

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

**Second Appeal No. 322 of 2013
With
Civil Application No.6480 of 2013
With
Civil Application No.8891 of 2016
With
Civil Application No.10204 of 2016**

Shaikh Abdul Razzak s/o Shaikh Ahmed
And Others. **.. Appellants.**

Versus

Shaikh Yunus s/o Shaikh Ahmed
And Others. **.. Respondents.**

Shri. R.M. Deshmukh, Advocate, for appellants.

Shri. Mujtaba Gulam Mustafa, Advocate, for respondent
No.1.

Shri. R.L. Kute, Advocate, for respondent Nos.4, 8 to 10.

CORAM: T.V. NALAWADE, J.

DATE : 21 JULY 2016

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil Suit No.381/2002 which was pending in the Court of the Civil Judge, Junior Division, Jalna and also against the judgment and decree of Regular

Civil Appeal No.83/2007 which was pending in the Court of the Principal District Judge, Jalna. The suit of the respondent Sk. Yunus filed for partition and separate possession is decreed in his favour. Original defendant Nos.2,3 and 13 have filed the present appeal. Both the sides are heard.

2) Plaintiff, defendant Nos.1 to 3 and defendant Nos.5 to 7 are real brothers and sisters in terse. Husband of defendant No.4 was also real brother of the plaintiff. Defendant Nos.8 to 13 are purchasers of some portion of the suit property from defendant Nos.1 and 2.

3) Land Survey No.408/2 admeasuring 1 hectare 44 R situated at Jalna is the suit property. It is the case of the plaintiff that the suit property was owned by Shaikh Ahmed Shaikh Amir, father of the plaintiff. Father of the plaintiff died on 21-11-1998. It is the case of the plaintiff that all the successors of his father are entitled to have share in the property.

4) It is the case of the plaintiff that defendant Nos.1 and 2 have got mutated their names in the revenue record by joining hands with the revenue authority to show that they are the only owners. It is contended that by misusing such revenue record defendant Nos.1 and 2 have sold most of the portion of the suit property to defendant Nos.8 to 13. It is contended that the sale deeds executed by defendant Nos.1 and 2 in favour of these defendants are not binding on the share of the plaintiff. He had prayed for partition and possession of his share.

5) Defendant Nos.1 to 3 filed joint written statement to contest the suit. They admitted the relationship with the plaintiff. They contended that in addition to the suit property their father was having other properties like Survey No.405 admeasuring 2 acres 12 gunthas from Jalna. It is contended that during his lifetime for effecting partition amongst his sons and for giving share to the plaintiff, he sold Survey No.405 and gave the sale proceeds to the plaintiff. It is contended that the amount was deposited in the joint account of the plaintiff and the father of the parties and that amount was used by

plaintiff. It is contended that similarly other defendants were given cash amount as their share in the property and those amounts were kept in fixed deposits in the names of those successors.

6) It is the case of the defendants that defendant Nos.1 and 2 got the suit property as the father gave the property to their share and for that he executed Hibanama in favour of defendant Nos.1 and 2 in the year 1992. It is contended that under Hibanama portion of one acre was given to defendant No.1 and portion of 2 acres and 24 gunthas was given to defendant No.2. It is contended that on the basis of Hibanama, mutation was made. It is contended that as per the desire of the father, after effecting mutation, defendant No.1 sold the portion of 1 acre to defendant No.13 and this transaction was witnessed even by the plaintiff. It is contended that one plot is given from the suit land to the plaintiff and he is residing there.

7) It is the case of the defendant Nos.1 to 3 that plaintiff has filed the suit to harass the defendants and as

value of the property in that area has increased many times.

8) Defendant Nos. 10 to 13 filed joint written statement. They contended that Shaikh Ahmed had agreed to sell 1 acre portion to defendant Nos.12 and 13 and he had accepted the consideration for the same. It is contended that after the said agreement Shaikh Ahmed gave 1 acre portion to defendant No.1 and had asked defendant No.1 to execute sale deed in favour of defendant Nos.12 and 13. It is contended that accordingly defendant No.1 sold the portion to these defendants.

9) Issues were framed on the basis of the aforesaid pleadings. Plaintiff gave evidence which is as per his pleadings in the plaint. He denied that the sale proceeds of sale of Survey No.405 was deposited in his account for giving the amount to him. He has given evidence that the transaction had taken place long back and this amount was used by his father for satisfying the needs of the family. Nothing is brought on the record to create probability that share of the plaintiff in the property was given by partitioning the property by his

father. No Hibanama, gift document is produced by the defendants. On the other hand, widow of Sk. Amir has given evidence in support of the case of the plaintiff. She has denied the case of the defendants that partition was effected by her husband and everybody including the plaintiff was given share though in cash. One Shaikh Rajkumar, brother-in-law of the plaintiff has also given similar evidence.

10) Defendant No.2 gave evidence in according with the pleadings in the written statement. In the written statement itself it is admitted that the plaintiff is residing on some portion of Survey No.408/2. He has given oral evidence that under the Hibanama the suit property was given to the defendant Nos. 1 and 2 by their father in the year 1992. He has relied on agreement dated 30-6-1992 which is shown to be executed in favour of some of the defendants like Abdul Karim by his father and he has given evidence that the father had agreed to sell the property to these defendants. In the cross examination, one document of will was confronted to him. Though no reliance was placed on this will by the defendants and due

execution of the will is not proved, date of this document is shown as 3-11-1997 which was subsequent to the so called Hibanama. There is one circumstance that one suit was filed by their father bearing Regular Civil Suit No.145/1993 i.e. after the date of so called Hibanama. In the will executed in 1997 entire portion of survey No.408 is shown to be given to defendant No.2 Shaikh Abdul Rajjak. This circumstance shows that the suit property was not gifted to defendant Nos.1 and 2 as contended by them.

11) At Exhibit 82 there is copy of mutation which is shown to be made on the basis of document of Hibanama. This entry shows that by partitioning the property this suit property was given to defendant Nos.1 and 2 and for that there was Hibanama. If Ahmed Shaikh Amir was absolute owner of the property there was no question of partitioning the suit property by him amongst his sons. No title could have been passed by him in favour of his sons. Further there is no such record of partition. Even application if any given by Shaikh Ahmed to the revenue authority for making entries of the names of defendant

No.1 and 2 was not brought on the record. The so called agreement executed by Shaikh Ahmed in favour of some of the defendants (Exhibit 85) was of September 1992. Defendants are not certain as to when Hibanama was executed in the year 1992. This circumstance also falsifies the case of the defendant Nos. 1 and 2 that under Hibanama, the suit property was given to them by Shaikh Ahmed.

12) The learned counsel for the appellants placed reliance on the cases reported as (1) **AIR 2011 SC 1695 (Hafeeza Bibi v. Shaikh Farid)**; and, (2) **2014 (6) ALL MR 900 (S.C.) (Rasheeda Khatoon v. Ashiq Ali)**. They are on the requirements of valid gift, Hibanama. Facts of the reported cases were altogether different. Relevant facts of the present case are already quoted. None of the three conditions mentioned for making valid Hibanama are satisfied in the present matter. There is no evidence to show that at any time the father of the defendants had declared that he wanted to gift the property to defendant Nos.1 and 2. There is no record to create probability that possession was actually handed over during his lifetime by

the father of defendant Nos.1 and 2. On the contrary, there are circumstances like will was executed in 1997 in respect of the same property. Further the defendants are admitting that the plaintiff is in possession of some portion of suit property and he has made construction of his own house on the suit property. These circumstances also falsify the case of handing over of the possession under the gift.

13) In view of the aforesaid circumstances the Courts below have held that defendant Nos.1 and 2 failed to prove that the suit property was gifted to them by their father. Admittedly the property was owned by the father of the parties and the share is calculated by the Courts below as per Muslim law. These findings are findings of facts. No substantial question of law as such is involved in the matter. in the result, the appeal stands dismissed. Civil applications are disposed of. Contempt Petition needs to be listed after getting circulation. Learned counsel for the appellants requested for continuation of interim relief. Request is rejected.

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Sd/-
(T.V. NALAWADE, J.)