

Baliram Atmaram Kelapure

Vs

Indirabai and Others

Civil Appeal No. 7218 of 1996

(B.P. Jeevan Reddy, M.K. Mukherjee JJ)

18.04.1996

JUDGEMENT

-
B. P. JEEVAN REDDY, J. :-

1. Leave granted. Heard learned counsel for both the parties.

2. Second defendant is the appellant. Suit for partition, separate possession and profits instituted by the plaintiff-first respondent has been decreed by the Appellate Court with the following shares : Plaintiff 1/12, first defendant 5/12 and second defendant 6/12. The High Court has modified the said shares in the following manner : Plaintiff 1/12, first defendant 7/12 and second defendant 4/12. Since his shares have been reduced by the High Court, the present appeal has been preferred by the second defendant.

3. One Atma Ram, who died on January 23, 1971, had two wives—Janki Bai and Rama Bai. Plaintiff Indira Bai and the 4th defendant Tatyia are the children by Janaki Bai. Whereas first defendant Krishana and second defendant Baliram are the sons through Rama Bai. Rama Bai was alive when the suit was instituted and she was impleaded as the third defendant. Pending the suit Rama Bai died and defendants 1 and 2 – her sons – have been impleaded as her legal representatives. This was done notwithstanding the plea of the first defendant Krishna that Rama Bai has executed a will bequeathing her entire interest in his favour alone. In this appeal we are not concerned with Tatyia but only with the shares of the plaintiff and defendants 1 and 2. Here again the plaintiff's share at 1/12 is not in dispute. The dispute really is between defendant 1 and 2. The appellate Court had determined the shares of defendant 1 and defendant 2, keeping aside the Will relied upon by the first defendant. On the other hand, the High Court has accepted the Will as true and accordingly modified the shares of these two defendants as 2/12 and 4/12 respectively.

4. In our opinion, the High Court was not justified in modifying the shares as aforesaid. Firstly, the Will said to have been executed by Rama Bai in favour of the first defendant was not in issue in the suit nor in the L. R. application and no finding with respect to its truth and validity has been recorded. Notwithstanding the said Will, both the brothers defendants 1 and 2 were impleaded as the L. Rs. of Rama Bai. Moreover, since the first defendant is seeking to alter the normal rule of succession by putting forward the said Will, the burden lies upon him to establish the truth and validity of the Will.

5. For the above reasons, we set aside the judgment and decree of the High Court and restore the

judgment and decree of the first Appellate Court. It is, however, made clear that it shall be open to the first defendant to establish the truth and validity of the said Will in an appropriate suit/proceedings in which even, it is obvious, the inter se shares as between the present defendants 1 and 2 shall depend upon the finding of competent Court regarding the truth and validity of the Will.

6. The second appeal is accordingly allowed in the above terms. No. costs.

Appeal allowed.