

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION**

SECOND APPEAL NO. 115 OF 1993

Abdul Wahab Jilla Shaikh @ Pathan
(Since deceased through his LR's.)
Raziya Abdul Wahab Pathan & Ors.

..... Appellants

Versus

Ismail Subhedar Pathan
(Since deceased through his LR's.)
Amin Ismail Pathan & Ors.

..... Respondents

Mr. Ram Apte, Senior Advocate a/w Mr. Nitin Gangal, for
Appellants
Mr. G. V. Nagarsheth, for Respondent Nos. 1-A & 1-C and 1-D, 1-E,
1-F, 1-G, 1-H to 1-I

***CORAM : N. M. Jamdar J.
Thursday 7 July, 2016***

P. C.

By this appeal, the appellants challenge the Judgment and Order passed by the Additional District Judge, Thane dated 7 February, 1992 arising from the Judgment and Decree passed by the Civil Judge, Junior Division, Palghar, District Thane, dated 16 August, 1988 in Regular Civil Suit No. 103/1985.

2. The suit was filed by the appellants for declaration and injunction. The parties are related. The appellant no. 1-A is the sister of the respondents (defendants herein).

3. Heard the learned Counsel for the parties. The issue involved in this appeal is narrow. After the dismissal of the suit, when the appeal was filed, the learned District Judge framed only following two issues :

- “1. Whether the suit, simpliciter, for injunction is tenable in the circumstances of the given case ?
2. Whether the trial court has committed any error while dismissing the suit ?”

4. The learned District Judge held that the appellant failed to show his constructive and actual possession over the suit property. It was observed that tenants are in possession of the rented property, who are paying the rent to Respondent-Ismail. As regards the other reliefs, the District Judge held that as per the rules of inheritance of the Mohammedan Law (Hanifi Law of Evidence), the claim of the appellants to the share in the property can be pursued only after joining the necessary parties. The learned District Judge has held that failure on the part of the appellants to implead the necessary parties to the suit is fatal and the suit is not maintainable. Therefore, the appeal was disposed of only on these two points.

5. Mr. Apte, the learned Senior Advocate appearing for the appellants submitted that if the finding of the learned District Judge is that the suit as regards ownership claim is not maintainable without joining of the necessary parties, then the

appellants will file another suit by joining all the necessary parties. Mr. Nagarsheth, the learned Counsel for the respondents supported the decision of the learned District Judge which holds that without joining of necessary parties, the suit was not maintainable. Even in Paragraph 14 of the Judgment, the learned District Judge has held that relief for grant of declaration, cannot be granted in absence of the other residuaries. Mr. Apte submitted that this position is correct. In view of the rival contentions, no infirmity is found in the conclusion of the learned District Judge.

6. As regard the actual or constructive possession, the learned District Judge held that the appellant is not in physical possession or constructive possession of the suit property. Nothing is shown as to whether the tenants are paying rent to the appellant or the appellant is in physical possession. Therefore, the finding of the Appellate Court on this count also cannot be disturbed.

7. Mr. Apte submitted that the appellant proposes to file a fresh suit by joining all the necessary parties to claim a share and seek appropriate declaration. Since the learned District Judge has observed that present suit could not be entertained for want of necessary parties, it is open to the appellant to file appropriate proceedings by joining of the necessary parties to seek relief.

8. Needless to state that if such a suit is filed, it will be decided on its own merits and all contentions of the parties in that

regard, including that of limitation, are kept open. In view of the stand taken by the learned Counsel for the parties in this appeal, the Second Appeal can be disposed of with the above observations leaving it open to the appellants to institute an appropriate proceeding, if the appellants so desire, which as stated earlier would be considered on their own merits.

9. Considering the facts and circumstances of the case, the interim order which has been operative in this appeal will continue for four weeks. Further continuation will be on its own merits, without being influenced by the fact that the interim relief was granted and continued.

10. The Second Appeal is accordingly disposed of in above terms.

11. No order as to costs.

(N. M. Jamdar, J.)