

PETITIONER:
BALIRAM ATMARAM KELAPURE

Vs.

RESPONDENT:
SMT. INDIRABAI & ORS.

DATE OF JUDGMENT: 18/04/1996

BENCH:
JEEVAN REDDY, B.P. (J)
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JEEVAN REDDY, B.P. (J)
MUKHERJEE M.K. (J)

CITATION:
1996 AIR 2024 JT 1996 (5) 18
1996 SCALE (3)784

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Leave granted. Heard learned counsel for both the parties.

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 first share has been reduced by the High Court, the present has been preferred by the second defendant.

One Atmaram, who died on January 13, 1971, had two wives - Janki Bai and Rama Bai. Plaintiff Indira Bai and the 4th defendant latya are the children by Janaki Bai. Whereas first defendant Krishna 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 alive. In this appeal we are not concerned 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 defendants 1 and 2. The appellate court had determined the shares of defendant 1 and defendant 2, keeping aside the will relied upon 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 7/12 and 4/12 respectively.

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.

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/proceeding in which event, it is obvious, the inter se shares as between the present defendants 1 and 2 shall depend the finding of competent court regarding the truth validity of the will.

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