

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
CIVIL REVISION APPLICATION NO.897 OF 2012**

Mohammed Asgar, since  
deceased, through his L.Rs  
1. Shaikh Nafisa Mohammed  
Asgar and Anr.

Applicants

Vs

Khurshidbi (widow), since  
deceased, through her legal  
heirs and representatives:  
1. Abdul Rafim Mohammed Yusuf  
Shaikh and Ors.

.. Respondents

Mr. Javeed Hussein, Advocate for Applicants.  
Mr. M.L. Patil, Advocate for Respondent no.1.  
Mr. Vasant S. Gokhale, Advocate for Respondent no.3.  
Mr. Sangram S. Lotankar, Advocate for respondent no.6(b).

CORAM : R.G.KETKAR,J.  
DATE : 17/08/2015

**PC:**

1. Heard Mr. Javeed Hussein, learned counsel for the applicants, Mr. M.L.Patil, learned counsel for respondent no.1, Mr Vasant Gokhale, learned counsel for respondent no.3 and Mr. Sangram Lotankar, learned counsel for respondent no.6(b) at length.

2. Mr. Hussein submitted that pursuant to the order dated 28.7.2015, he has carried out the necessary amendments by bringing on record heirs and legal representatives of original defendants no.1 to 3, 5 to 7 on record. He submitted that respondent no.1- Ms. Khurshidbi died leaving behind respondent no.2 (defendant no.2). Defendant no.2-Sabirabegum died

issueless. Respondent no.3 (defendant no.3) Ajija died issueless and she was a spinster. Respondent no.5 died issueless. He was a bachelor. Respondent no.6-Sultan died leaving behind widow Zohra (respondent no.6(a)) and son Kamil (respondent no.6(b)). Respondent no. 6(b) died on 26.3.2005. Respondent no.6(b) is the only legal representative of respondent no.6(a).He further submits that respondent no.7-Vahidunnisa (defendant no.7) died issueless. She was a spinster. He, therefore, seeks permission to delete respondent no.2-Sabira, respondent no.3-Ajija, respondent no.5-Mohamed Hussain, respondent no.6(a)-Zohra and respondent no.7-Vahidunnisa. On the motion made by Mr.Hussein, leave to delete these respondents is granted. Amendment shall be carried out forthwith.

3. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and Application is taken up for final hearing.

4. By this Application under Section 115 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), the applicants who are heirs of the original plaintiff, have challenged the Judgment and order dated 4.5.2012 passed by the learned Jt. Civil Judge, Sr. Dn., Pune below Exhibit 143 in Special Darkhast No.169 of 1988. By that order, the learned trial Judge rejected the application filed by the decree holders to give symbolical possession of 2/13<sup>th</sup> share in

the immovable properties bearing no. 478, 105 and 298.

5. In support of this Application, Mr. Hussein submitted that Asgar Mohmed Yusuf, hereinafter referred to as 'original plaintiff', had instituted Special Civil Suit No.1 of 1970 in the Court of II Jt Civil Judge, Sr Dn., Pune, for partition and separate possession of his 2/13<sup>th</sup> share in the suit properties. The suit was decreed on 28.4.1978. The learned trial Judge declared that the original plaintiff has 2/13<sup>th</sup> share in the suit properties consisting of immovable properties bearing House No.478, (old) Bazar, Kirkee, Pune-3, House no.105, Elphinstone Road, Kirkee, Pune and House No.298, Dapodi and two hotels by names 'Regal Hotel' and Restaurant at 'New India Billiard & Saloon'. The learned trial Judge held that the original plaintiff has 2/13<sup>th</sup> share in the movables consisting of 2 billiard tables and 20 cues and 20 balls. The learned trial Judge further declared that the original plaintiff is entitled to 2/13<sup>th</sup> share in the past and future income of the two hotels and billiard tables and the amount of rent of the suit buildings. The income of the two hotels and the billiard tables till the date of the suit is of Rs.5530/- and the income of the rent till the date of the suit is of Rs.1330/- The plaintiff is entitled to 2/13<sup>th</sup> share in Rs.5530/- and Rs.1330/-. The learned trial Judge also appointed Commissioner in the final decree proceeding to suggest partition of the three house buildings and two hotels.

6. Mr.Hussein submitted that Appeal was preferred

challenging the trial Court's decree which was dismissed. Thereafter, the plaintiff filed Darkhast proceedings for execution of the decree. During the proceedings, the decree holders filed application-Exhibit 143 for putting them in symbolical possession of 2/13<sup>th</sup> share in the immovable properties. By the impugned order, the learned trial Judge declined the prayer on the ground that all the properties are in possession of tenants who are not ready to vacate the premises and are also not ready to purchase the premises as per market value. The learned trial Judge, however, held that having regard to the scope of the original decree, the decree holders are entitled to future rent from the tenants. Mr. Hussein submitted that the learned trial Judge ought to have put the decree holders in symbolical possession of 2/13<sup>th</sup> share in the properties even if the tenants are not ready to vacate the premises and are not ready to purchase the premises as per market value. In so far as the direction that the decree holders are entitled to future rent from the tenants is concerned, the same may be maintained.

7. Mr. Gokhale supported the impugned order. He submitted that as the suit premises are occupied by the tenants, the decree holders cannot be put in symbolical possession. Equally, they are not willing to purchase the premises as per the market value. The learned trial Judge was, therefore, justified in declining the prayer made by the decree holders for putting the decree holders in

symbolical possession.

8. Mr. Patil invited my attention to paragraph 3 of the application dated 12.8.2011 filed by legal representatives of original decree holder under Order 21, Rule 82 of C.P. C as also paragraph 4 of the order dated 1.10.2011 passed by the learned trial Judge below Exhibit 141. He submitted that in paragraph 3 of the application, the decree holders specifically asserted that the judgment debtor Khurshidbi died prior to 1985 and her heirs are her sons and daughters. It was submitted that as on date, only two judgment debtors and an heir of one of the judgment debtors are alive and they are judgment debtor no. 4-Abdul Rahim, Judgment debtor no.8Rashid Mohammad and judgment debtor 6(B) Kamil Sultan. In paragraph 4 of the order dated 1.10.2011, the learned trial Judge also noted that only judgment debtors no. 4, 8 and heirs of judgment debtor no.6(B) are alive along with decree holders. He submitted that the learned trial Judge was not justified in declining the prayers of the decree holders for putting them in possession of symbolical possession. He submitted that the direction issued by the learned trial Judge that the decree holders are entitled to future rent from the tenants may be sustained.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of the impugned order shows

that the learned trial Judge refused the prayer of the decree holders only on the ground that all the properties are in possession of the tenants who are not willing to vacate the premises and are also not ready to purchase the premises as per market value and, therefore, symbolical possession of the properties cannot be given to the decree holders. I am of the opinion that the learned trial Judge was not justified to decline the prayer of the decree holders. It is precisely that when actual physical possession cannot be given to the decree holders, the decree holders can be put in symbolical possession leaving the decree holders to adopt appropriate proceedings for evicting tenants. In view thereof, the decree holders are entitled to be put in symbolical possession of their 2/13<sup>th</sup> share in the suit properties. To that extent, the impugned order deserves to be set aside. As far as the finding of the learned trial Judge that decree holders are entitled to future rent from the tenants is concerned, that is upheld. In view thereof, Application partly succeeds. Rule is partly made absolute in the following terms:

(i) Finding of the learned trial Judge that the decree holders cannot be put in symbolical possession of 2/13<sup>th</sup> share in the suit properties as they are in possession of the tenants as also they are not willing to purchase the suit properties at market value is concerned, that is set aside. The Executing Court is directed to put the decree holders in symbolical possession of their 2/13<sup>th</sup>

share in the suit properties.

(ii) The decree holders are also entitled to future rent from the tenants.

(iii) Rule is made partly absolute in the above terms. In the circumstances of the case, there shall be no order as to costs.

(R.G.KETKAR, J.)