in R.C.S. No. 45 of 1995, the original Defendant is before this Court. For the sake of convenience, the parties are referred by their status before the Trial Court.

2. Regular Civil Suit No. 45 of 1995 was instituted by the Plaintiff

seeking declaration that the alleged Will deed executed by Housabai in favour of the original Defendant is null and void and for a declaration that the Plaintiff is the owner of the entire property and for perpetual injunction. It was pleaded by the Plaintiff that the suit property was the ancestral property of one Appa Vanganekar who had two sons Doulu and Sakharam. The Defendant claimed through the Will of Housabai who belongs to the branch of Sakharam being the wife of Yashwant i.e. son of Sakharam. The case of the Plaintiff was that Housabai never resided at the matrimonial house and after the death of Yashwant and Krishna i.e. sons of Sakharam the name of Housabai should not have been mutated in the Revenue records. It was the case of the Plaintiff that upon the death of Sakharam, and Yashwant and Krishna, the Plaintiff's father i.e. Doulu received the property being ancestral property by survivorship and as such, Housabai had no right to execute Will deed in respect of the suit property. The Defendant resisted the suit and submitted that Housabai was the full owner of half portion of the suit property which has been bequeathed in his favour by Will of 8<sup>th</sup> April, 1994.

**3.** The parties went to trial and the Trial Court answered the issues in favour of the Plaintiff and decreed the suit. The Trial Court held that the Defendant has failed to prove the Will deed and as such, permanently restrained the Defendant from obstructing the possession of the Plaintiff

over the suit property. As against this, the original Defendant filed Regular Civil Appeal No. 47 of 2005. The Appellate Court considered the evidence and held that the Defendant has failed to prove the Will and as such, the Defendant had no claim over the suit properties and dismissed the Appeal.

4. Heard learned counsel for the parties.

5. Learned counsel for the Appellant would submit that the substantial question of law which arises in the present case is that the burden of proof has been wrongly cast upon the Defendant to prove the genuineness of the Will considering that it was the Plaintiff who had sought relief as regards the Will deed. He would further submit that both the Courts have held that by virtue of a partition deed which has been executed in the year 1950 and which was marked as Exhibit 95, Housabai had become the absolute owner of the suit property under the provisions of the Hindu Succession Act and being the owner was fully entitled to dispose of the property on the basis of the Will deed. He submits that it was for the Plaintiff to prove that the Will deed is not genuine and is null and void. He submits that the provisions of Section 101 of the Indian Evidence Act cast burden upon the Plaintiff to prove the same.

6. *Per contra*, learned counsel for the Respondent would submit that

the document Exhibit 95 came to be exhibited in view of Section 90 of the Evidence Act. He would further submit that mere exhibiting of the document would not lead to the contents being proved. He submits that the document *prima facie* is doubtful inasmuch as, the documents is stated of the year 1950 by which it is claimed that Housabai had received half share in the property upon partition at time when her husband i.e. Yashwant was alive who is stated to have expired in the year 1952. He submits that there is no substantial question of law which arises in the present case.

7. Considered the submission and perused the record.

8. The concurrent findings of the Court as regards the half of the share property belonging absolutely to Housabai have not been challenged by any cross-objection and as such, it is not necessary for this Court to go into the said issue. The submission of learned counsel for the Appellant is that the burden of proof has been wrongly cast upon the Plaintiff to prove the genuineness of the Will. It is well settled that the burden is upon the propounder of the Will to prove that the Will has been duly executed.

9. In the present case the findings of the Trial Court is that the Defendant had not even entered into the witness box nor examined any

of the witnesses. That being the case the Defendants have failed to prove the genuineness of the Will and that the same was executed by Hausabai in his favour. Considering the evidence which has been brought on record, the Trial Court as well as the Appellate Court has rightly decreed the suit. Considering the settled position in law as regards the burden being upon the propounder of the Will to establish the execution of the Will, no substantial question of law arises in the present case.

**10.** Appeal is devoid of merits and stands dismissed.

**11.** In view of dismissal of Second Appeal nothing survives in the pending Applications filed therein for consideration and the same are also disposed of as such.

**(SHARMILA U. DESHMUKH, J. )**