

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO.3 OF 2016

1. Afsar Sultansab Shaikh (Died)
Through Legal Heirs

1-A Shabana w/o Afsar Shaikh,
Age 42, Occu. Agri.,

1-B Arif Afsar Shaikh
Age 22 years, Occu. Agri.,

1-C Heena Afsar Shaikh,
Age 12 years
through legal guardian
Shabana w/o Afsar Shaikh

1-D Hasif Afsar Shaikh
Age 10 years,
through legal guardian
Shabana w/o Afsar Shaikh

2. Ismail Sultansab Shaikh,
Age 32 years, Occu. Agri.,
All R/o Bhutmugali,
Taluka Nilanga, Dist. Latur

..Appellants
(Orig. Defendants/
Appellants)

Versus

1. Smt. Liyakatbee Jabbarsab
Shaikh, Age 60 years,
Occu. Agri., R/o Masalaga,
Taluka Nilanga, District Latur

..Orig.Plaintff/
Respondent

2. Sakina Makdumsab Shaikh,
Age 42 years, Occu. Househd,
R/o Kasar Sirsi, Taluka Nilanga,
District Latur

3. Rajeeeyabee Sharfoddin Shaikh,
Age 38 years, Occu. Household,
R/o Gunjarga, Taluka Nilanga,
District Latur

..Respondents
(Orig.Defendants/
Respondents)

Mr A.N. Sabnis, Advocate for appellants
Mr S.N. Vibhute, Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.

DATE : 30th September 2016

PER COURT

1. Heard the learned Counsel for the parties by consent finally.
2. It is an undisputed position that suit property-land bearing Survey No. 33 situated at village Bramachiwadi, Taluka Nilanga, District Latur belonged to deceased Sultan Nawaz Shaikh. Present appellants are his legal representatives. Respondent No.1 - original plaintiff claiming herself to be daughter of said Sultan Nawaz Shaikh begotten from his first wife - Daulatbee has instituted a suit bearing Regular civil suit No.267 of 2007 against present appellants and others, seeking partition and separate possession of the suit property. Parties hereinafter are referred to by their original status in the suit, i.e. appellants as 'defendants' and respondent no.1 as 'plaintiff'.
3. It is the case of plaintiff that she is daughter of Sultan Nawaz Shaikh and Daulatbee being his first wife. Sultan Nawaz Shaikh later married to one Goribee. Daulatbee had filed proceedings bearing Miscellaneous Criminal Application No.3 of 1968 against Sultan Nawaz Shaikh claiming maintenance from him at the rate of Rs.50/- per month and had sought attachment and sale of his properties. That application was disposed of on 4th July 1968 by Judicial Magistrate, First Class, Nilanga, as abated due to death of Sultan.
4. The present appellants-defendants in aforesaid suit, by filing written statement denied that Daulatbee was married to Sultan Shaikh

and as such, plaintiff cannot seek right in the property of Sultan Nawaz Shaikh. It is contention of the defendants that plaintiff is not the daughter of Sultan Nawaz Shaikh and she was their step sister.

5. Upon pleadings of the parties, as aforesaid, the trial court framed issues, issue no.1 being as to whether plaintiff is daughter of Sultan and second issue, whether the plaintiff is entitled to partition and separate possession, and answered issue no.1 affirmatively and issue no.2 partly in affirmative.

6. The trial court, while deciding aforesaid suit held the plaintiff to be daughter of Sultan Nawaz Shaikh and that she is entitled to share in the suit property to the extent of 1/9th. While decreeing the suit as aforesaid, the trial court in paragraphs no.8, 9 and 10 has observed;

“ 8. The crucial question in the present suit is only, that, whether the plaintiff is the daughter of Sultan or not. In this case, it is admitted that the suit property was belonged to the Sultan & he is the predecessor in title of the suit property. Also the parties are the Muslim by religion & governed by the Muslim personal law. Further the revenue record of the suit property shows the mutation of the partition. Here in this case the plaintiff claimed that she is one of the family member & the successor of Sultan & in that capacity, she is having her undivided share in the suit property. This contention of the plaintiff is totally denied by the defendants. Basically, the defendants have denied the relations of the plaintiff with Sultan & the defendants. According to them, the plaintiff is not the daughter of Sultan. So this is the basic issue to be decided in this case.

9. So here to prove that the plaintiff is the daughter of Sultan & Daulatbee, the plaintiff herself deposed on oath & she stated that Sultan had two wives, first is Daulatbee & the second is Goribee. Out of which the plaintiff is the daughter of Daulatbee & Sultan & the defendants are the sons & daughters of Goribee & Sultan. So in such a way on oath plaintiff has deposed regarding her relation with Sultan.

10. *Futher to corroborate the deposition of the plaintiff, she examined two witnesses viz., Ghudusab Kasimsab Shaikh & Nizam Pashamiya Shaikh. Out of which the plaintiff has waived the evidence of Ghudusab Shaikh by not pressing the affidavit-in-chief of Ghudusab. So his affidavit cannot be read as evidence in this case. Further Nizam Shaikh in his evidence stated that, he know plaintiff & defendants & also Sultan. He especially deposed that the plaintiff is the daughter of Sultansab. Also it is deposed that, Daulatbee is the wife of Sultansab & the plaintiff is the daughter of them. He further stated that he the close relative of the plaintiff & defendants, so he know the above facts. Further the plaintiff has filed the heir-ship certificate issued by the Grampanchayat Office, Bhutmugali. The said certificate is duly exhibited, it shows that the plaintiff is one of the legal heir of Sultan. Further the plaintiff has filed exh.1 & 7 from the maintenance proceeding bearing Cri. M.A. No.03/1068. These documents are the certified copies, which show that in the year 1968, the mother of plaintiff, Daulatbee had filed the maintenance petition against Sultan. In the said proceeding Daulatbee had claimed that she is the legally wedded wife of Sultan & on that count she asked for the maintenance under section 125 of Cr.P.C. Further the say filed in that proceeding at exh.7 is produced, it is the certified copy of that document, which shows that, Sultan appeared in the said proceeding & has filed the say. Further the said document shows that Sultan had admitted the marital relation of him with Daulatbee & by alleging that Daulatbee is living in adultery, he has given Talak to her. These documents prove that Daulatbee was the wife of Sultansab. It is further seen that no where in this proceeding the defendants have denied that the plaintiff is the daughter of Daulatbee. On the contrary, it is alleged that the mother of plaintiff was not the wife of Sultanbee. So here the plaintiff adduced satisfactory oral as well as documentary evidence, which shows that she is the daughter of Sultansab. On the contrary, so as to disprove the said contentions of the plaintiff, the defendants have merely denied it in the pleading, but in support of their contentions, no oral as well as documentary evidence is adduced by the defendants. So to disbelieve the contentions of the plaintiff & also the evidence led by the plaintiff, nothing is filed on record by the defendants. Hence, the facts and circumstances tends me to hold that, the plaintiff has succeeded to prove that she is daughter of Sultansab & Daulatbee. Hence, I answer issue no.1 in affirmative”.*

7. Aggrieved by aforesaid decision of the trial court decreeing the suit, the defendants preferred Regular civil appeal bearing No.64 of

2013. The appellate court dismissed the appeal under its order dated 19th November 2015 which is impugned in present second appeal. The appellate court had framed points for determination viz; whether the plaintiff proves that she is daughter of Sultan Nawaz Shaikh and whether she is entitled for partition and separate possession, and answered those in the affirmative. After recording the submissions on behalf of parties, the appellate court has observed;

“ 11. Plaintiff Liyakatbee deposed that Daulatbee was the first wife of Sultan and she is their daughter. Goribee was the second wife of Sultan and defendants are children from Goribee from Sultan. Now, Sultan and his two wives Daulatbee and Goribee are no more. So she has share in the suit land owned by her father Sultan. Similarly, her witness P.W.2 Nizam Pashamiya Shaikh also deposed as per the pleading raised by plaintiff. Both were cross examined by the defendants by putting suggestions that Goribee was not the wife of Sultan and therefore, plaintiff is not daughter of Sultan. Plaintiff has denied those suggestions, while put to her during her cross examination. I have gone through the entire cross examination of plaintiff Liyakatbee made by the learned counsel on behalf of defendants. It is very surprising to note that in the opening para of cross examination, the learned counsel for defendants has taken admissions of plaintiff which are totally contradictory to the defence made out by the defendants. On the other hand, those admissions taken by learned counsel for defendants are almost supporting to the pleading of plaintiff. In said cross examination, the learned counsel for defendants has taken admission from plaintiff that Sultan was their father, he had two wives, namely Daulatbee who is the mother of plaintiff and first wife and Goribee was second wife. Further admission is taken that after marriage of plaintiff Liyakatbee her father performed marriage with Goribi. These admissions taken by learned Counsel for defendants clearly supports plaintiff's case that Daulatbee was first wife of Sultan and plaintiff is daughter of Daulatbee from Sultan.

12. Plaintiff has examined village Sarpanch Vijay Ganesh Chavan as P.W.4. He deposed that on 11.7.2007, he has issued heir-ship certificate about the heirs of late Sultan Nawaz Saikh. As per said certificate, plaintiff and defendants are the children of Sultan Shakh. His testimony is supported by his certificate at Exh.38. It shows that Liyakatbee the plaintiff was also mentioned as daughter of Sultan.

13. Admittedly, the defendants have not led oral evidence. In order to prove plaintiff is the daughter of Sultan and in order to disprove the same, both parties have relied on the maintenance application filed by

Daulatbee against husband Sultan and the say of Sultan in the said maintenance petition. The certified copies of application for maintenance by Daulatbee and say filed by husband Sultan are at Exh.46 and Exh.47. Application shows that Daulatbee filed maintenance application against Sultan being his wife. It is argued by defendants that in said application, Daulatbee nowhere argued that she has a daughter namely Liyakatbee from Sultan. No doubt, no such disclosure is made by Daulatbee in said maintenance petition. However, as that time, plaintiff might be major and married one, Daulatbee might have not made its disclosure in her application. Said disclosure was also not mandatory as it is a petition for maintenance by wife against husband. So, non mentioning of plaintiff as daughter by Daulatbee in her maintenance application is not sufficient to prove that plaintiff is not daughter of Sultan.

14. As discussed earlier, plaintiff has relied on the say filed by Sultan in said maintenance petition. The certified copy of say of Sultan is at Ex.47. In said reply, Sultan clear cut admitted that Goribee was his first wife. He has denied the liability of maintenance on the ground that already he has divorced Daulatbee being unchaste. So, the net result is that admission by Sultan is sufficient evidence to establish that Daulatbee was the first wife of Sultan. Here, it is nowhere disputed that plaintiff is the daughter of Daulatbee. As it is established that Daulatbee was the wife of Sultan, automatically it is established that plaintiff is the daughter of Sultan from Daulatbee. So, I answer this point in the affirmative.”

8. Learned counsel appearing for defendants purported to raise a preliminary contention that it has come on record, there is division of property after death of Sultan Nawaz Shaikh, and as such, suit could not have been proceeded in absence of declaration seeking division being illegal. He further contends that from the age of the plaintiff as occurring on the date of suit is shown to be 60 years and further being shown as 85 years old lady, it ought to have been considered that it is difficult to appreciate that the plaintiff can be considered to be daughter of late Sultan Nawaz Shaikh. He contends that it was the contention of Daulatbee in the maintenance proceeding filed in 1968, she had married to Sultan Nawaz Shaikh about 20 years back i.e. around the year 1947-1948. In said application, Daulatbee stated her age to be 35 years. In that case, it would appear, she having married

to Sultan Nawaz Shaikh just at the age of about 15 years and if the age of 60 years of the plaintiff as shown in the plaint is taken into account, she shall be deemed to be born around 1947-48 and Daulatbee being aged about 15 years then, probability that plaintiff can be considered to be daughter of Sultan Nawaz Shaikh cannot be accepted. He further contends that the defendants deserve an opportunity to establish that plaintiff is not daughter of late Sultan Nawaz Shaikh by remanding the matter to the appellate Court and requests accordingly.

9. Countering aforesaid submissions, learned Counsel Mr Vibhute appearing on behalf of plaintiff - respondent no.1 submits that having regard to the specific defence raised by the defendants - present appellants that deceased Daulatbee was not the wife of late Sultan Nawaz Shaikh, issue with regard to plaintiff being daughter of Sultan Nawaz and Daulatbee had been framed and both the Courts have concurrently found that plaintiff has established that she is daughter of Sultan Nawaz Shaikh. He points out that the observations in paragraphs no.11, 12 and 13 of the judgment of appellate court and ones in that of trial court, reproduced hereinabove, would indicate that the issue in this regard not only had been framed but also had been appreciated and have received affirmative answers and it is not at all the case of the present appellants, such an appreciation was not with reference to the record or for that matter in anyway not adhering to the factual position. The defendants had not requested for adducing any further evidence. He further contends, a declaration in respect of division of property under revenue record requires

substantiation. It cannot be said, it would have been binding as far as rights of the parties are concerned. It is also not the case that division is registered. Reliance by defendants on the revenue record such as mutation entry and so called division of property is of no significance. He further submits that no supporting material for such a proposition has been placed on record on behalf of the defendants. He, as such, submits plaintiff will be entitled to 1/3rd share in the suit property, which has rightly been declared by the courts.

10. Having heard learned counsel as aforesaid and also on civil application for interim relief and looking into the documents as appended to application, though it is contended on behalf of defendants that the plaintiff cannot be said to be daughter of late Sultan Nawaz Shaikh, it appears that the plaintiff in support of her case, has adduced evidence. Said evidence does not appear, in any way, to have been rebutted by the defendants. On the contrary, the appellate court in paragraph 11 has taken note of the evidence adduced on behalf of the defendants which considerably corroborates the case of the defendants-present appellants. As far as corroboration to the case of plaintiff that Daultbee had married to Shaikh Nawaz Sultan is concerned, it is not in dispute that plaintiff is daughter of Daulatbee nor it is the case that Daulatbee had any other marital relationship. As far as the ages are concerned, one would fail to consider that such a contention is being raised at the stage of second appeal and further it would be pertinent to take a note that the ages during the period of the proceedings referred to in the maintenance petition were stated to be 35 and 40 respectively of Daulatbee and

Sultan Nawaz Shaikh. Even going by the same, it appears that Daulatbee can be said to have been born in 1933. In such a case, one would not be able to say, plaintiff had not at all been born to Syed Nawaz Shaikh. The Courts have appreciated the evidence as had been adduced which appeared to have received sufficient corroboration in evidence in documentary form about Dulatbee having married to Sultan Nawaz Shaikh and plaintiff having born to Daulatbee who is a heir of Sultan Nawaz Shaikh. It does not appear to be away from the material on record, nor it appears to be perverse. Preponderance of probability does not rule out that plaintiff being born to Sultan Nawaz Shaikh. The transaction which appears in revenue record in this particular case does not appear to be binding on the rights of the plaintiff in view of relationship with the ancestors who had left behind them suit property.

11. In such circumstances, no interference is called for. As such, second appeal stands dismissed.

SUNIL P. DESHMUKH,
JUDGE

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