

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO.503 OF 2014

Mohammad Zaheer S/o Abdul Rehman and anr

..vs..

H. Tajunnisa Begum Wd/o M. Husssain and ors

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
of directions and Registrar's orders

Court's or Judge's order

Shri A.M. Quazi, Counsel for the Appellants.

Shri N.A. Vyawahare, Counsel for the Respondents.

CORAM : A.P. BHANGALE, J.

DATE : AUGUST 31, 2015.

Heard.

By order dated 23.12.2014, this Court noted one of the questions that arose was whether the First Appellate Court had correctly determined the shares of the parties after taking into account the observations made in paragraph No.20 of the judgment in Second Appeal No.334 of 1995. Accordingly, the notice was issued to the respondents making it returnable on 27.2.2015. In addition to regular mode of service, the appellants were to serve the respondents by registered post with acknowledgement due.

Learned counsel for the appellants has invited my attention to paragraph No.20 of the

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judgment and order in Second Appeal Nos.334 of 1995 and 508 of 2006 decided on 9.1.2013 wherein this Court while allowing the appeals the judgment and decree dated 13.11.1991 passed in Regular Civil Suit No.201 of 1983 by learned Joint Civil Judge Senior Division, Gondia as well as the common judgment and order dated 22.12.1994 passed in Regular Civil Appeal Nos.14 of 1992 and 18 of 1992 by learned Additional District Judge, Gondia were quashed and set aside. Thus, after setting aside the impugned judgments and orders therein and allowing the Regular Civil Suit No.201 of 1983 filed by the plaintiffs therein, the case was remanded back in Regular Civil Appeal No.71 of 2003 to the Appellate Court at Gondia for decision afresh in the light of the decision in Second Appeal No.334 of 1995 in accordance with law, within a period of six months from the date of receipt of writ from this Court.

It is the grievance of the appellants that despite such direction, the First Appellate Court failed to decide first appeal i.e. Regular Civil appeal No.71 of 2003 in the light of the judgment and order in Second Appeal Nos.334 of 1995 and 508 of 2006 according to law.

Thus, while deciding the appeals this Court in paragraph No.20 of the judgment and

order had explained that the Mohammedan Law contemplates a situation where a Mohammedan can have as many as four wives at a time. Hence, the children born from all such four wives being the children of the same father, would be treated as his real sons and daughters entitled to inherit his estate as 'Residuaries'. Furthermore, it was also observed that there is no prohibition under the Mohammedan Law for a Mohammedan female to perform a second marriage, if her earlier marriage does not subsist. In that cases, the children born out of such marriages from different husbands, shall be the legitimate children called as uterine brothers and sisters entitled to be classified as 'Sharers' at Serial Nos.9 and 10 in the Table of Shares under Section 63; to inherit the estate of a deceased Mohammedan. Thus, it was observed that significantly, the Mohammedan Law does not make any distinction for the purposes of inheritance in respect of a property owned by a Mohammedan female or male, like one which exists under the provisions of Sections 8 and 15 of the Hindu Succession Act. Thus, the property of a Mohammedan female dying intestate will, therefore, be governed by the same rules of inheritance and succession, as if it is a property

owned by a Mohammedan male dying intestate. Thus, this Court by a reasoned judgment observed that though the uterine brothers and sisters are the real sons and daughters of the same mother, they cannot be classified as 'Residuaries' under Section 65 of the Mohammedan Law to inherit the estate of their mother, but they are to be classified as 'Sharers' under Section 63 of the Mohammedan Law, as if they are inheriting the estate of putative father. Thus, the substantial question of law was decided accordingly.

Learned First Appellate Judge while partly allowing the appeal did not consider the observations made by this Court.

Considering the submissions advanced at the bar on behalf of the respondents, the proceedings be remanded for re-consideration by the Appellate Court.

Shri Vyawahare, learned counsel for the respondents, submits that both the parties will get opportunity to point out the legal position under the Mohammedan Law and the proceedings can be decided in the light of the observations made earlier by this Court and legal position.

Shri A.M. Quazi, learned counsel for the

appellants, submits that the First Appellate Court ought to have considered the observations made by this Court in paragraph No.20 of the judgment and order. He submits that learned First Appellate Judge has not applied his mind to the facts and circumstances of the case. Since the First Appellate Court is final Court of facts, it is necessary that the First Appellate Court must apply its judicial mind hearing the parties through their Advocates, considering the evidence led by both the parties as well as legal position in the peculiar facts and circumstances of the case. Since according to the appellants they are inheriting Joharabee, she was entitled for the 1/2 share equal to that of her brothers. In other words, he submits that collectively they will get only 1/2 share while Joharabee will get 1/2 share in the suit property.

The submissions advanced by learned counsel for the appellants need to be considered by the First Appellate Court in the light of the judgment and order passed by this Court in Second Appeal Nos.334 of 1995 and 508 of 2006 decided on 9.1.2013 and upto date legal position according to Mohammedan Law.

Therefore, the impugned judgment and order is set aside. The First Appellate Court shall

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re-apply its mind for the reasons stated above and upon hearing the parties upon legal position shall fix the shares of the parties to the dispute in accordance with law and pass consequential orders accordingly.

The second appeal is disposed of as allowed accordingly.

JUDGE

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