

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

SECOND APPEAL NO. 694 of 2017

Amjad Khan S/o Kudratulla Khan,
age 55 years occupation business
R/o house No. 59109, Hamalwadi,
behind Holiday Camp, Aurangabad.

...APPELLANT

VERSUS

1. Dr. Sudarshanrao Namdeorao Lolge (DIED)
through legal representatives:

- 1/A. Gopikabai W/o Sudarshan Lolge, age major
- 1/B. Sandesh S/o Sudarshan Lolge, age major
- 1/C. Dinesh S/o Sudarshan Lolge, age major
- 1/D. Rajesh S/o Sudarshan Lolge, age major
- 1/E. Jitesh S/o Sudarshan Lolge, age major

No.1/A household and Nos. 1/B to 1/E business
by occupation and all R/o Vasmatnagar
Taluka Vasmatnagar Dist. Hingoli.

2. Dr. Prakash Namdeorao Lolge, (DIED)
through legal representatives:

2/A. Dr. Sanjay S/o Prakash Lolge,
age major occupation medical Practitioner
R/o Purna Tal. and Dist. Parbhani.

2/B. Ajay S/o Prakash Lolge (DIED)
through legal representatives:

2/B/1. Sangita W/o Ajay Lolge,
age major occupation household R/o as above.

2/B/2 Akshay S/o Ajay Lolge,
age major occupation business & service R/o as above.

2/C Mankarnika W/o Prakash Lolge, (DIED)

3. Subhash S/o Namdeorao Lolge,
age major occupation service
R/o Raj Nagar opp. Goldie Theatre,
Railway Station road, Aurangabad
 4. Chandrashekhar S/o Namdeorao Lolge,
age major occup. agriculture
R/o Purna Tal. and District Parbhani.
 5. Suhas S/o Namdeorao Lolge,
age major occupation service R/o Katraj, Pune
 6. Vikas S/o Namdeorao Lolge,
age major occupation business/service
R/o Shreya nagar, Aurangabad.
 7. Gazi Salauddin Ahmed S/o Murtuza Ahmed Ansari,
age 47 years occupation business
R/o Hamalwadi, near Holiday Camp,
Aurangabad Tal. and dist. Aurangabad.
 8. Rashid Khan S/o Kudratulla Khan,
age 50 years occupation business
R/o House No. 59109, Hamalwadi,
behind Holiday Camp, Aurangabad.
- ...RESPONDENTS**

*Mr S.P. Bramhe, Advocate, holding for Mr A.N. Sabnis, Advocate
for appellant.*

Mr Rajendra S. Deshmukh, Advocate for respondent No.3

CORAM : NITIN W. SAMBRE, J.

DATE : 15th November, 2017

ORAL ORDER :

After the death of Murtuza, his two widows,
Ashrafamunnisa and Fatima, entered into legal battle over the

fortune left behind by deceased Murtuza, resulting into filing suit O.S. No. 5 of 1961.

2. The said suit came to be compromised by the parties therein on 31st January 1962. As a consequence, entire immovable property had come to the share of Ashrafunnisa, whereas, Fatima, the other widow was monetarily compensated. After the aforesaid compromise, widow Ashrafunnisa of Murtuza executed sale deed in favour of Namdeorao, who was prompted to file Regular Civil Suit No. 217 of 1982 for declaration and possession, based on the title against Gazi Salauddin, son of Fatima. The said suit came to be decreed on July 15, 1997 whereby the learned Trial Court declared that the title of present respondents over the suit property by virtue of the sale deed executed by Ashrafunnisa, was established and defendant Gazi has made encroachment over the suit property. As such, ordered delivery of possession.

3. In the compromise decree executed on 31st January 1962, Khurshid begum, mother of present appellants, gave up her entire rights as Fatima was monetarily compensated.

4. The decree passed in favour of respondents in Regular Civil Suit No. 217 of 1982, confirmed in Regular Civil Appeal No. 239

of 1997 and the Second Appeal at the behest of the defendant therein, namely Gazi, paternal uncle of the appellants, came to be dismissed on September 7, 2011 by this Court.

5. As a consequence, the respondents had taken out execution proceedings vide Regular Darkhast No. 152 of 2014 for possession in which the present appellants raised an objection under Order XXI Rule 97 and Rule 101 of the Civil Procedure Code. The said objection was turned down by the executing Court, so also by the First Appellate Court. As such, this Second appeal.

6. Heard Shri Bramhe, learned Counsel for the appellants and Shri Deshmukh, learned Counsel for the decree holders.

7. Shri Bramhe, learned Counsel for the appellants, would urge that the decree passed in Regular Civil Suit No. 217 of 1982, so also the compromise decree in Original Suit No. 5 of 1961 is not binding on the appellants for the reason that the present appellants being in lawful possession of the suit property, were never added as party defendants to both the suits. Shri Bramhe, then would invite attention of this Court to the judgment of the Apex Court in the matter of **Meethiyan Sidhiqu Vs. Muhammed Kanju Pareeth Kutty and**

others {(1996) 7 Supreme Court Cases 436} so as to submit that under the Muslim law, unless Court appoints mother as natural guardian, mother has no right or power to deal with the property of the minor. He would urge that the present appellants/objectors succeeded to their grand-father's property and are in possession of the same after death of their grand-father Murtuza. According to him, in view thereof, the decree cannot be executed against the appellants. He submits that their mother has illegally relinquished right, if any, of the present appellants and such act is not binding on the appellants. As such, he sought that question of law be framed that whether the decree could be legally executable against the appellants in absence they being parties to the proceedings.

8. While countering the submissions, the learned Counsel Shri Deshmukh for the decree holders would urge that once by virtue of compromise decree drawn in Original Suit No. 5 of 1961 on 31st January 1962, mother of appellants, Khurshid begum, has relinquished her right in favour of her mother i.e. grand-mother of the appellants, namely, Fatima, and Fatima was adequately monetarily compensated. In the said suit, unless the compromise decree is set aside, it shall not be open for the appellants to claim that their mother Khurshid begum has no right to settle the issue. He would urge that

Gazi, maternal uncle of the present appellants, has unsuccessfully compensated the suit in question and it is really difficult to digest that present appellants being nephews of Gazi, are not aware of the suit and decree in question . According to him, Gazi, so also present appellants are claiming their right to suit property through Fatima, and as such, the intention could be gathered from the very conduct of the appellants to create impediment in execution of the decree in question. He submits that the appeal lacks substantial question of law and be dismissed.

9. The execution of the compromise decree dated 31st January 1962 in Original Suit No. 5 of 1961 is not an issue under dispute. In the wake of the said backdrop, what is required to be noticed is that the mother of present appellants and grand-mother Fatima have compromised their individual rights by accepting monetary compensation and by relinquishing their share. The plea that the compromise decree is not binding on the members from the Fatima's side, was rather raised in earlier round of litigation at the behest of Gazi, maternal uncle of appellants, and same was answered in negative.

10. Apart from above, the pleadings of the respective parties depict that the compromise decree entered into between mother of the appellants and Ashrafunnisa on the other side, the vendor of the

present respondents on 31st January 1962 was well within their knowledge and for the reasons best known to them, is not questioned till date. Said compromise is very much recognized in law pursuant to provisions of Order XXIII Rule 3 of the Code of Civil Procedure. If the parties aggrieved by the compromise, the option remains that such a party either to apply for setting aside the same or to question the same before the higher Court or Authority, which, of course, is not done by the present appellants till date.

11. It is then required to be noted that the appellants claim to be in possession of the suit property being grand-children of Murtuza, the original owner of the property. Gazi, grand son of Murtuza, also claims to be in possession of the suit property as is apparent from the contents of decree in Regular Civil Suit No. 217 of 1982 and First Civil Appeal No. 239 of 1997 and judgment in Second Appeal No. 81 of 2006. This Court while dealing with the Second Appeal preferred by Gazi, noticed that Fatima got her name entered as owner and possessor in respect of suit property in City Survey, which was given cause to the present respondents/decreed holders to file the suit. In the said proceedings, Gazi has come out with a specific plea that he has succeeded to the property of his grand-father and has right to develop the same.

12. It appears that the present appellants are also claiming possession over the suit property. If it is to be held that present appellants and Gazi are in joint possession, fact remains that it has to be presumed that the appellants were knowing about earlier round of litigation between respondents and Gazi.

13. So far as claim put-forth by the learned Counsel for the appellants that their mother had no right to deal with property of minor children, as she was not recognized as natural guardian under the Mohammedan Law. What is required to be noticed is, Ashrafunnisa, has dealt with the property in question qua the mother of the present appellants. As observed here-in-above, it was always open for the appellants to question independently action of Ashrafunnisa and their grand-mother Fatima, which is not done by them till date.

14. In the wake of above, I hardly notice involvement of any question of law in the matter.

15. From the factual matrix, as are narrated and drawn from the record and proceedings, it is noticed that the appellants are trying to create unnecessary hurdle without any legal authority in the execution of decree in question. The decree that was passed in favour of the present respondents/plaintiffs in 1997 unexecuted for

last 20 years as the respondents are agitating for their claim since 1982 i.e. almost for last more than 34 years.

16. In the wake of above, it will be appropriate to order that the executing Court shall proceed expeditiously with the proceedings of the decree in question.

17. Appeal, as such, must fail and stands dismissed.

18. In consequence, Civil Application, if any, stands disposed of.

(NITIN W. SAMBRE, J.)

pjm