

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

WRIT PETITION NO. 3092 OF 2016

Shaikh Anis s/o Shaikh Nasir Choudhary ... Petitioner

Versus

Sk. Amir s/o Sk. Nasir Choudhary and others ... Respondents

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Mr. A. R. Ambali, h/f Mr. Mobin H. Shaikh, Advocate for
petitioner
Mr. Shaikh Faruk V. Patel, Advocate for respondent No.2 –
caveator.

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CORAM : SUNIL P. DESHMUKH, J.

DATE : 2nd APRIL, 2016

ORDER :

1. Purportedly aggrieved by order passed by 14th Joint Civil Judge, Junior Division, Aurangabad dated 27th January, 2016 rejecting application at Exhibit-74 in Regular Civil Suit No. 1025 of 2009 seeking review of order dated 31st August, 2015 passed by 13th Joint Civil Judge Junior Division, Aurangabad allowing Exhibit-64 which was filed by defendants for direction to plaintiff to correct valuation of the suit, plaintiff is before this court.

2. It is being contended that under Muslim Personal Law, there is no concept of joint family or for that matter of joint property and that upon death of the ancestor, the heirs succeed to defined shares in the property of the ancestor, and are considered to be tenants in common and in constructive possession of the property and therefore, in present matter although the share has been valued at Rs.3,00,000/-, court fee may not be payable over the value of share.

3. Having regard to the nature and character of the right and plaintiff being in constructive possession, it is being contended that by seeking physical possession, what is being asked is only change of the mode of enjoyment of the share.

4. This is being submitted with reference to a decision reported in *AIR 1952 Kutch 36 in the case of Vora Fidaali Gulamhusein and others v. Vora Asgarali Isufali and others*, wherein it appears to have been considered thus;

(b) Court fees Act (1870), Sec.7 (iv), (b) and Sch.II, Article-17(vi) – Suit for partition of Mahammadan Co-heir.-

As a co-tenant in exclusive possession of the property of co-ownership is in possession for and on behalf of all co-tenants, unless there are circumstances from which an

ouster can be presumed, acts such as exclusive possession and enjoyment are quite constraint with the co-tenant holding the property as such. Muhammadan co-heirs succeeding to the property of their common relation are tenant-in-common in respect of the said property and apart from the question of actual joint possession, each of them is in constructive joint possession of it unless there is reason to hold that he is ousted from its possession and enjoyment. The plaintiffs therefore by praying for partition only seek change in the mode of possession and enjoyment of the property which was in their constructive joint possession and hence the relief of partition sought is incapable of being valued in money. For such a relief fixed court – fee is payable under Article 17 (VI) of Schedule II.

5. It is, therefore, contended that the requisite court fee as would be payable has already been paid and as such the application Exhibit-64 had been erroneously decided, so is the case of the impugned order wherein its review has been rejected.

6. Learned counsel for respondents-defendants vehemently contends that the averments in the plaint show that suit seeks partition and separate possession by metes and bounds and in such a case, the order directing to make payment of court fee has been properly passed. It is being

submitted that Maharashtra Court Fees Act does not make any distinction in payment of court fee with reference to any personal law. The court fee relates to claim in a matter and not to the personal law governing the parties. He refers to Section 6(vii) of Maharashtra Court Fees Act, which reads thus;

6 (vii) "In suit for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property whether or not the plaintiff is in actual or constructive possession of the property of which he claims to be a co-parcener or co-owner - according to the value of the share in respect of which the suit is instituted".

7. He, therefore, contends that the suit being for partition and separate possession by metes and bound and the provision itself has not made any distinction as far as relief with reference to constructive possession or factual possession is concerned, court fee, as such, would be payable as per law with reference to claim according to Maharashtra Court Fees Act, *dehors* personal law. He submits that the petitioner cannot be allowed to approbate and reprobate having solemnly stated about valuation in the suit for partition and separate possession while it goes to payment of court fee

submitting that they are governed by personal law. He further submits that Maharashtra Court Fee Act was not under consideration in the citation relied on and even otherwise facts are also apart.

8. Having regard to aforesaid and particularly the purpose appearing in relevant provisions of the Maharashtra Court Fees Act, Section 6 (vii), the orders passed, prima facie are not liable to be interfered with.

9. The impugned order being interlocutory, if the petitioner is able to produce material and evidence in support of his aforesaid case, during trial he may seek refund and/or re-agitate his claim at the time of hearing of suit.

10. In the circumstances, writ petition stands rejected.

(SUNIL P. DESHMUKH, J.)

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