

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

902 SECOND APPEAL NO. 307 OF 2012
WITH CA/6212/2012 IN SA/307/2012 WITH CA/12388/2012 IN
SA/307/2012

KASAM ALIBHAI PATHAN AND ORS
VERSUS
NAJMOHAMMAD ALIBHAI PATHAN, DIED THR. L.RS. CHANDBI AND
ORS

...
Advocate for Appellants : Garud N.C.
Advocate for Respondents : V.S. Bedre h/f. Mr. P.S. Mapara
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CORAM : T.V. NALAWADE, J.
DATED : 15th June, 2016.

ORDER :

1. The appeal is filed to challenge the judgment and decree of Regular Civil Suit No. 173/1977, which was pending in the Court of Civil Judge, Senior Division, Parner, District Ahmadnagar and also against the judgment and decree of Regular Civil Appeal No. 316/2004, which was pending in District Court, Ahemednagar. The suit filed by respondent Najmohammad for relief of partition and separate possession of his share is decided in his favour and he is given 2/11 share in the suit property. Shares of the remaining co-sharers are also determined by the Courts below. Heard both the sides.

2. One Ali Ahmad was the father of plaintiff. Ali Ahmad

is succeeded by three sons and three daughters. It is the case of plaintiff that land Block No. 480 was with Ali Ahmad, plaintiff and defendants as tenants and under the provisions of section 32 (M) of the Bombay Tenancy and Agricultural Lands Act, 1948, certificate of purchase is also issued in the name of Ali Ahmad. It is his case that as successor of Ali Ahmad, he is entitled to get share in this property. It is the case of plaintiff that land Block No. 130 (old Survey No. 128) was purchased in the names of defendant Nos. 1 and 2, but, it was not actually sale transaction for them and the property was taken for all the members of the family of Ali Ahmad under registered sale deed dated 11.3.1966. It is contended that defendant Nos. 1 and 2 had no source of income and there was no question of making payment of consideration by them for purchasing property for themselves. It is contended that in view of these circumstances, plaintiff is entitled to get share in this property also.

3. Defendant Nos. 1, 2 and 9 filed written statement to contest the matter and their written statement was adopted by defendant Nos. 6 to 8 and 10 and 11. They took the defence that only land Block No. 484 (old Survey No. 139/4) was the property to which plaintiff could have succeeded. It is contended that plaintiff has sold his share from this property to one Doifode and

as this property is not included in the suit, the suit is not tenable.

4. The defendants contended that Ali Ahmad had two wives and Ali Ahmad is succeeded by one more son Yesu Ali, also who is step brother of plaintiff and as he is not made party to the suit, the suit is bad for non-joinder of necessary party.

5. It is the case of defendants that land Survey No. 138 (Block No. 480) was with Ali Ahmad as tenant and in the tenancy proceeding order was made in favour of Ali Ahmad to issue purchase certificate in his favour under section 32 (M) of the Bombay Tenancy and Agricultural Lands Act. It is contended that under the will, Ali Ahmad has bequeathed this property to defendant No. 1 and so, defendant No. 1 has become absolute owner of this property. It is contended that defendant Nos. 1 and 2 had purchased land Survey No. 128 from their separate income and so, plaintiff and other defendants have no concern with the property and this property cannot be subject matter of the partition.

6. On the basis of aforesaid pleadings, issues were framed. Plaintiff gave evidence, but defendant Nos. 1 and 2 did

not step in the witness box. Plaintiff examined his power of attorney. Some record was produced by both the sides. One witness Abhiman was examined by plaintiff to show that his father had transferred Survey No. 128 to the family of Ali Ahmad, but it was exchange transaction and some property was given by Ali Ahmad for taking survey No. 128.

7. It is not disputed that in the year 1966 defendant Nos. 1 and 2 were living with their father Ali Ahmad. Admittedly, Ali Ahmad was having property which had come from his father viz. Block No. 484 and he was cultivating one more land like Survey No. 138 (Block No. 480). In view of these circumstances, it was necessary for defendants to give convincing evidence for proving that the third property bearing Block No. 130 (Survey No. 128) was acquired by defendant Nos. 1 and 2 from their separate income. They preferred not to enter the witness box.

8. The Courts below have considered the effect of absence of oral evidence of defendant No. 1 which was required for rebuttal of the case of plaintiff and aforesaid evidence of vendor. The Trial Court has referred the Principles of Muslim Law given in book of Mohammadian Law which are quoted at para No. 57 and has held that inference is easy that Survey No. 128

was purchased by the father of plaintiff from the income received from Gat No. 484 and from other income of all members of family and so, plaintiff is entitled to get share in this property also.

9. The document of will is given as Exh. 99 by the Trial Court as it was 30 years old document. This document does show that Block No. 480 (Survey No. 138) which was with Ali Ahmad as a tenant was given to son of defendant No. 1 viz. defendant No. 6. The record produced shows that Ali Ahmad was tenant in this land, but there are aforesaid circumstances showing that issues of Ali Ahmad were major at the relevant time and they were living together. The record further shows that most portion of the price determined by the authority was paid subsequent to the death of Ali Ahmad and then certificate was issued in the name of Ali Ahmad. Thus, Ali Ahmad had not become owner during his lifetime. There is one more circumstance like the capacity of the deceased to bequeath the property. Under Mohammadian law , only 1/3rd property could have been bequeathed. There are circumstanced like deceased Ali Ahmad was not owner on the date of will and even till his death, he had not become owner under tenancy law as certificate was not issued in his favour. The Courts below have

referred the provision like paragraphs Nos. 122 and 123 of Mohammadian Law by Mulla and have held that the property could not have been bequeathed by Ali Ahmad as he was not owner of this property till his death. Provisions of para Nos. 124 and 125 are also considered by the Courts below. Due to these reasons, it is held that plaintiff is entitled to have share in this property also.

10. One more circumstance was used as defence by the defendant. One brother of the parties was not made party defendant in the suit. Under Mohammadian Law, the shares of Muslims are definite and they do not change due to subsequent events as the property becomes vested in successors as soon as the death of the owner takes place. The Courts below have carved out the shares of said son of Ali Ahmad viz. Yesu Ali. The other contention that plaintiff has sold his share from Block No. 484 is also considered by the Courts below and order is made to see that the share sold by plaintiff is allotted to his share, but equitable partition is made. Thus, care is taken by the Courts below to see that no injustice is caused to the successors of Ali Ahmad. There was no other alternative before the Courts below than to give the decree of aforesaid nature as the defendants preferred not to enter in the witness box and has not given

evidence in rebuttal. No substantial questions of law as such are involved in the matter. In the result, the appeal stands dismissed. Civil Applications are disposed of.

[T.V. NALAWADE, J.]

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