



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 437 OF 2023 WITH
CIVIL APPLICATION NO. 9757 OF 2023
IN SA/437/2023

Sugarabi Shavkha Pathan And Ors

....Appellants

VERSUS

Hajirabi Yusufkha Pathan

....Respondent

....

Mr. M. M. Patil, Advocate for Appellants

Ms. A. N Ansari, Advocate for Respondents

...

CORAM : R.M. JOSHI, J

DATE : FEBRUARY 14, 2024

PER COURT :

1. This appeal filed under Section 100 of Code of Civil Procedure takes exception to the judgment and decree passed by First Appellate Court in RCA No. 134/2017 whereby the judgment and decree passed by trial Court in RCS No. 80/2008 came to be modified by including properties bearing no. 714 and 717 situated at Dharangaon, Dist. Jalgaon in the decree. This appeal came to be preferred by the Plaintiff only to the extent of said exclusion of these properties from the decree.

2. Parties are referred to by their nomenclature

in the original proceedings.

3. The facts which led to the filing of present Appeal can be narrated as under:

Plaintiff filed suit for declaration, partition and possession of the suit properties as described therein, which includes properties recorded above along with house property. It is the case of the Plaintiff that the suit properties belong to their father Shavkha Pathan. Plaintiff claims her share therein. Defendant No.1 by filing written statement has contended that the landed properties described herein above were given by her husband i.e., father of the Plaintiff in the year 1975 to her and her name was mutated in the revenue record. Learned trial Court has held that it is hiba i.e., gift given by husband to the wife, and as such, defendant no. 1 has become exclusive owner thereof. The said findings are reversed by the First Appellate Court by observing that the Defendant No. 1 has never come out with a case that the property was transferred in her name as gift/hiba.

4. Learned Counsel for Defendant No. 1 sought to convince this Court by relying upon the case law to

contend that the act of gift can be done mutation. In support of his submissions, he relied on following judgments: *Bellachi by Lrs Vs. Pakeeran, (2009) 4 SCR 823, Smt. Ajambi (dead) by Lrs Vs. Roshanbi and Ors, (2010) 10 SCR 717, Khursida Begum (D) by lrs and Ors Vs. Mohammad Farooq (D) by Lrs and Anr, (2016) 1 SCR 484 & Valia Peddikakkandi Kutheessa Umma and Others Vs. Pathakkalan Naravanath Kumhamu and Ors, 1963 4 SCR 549.*

5. If the judgment in case of Khursida (supra) is perused carefully then it does not lay down any law that mutation entry in the name of any person can be treated as gift. All that has been held by Hon'ble Apex Court in the said judgment while dealing with the situation where property is in occupation of tenants is that in such situation a gift can be completed by delivery of title deed or by request to tenants to attorn to the donee or by mutation. Thus, it cannot be said that merely because any property is mutated in the name of the plaintiff it is to be treated as hiba.

6. By relying upon the judgment in case of Smt. Ajambi (supra) it is sought to be argued that the disposition inter vivos is hiba. In this regard,

paragraph 21 of the said judgment needs to be considered carefully, which is reproduced herein below for ready reference.

21. *This Court in the case of Abdul Rahim & Ors. Vs. Sk. Abdul Zabar & Ors, reported in (2009) 6 SCC 160 held thus:-*

15. We may notice the definition of gift as contained in various textbooks. In Mulla's Principles of Mohammadan Law the "hiba" is defined as a transfer of property made immediately without any exchange by one person to another and accepted by or on behalf of later (sic latter). A.A.A. Fyzee in his Outlines of Muhammadan Law defined "gift" in the following terms:

"A MAN may lawfully make a gift of his property to another during this lifetime; or he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will."..."

7. While considering the principles of hiba it is observed that what constitutes hiba i.e., gift. It is in the context of the time of disposition it is held

that the disposition inter vivos i.e., during his lifetime or he may give it away to someone after his death by will and that the testamentary disposition was restricted to 1/3rd of net estate. Thus, what has been held therein is that disposition inter vivos deals only with the quantum and the person is entitled to dispose of property during his lifetime. This cannot be treated as any transfer effected during the lifetime of the person will become to hiba.

8. It is further sought to be argued that if a proper meaning given to the pleadings of defendant no. 1 which indicates that it is oral gift given between husband and wife and pursuant thereof mutation entries are recorded. In this regard, it is pertinent to note that in the plaint there is no reference of any gift being given by the husband to wife. Though liberal construction is to be given to a mufusil pleadings, but it cannot be permitted to the party to go beyond pleadings and to seek such interpretation to make out case never pleaded even indirectly. Such interpretation is also not permissible in the facts of the case. Even in the evidence before trial Court defendant no. 1

neither claims there being any gift in her favour nor during the cross-examination of plaintiff any suggestion is made to the effect. If a case of Hiba would have been made out by defendant no. 1 in written statement, it was open for the plaintiff to rebut such case. It cannot be permitted now to claim at this stage of the proceedings that transaction was hiba and thereby to deny fair opportunity to the plaintiff to meet such claim. Therefore, this Court finds that it is not possible to concede to the submissions made across the bar by the learned Counsel for defendant no. 1 that the construction to the pleadings should be given as if it is case of a gift of properties by husband of defendant No.1 in her favour.

9. Learned Counsel for Defendant has also sought to argue point of limitation by drawing attention of the Court to the cross-examination of the plaintiff wherein she admits that knowledge of the mutation entry in the year 1975 and also that in the year 1986 her father died and even thereafter within 12 years no suit is filed as contemplated by Article 110 of the Limitation Act and hence, suit is beyond limitation.

10. Apart from the fact that the issue of limitation is not pure question of law, facts as pleaded in the plaint are required to be taken into consideration. Defendant has come out with specific case to the effect that the suit properties were jointly held, cultivated etc. Thus, it is not the case of the plaintiff that she was excluded therefrom in the year 1975 or even after death of her father. In fact, in written statement defendant no. 1 has come out with case that only in the year 1994 i.e., after defendant no. 1 has sold these properties to defendant nos. 2 and 3, an exception was taken to the mutation entries sought to be made in the name of purchasers. Having regard to this pleading of defendant, this Court finds substance in the contention of learned Counsel for Plaintiff that the said exclusion can be treated when the properties are sold to the defendant. As such, there is no substance in the challenge to the impugned judgment and decree passed by First Appellate Court, even on ground of bar of limitation.

11. This Court finds that no substantial question of law being involved in this Appeal which is *sine qua*

non to entertain any second appeal, as no perversity can be attached to the said findings having regard to the facts and circumstances of the case, pleadings and evidence. Hence, appeal stands dismissed. Pending application is also disposed of.

12. Learned Counsel for the Appellant/Original Defendant No. 1 seeks continuation of order of status quo for the period of eight weeks.

13. Learned Counsel for the Plaintiff opposed the said request.

14. In view of the fact that the said status quo is running since long, this Court find it fit to extent the same for the period of eight weeks.

(R. M. JOSHI, J.)

Malani