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

**SECOND APPEAL NO.460 OF 2017
WITH
CIVIL APPLICATION NO.8530 OF 2017
IN
SECOND APPEAL NO.460 OF 2017**

1. Ibrahim s/o Babulal Shaikh,
Age: 39 years, Occ: Agri.,
R/o. Amarawatiwadi, Tal. Tuljapur,
Dist. Osmanabad.
2. Babulal s/o Gulab Shaikh,
Age: 69 years, Occ: Agri.,
R/o. As above.
3. Hashmabee w/o Akbharkasim Siddiqui,
(since deceased deted as her L.Rs.
are already on record)
4. Mahaboobbi w/o Akbarkasim Siddiqui,
Age: 70 years, Occ: Agri.,
R/o. As above. ..APPELLANTS

VERSUS

Abbas Kadri s/o Shabbir Hussain
Siddiqui (Died through L.Rs)

- 1A. Mahmoodbee w/o Abbaskadri Siddiqui,
Age: 67 years, Occ: Household,
R/o. Amrawatiwadi, Tal.Tuljapur,
Dist. Osmanabad.
- 1B. Maheboob s/o Abbaskadri Siddiqui,
Age: 53 years, Occ: Contractor,
R/o.Kalewadi Phata, Bharat
Society, Near Jagtap Dairy, Pune
Tal. Pune, Dist. Pune.
- 1C. Mahamad Sharif s/o Abbas Kadri

(2)

Siddiqui, Age: 53 years,
Occ: Labour, R/o. Malewadi,
Tal. Haweli, Dist. Pune.

- 1D. Bebi d/o Abbas Kadri Siddiqui,
Age: 57 years, Occ: Household,
R/o. Padmawati, Shankar Nagar-1
Taljai, Pune, Tal. Pune,
Dist. Pune.
- 1E. Shakribi w/o Gaibilal Shaikh,
Age: 55 years, Occ: Household,
R/o. As above.
- 1F. Ashabee w/o Babu Shaikh,
Age: 52 years, Occ: Household,
R/o. As above.
- 1G. Peer Ahmed s/o Kadri Siddiqui,
Age: 51 years, Occ: Agri.,
R/o. Amrawatiwadi, Tal. Tuljapur,
Dist. Osmanabad.
- 1H. Ujeer Ahmad Abbas Kadri Siddiqui,
Age: 25 years, Occ: Agri.,
R/o. As above.
- 1I. Wahedabee w/o Balekhan Shaikh,
Age: 37 years, Occ: Household,
R/o. As above.
- 1J. Umedabi d/o Abbas Kadri Siddiqui,
Age: 26 years, Occ: Household,
R/o. As above.
- 1K. Rahimunisa d/o Abbas Kadri Siddiqui,
Age: 27 years, Occ: Household,
R/o. As above.
- 1L. Dadima Shaukat Mujawar,
Age: 33 years, Occ: Household,
R/o. Uple (R) Tal. Barshi,
Dist. Solapur.

..RESPONDENTS

(3)

Mr Y.R. Mahajan, Advocate for appellants;
Ms. A.N. Ansari, Advocate for respondent Nos.1A to
1L.

CORAM : N.W. SAMBRE, J.

DATE : 18th JULY, 2017

ORAL ORDER :

This appeal is under Section 100 of the Code of Civil Procedure questioning the concurrent findings recorded by learned Civil Judge, Junior Division, Tuljapur in Regular Civil Suit No. 102 of 1997 for declaration of title and in the alternative, for partition and separate possession, further confirmed in Regular Civil Appeal No.37 of 2009 by learned District Judge-2, Osmanabad.

2. Appellant Nos. 3 and 4 are wives of one Akbar Karimoddin Siddiqui, whereas appellant No.2 is brother of appellant No.4, appellant No.1 is son of appellant No.2, whereas respondent No.2 to the appeal-original plaintiff was real brother of deceased Akbar Kasim. Akbar Kasim left for heavenly abode on 26th March, 1997 before which it

(4)

is claimed that on 14th February, 1997 he executed will at Exhibit-46, adoption deed at Exhibit-45, in favour of appellant No.2. It is also claimed that said Akbar Kasim executed sale deed in favour of appellant No.2 on 24th February, 1997, which is at Exhibit-48.

3. In view of *Shariyat* law, plaintiff-respondent herein claiming to be successor, filed suit claiming that deceased was owner of land Gat No. 131 admeasuring 9 Hectare 20 Are, of which, 3 Hectare and 88 Are was alienated by him during his life time, whereas land to the extent of 5 Hectare and 32 Are remained with him. It is claimed that said Akbarkasim was sick from January 1997 and was under treatment at Solapur and Tuljapur. It is then claimed that he being legal heir of deceased Akbarkasim is entitled for share in the suit property. It is also claimed that at the behest of appellant No.2, sale deed of the land was executed on 24th February, 1997 in the name of a person by name Ibrahim Akbarksim Siddiqui. It is further

(5)

claimed that there is no person by name Ibrahim Akbarkasim Siddiqui in existence. It is urged that sale deed was executed without any consideration. The sale deed, as such, sought to be declared as sham and bogus document and executed without any consideration. It is also claimed that present appellant Nos. 3 and 4 will inherit 1/4th share in the suit property and remaining land out of Survey No. 131 to the extent of 3 Hectare and 99 Are was given in possession of plaintiff-respondent. It is alleged that the defendants are causing obstruction to the possession of the plaintiff and declaration is sought, as owner of the suit property.

4. Vide written statement at Exhibit-21 relationship between the parties was admitted. It is claimed that since plaintiff was not in good terms with deceased Akbarkasim, he has decided to pass on property to the defendants and with the consent of defendant Nos. 3 and 4, adoption deed was executed adopting appellant No.2 and deed to that effect was registered on 14th February, 1997.

(6)

It is also claimed that to avoid any complication, sale deed was executed by deceased on 24th February, 1997, which was registered in the office of Sub Registrar, Tuljapur. The possession of the plaintiff over the suit property was disputed.

5. The issues were framed at Exhibit-25 as under:

ISSUES	FINDINGS
(1) Whether plaintiff proves that he is an owner & possessor of 3H.99R of land from Gat No.131?	Plaintiff proved owner Ship, but failed to prove possession.
(2) Whether plaintiff further proves that, the sale deed executed by Akbar Kasim in favour of Ibrahim Akbarkasim Siddiqui is sham, bogus, null and without any consideration.?	Affirmative.
(3) Whether plaintiff is entitled declaration as owner and possessor of 3H.99R of land from Gat No. 131?	Plaintiff has proved ownership but failed to prove possession.
(4) "In alternative" whether plaintiff is entitled for partition and separate possession as claimed?	Affirmative.

(7)

(5) What order and decree? As per final order.

6. The plaintiff examined himself at Exhibit-30, PW-2 Jalindar Kamble at Exhibit-78, PW-3 Shrirang Moghe at Exhibit-79, PW-4 Mahamudbi Abbas Kadari at Exhibit-80, PW-5 Mahesh Sawant, Village Officer at Exhibit-84, PW-6 Shivaji Mule, Election Officer at Exhibit-90, PW-7 Gunwant Patil at Exhibit-103 and PW-8 Giriba Kamble at Exhibit-113.

7. Defendant No.1 Ibrahim deposed at Exhibit-43, DW-2 Hamid Siddiqui at Exhibit-44, DW-3 Annasaheb Magar, DW-4 Babular at Exhibit-50, DW-5 Vithal Gandhore at Exhibit-51, DW-6 Hashmarbi at Exhibit-52, DW-7 Chandrakant Kapse at Exhibit-119, DW-8 Dr. Malba at Exhibit-123 and DW-9 Dinanath Pardeshi at Exhibit-128.

Respective parties produced revenue entries in relation to the suit property in the form of 7/12 extracts, mutation entries and also

(8)

certified copies of sale deed, adoption deed, will deed, voters list etc.

8. Learned trial Court, upon appreciating evidence, decreed the suit, declaring the plaintiff to be having owner of 3/4th share i.e. to the extent of 3H 99R land out of Gat No.131 i.e. suit property. It is further declared that he is entitled to get partition and separate possession of 3/4th share. It is further declared that defendant Nos. 3 and 4 i.e. widows of deceased Akbar will be entitled to 1/4th share in common.

9. In appeal preferred by the appellants, the lower appellate Court framed points and reconsidered and analyzed the entire evidence and dismissed same. As such, this second appeal.

10. In the aforesaid background, Mr. Mahajan, learned Counsel for the appellants would urge that defendant No.1 in the adoption deed has used name of deceased Akbarkasim as his father and sale deed

(9)

was executed in his favour on 24th February, 1997 as Adoption deed at Exhibit-45 was before sale in question. According to him, in view of the provisions of Section 54 of the Transfer of Property Act, even if the sale is without consideration, still according to him, the sale deed dated 24th February, 1997 since satisfies the requirement of Section 54 of the Transfer of Property Act, suit ought not to have been allowed contrary to the said provisions. He would then claim that if their case comes under conflict in between provisions of Section 54 of the Transfer of Property Act and Section 25 of the Contract Act i.e. sale without consideration, provisions of Transfer of Property Act shall prevail. Mr. Mahajan, learned Counsel would then urge that presuming that there is no sale in favour of the present appellants, in view of provisions of Section 55 of the Transfer of Property Act, purchaser has always lien over the property and as such, he can pass consideration at later stage. According to him, this Court, in view of provisions

(10)

of Order 7 Rule 7 or Order 41 Rule 33 of the Code of Civil Procedure, can mold the relief in favour of the appellants by passing appropriate order. He suggest appropriate consideration can be passed in favour of defendant Nos. 3 and 4 i.e. widow of deceased Akbarkasim. He would then urge that in view of *Shariyat* law, right of succession accrued only after burial and as such, sale deed must govern the field and relation between the parties. He would then urge that provisions of Section 4 of the Gift Act are also overlooked by learned Courts below and it can always inferred that there is a gift in favour of appellants by deceased Akbarkasim of the suit property.

11. Learned Counsel for the respondents would urge that the issues which are sought to be raised in the present second appeal are already dealt with and answered by learned trial Court and lower appellate Court. She would then invite attention of this Court to the findings recorded by both the Courts below so as to demonstrate that the present

(11)

second appeal lacks merit and be dismissed.

12. In the events as are reflected in the pleadings and evidence of the parties, it is required to be considered, adoption deed Exhibit-45 is rightly held to be not admissible in view of *Shariyat* law, as parties are Muslim by their religion.

13. The moment there is claim of sale deed in favour of the appellants, even will Exhibit-46 also ceased to exist its effect.

14. In the aforesaid background, it is required to be noted that the claim of present appellants by virtue of sale deed at Exhibit-48, they became owner of the suit property has been rightly negated by both the Courts below. Learned trial Court noted that the sale deed is to be accepted as has been executed in favour of appellant No. 1, the said appellant No.1 was throughout residing with Akbarkasim and there was

(12)

no independent source of income to pay consideration, particularly Rs.1,24000/- and Rs.55,000/-. The said consideration was paid for meeting the domestic need of Akbarkasim. However, the fact remains that Akbarkasim has his own independent source of income i.e. land in question. The nature of source of income of defendant No.1, domestic need of Akbarkasim is not at all established by the appellants. The trial Court, as such, recorded finding that the sale deed is without any consideration. Apart from above, it is also required to be noted that the circumstances viz., execution of adoption deed dated 14th February, 1997, thereafter execution of will Exhibit-46 dated 14th February, 1997 and sale deed Exhibit-48 dated 24th February, 1997 if considered in order, in which they were executed, particularly, in the background of the fact that Akbarkasim was not keeping good health and died on 26th March, 1997. It has to be inferred that the appellants some how wanted to grab the said property of the deceased.

15. Learned Counsel for the appellants based on the provisions of Section 54 of the Transfer of Property Act though submitted that there could be sale deed without consideration, same is liable to be rejected because it is the case of appellants on facts that sale deed Exhibit-48 was for consideration, which fact was not established in the backdrop of above said observations.

16. So far as the next contention of the appellants about consideration of transaction in question as gift within meaning of provisions of Section 4 of the Gift Tax Act, 1958, it is required to be noted that such was never case of the present appellants before both the Courts below. In law, there is no presumption to infer that there was a gift in favour of the appellants by deceased Akbarkasim, particularly in absence of any pleadings to that effect raised by the appellants. Apart from above, if the appellants come out with such case, burden is on the appellants to prove

(14)

such gift, which appellants have duly failed to. As such, said contention of appellants are also liable to be rejected.

17. So far as next contention that the appellants have lien over the suit property, particularly in the backdrop of provisions of Section 55 of the Transfer of Property Act is concerned, once having held that sale deed in favour of appellant No.1 was found to be without consideration and it was executed in doubtful circumstances, the question of appellants having lien over the suit property will be without any basis. Apart from above, it is to be noted that the appellants tried to make out a case by submitting that the sale deed dated 24th February, 1997 at Exhibit-48 can be taken into account to its logical end by molding relief under Order 7 Rule 7 and Order 41 Rule 33 of the Code of Civil Procedure appropriate relief can be granted. In my opinion, such relief cannot be molded, particularly in favour of present appellants when by Shariyat law,

(15)

respondents are already held to be entitled for succession to the extent of 3/4th share held by Akbarkasim. In any case, the property after death of Akbarkasim would not entirely devolve upon appellant Nos. 3 and 4 i.e. widows of Akbarkasim, as by *Shariyat* law by succession, it is the plaintiff, who is entitled to succession and appellant Nos. 3 and 4 are held to be entitled to only 1/4th share.

18. In the backdrop of above observations, I hardly notice involvement of substantial question of law in the appeal. The appeal, as such, fails and stands dismissed.

19. Consequently, civil application stands disposed of.

(N.W. SAMBRE, J.)

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