

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APEAL FROM ORDER NO.69 OF 2018
WITH
CIVIL APPLICATION NO. 13335 OF 2018

MASIYODDIN FASIYODDIN KAZI AND OTHERS
VERSUS
AKRAMODDIN AFZALODDIN KAZI AND OTHERS

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Advocate for Petitioners : Shri Kazi S.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: December 05, 2018
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PER COURT :-

1. The appellants, who are original plaintiffs, are aggrieved by the judgment and order dated 16.8.2018, delivered by the appellate Court, by which, RCA No. 20 of 2016 filed by original defendant Nos.1 to 4, has been allowed and RCS No.865 of 2010 is remitted to the trial Court with certain issues, which have been framed by the appellate Court. Consequentially, the judgment of the trial Court dated 14.1.2015 is quashed and set aside.

2. The operative part of the impugned order dated 16.8.2018 reads as under:-

" I] The appeal is partly allowed.

II] The judgment and decree passed by Civil Judge (Jr. Dn.),

Ashti, in Regular Civil Suit No.865/2010 is hereby set aside.

III] The trial Court is directed to re-admit the suit claim under its original number in the register of said suit. He is further directed to frame following issues as additional issues in addition to earlier issues which are as follows:-

1(A) Whether plaintiffs are entitled for the relief of partition and separate possession? If yes, to the extent of which share and in respect of which properties?

1(B) Whether the defendants have become owner of suit properties by way of Adverse Possession?

1(C) Whether suit claim for relief of partition is barred by principle of 'Res Judicata' in view of final decision of former suit bearing RCS No. in the Court of C.J.(Sr.Dn) Beed.

The trial Court is also directed to frame additional issues on the basis of pleadings of added parties, if any.

IV] The trial Court is also directed to give an opportunity to lead evidence to both the parties and shall decide the suit claim in accordance with law.

V] The parties shall appear before the trial Court on 1.10.2018.

VI] R & P along with copy of judgment and decree in appeal be sent to trial Court.

VII] Considering the peculiar circumstances of the case, no order as to costs.

VIII] Decree be drawn accordingly."

3. The thrust of the appellants is as under: _

(a) Though the four daughters of Fasiyoddin, who is the father of appellant Nos.1 to 3 and 5 and husband of the appellant No.4, have not been shown in the family tree in the plaint, it is averred in the plaint that the four sisters of these petitioners have relinquished their entire shares in favour of these four brothers.

(b) One sister, namely, Mukhtarjahan stepped into the witness box and deposed on behalf of all the sisters that they have given up their claims and have relinquished their shares in favour of these four brothers.

(c) Issues were rightly framed by the trial Court under Order XIV of the CPC and the appellate Court has unnecessarily added three issues while remanding the matters to the trial Court.

(d) The three issues framed by the appellate Court are not in accordance with the Mohammedan Law and are irrelevant.

(e) The appellate Court has not properly considered the evidence of the parties and therefore, the impugned judgment is perverse.

(f) Though there was an earlier suit bearing RCS No. 384 of 2005, the said suit would not operate as a *res judicata* against any of these appellants.

4. Reliance is placed upon the following judgments:-

(i) Ibrahim Ashraf Patel Vs. Jamrood Bee [2001 (3) Mh.L.J. 886],

(ii) M/s Khatri Film Enterprises Vs. M/s Vijay Cycle Stores - [2010 (2) All MR 722],

(iii) Hayatuddin Vs. Abdul Gain - LEX (Bom) 1974 12 22

(iv) Meenakshi Vinayagar Temple Vs. Meenakshi Ammal - 2015 ALL SCR 3586,

(v) Vishwanath Bapurao Sabale Vs. Sahalinibai Nagappa Sabale - LEX (SC) 2009 3 106, and

(vi) Subhash Narayanrao Moralwar Vs. Vilas Pandurang Wankhede [2013 (7) ALL MR 201].

5. In this appeal, the contention of the appellants is that the impugned judgment is perverse, erroneous and hence, deserves to be set aside.

6. It is undisputed that one sister of these appellants namely, Mukhtarjahan has deposed on behalf of the four sisters that they have relinquished their share in favour of these brothers. Pleadings in paragraph No.2 of the plaint indicate a statement that the four sisters have voluntarily relinquished their shares in favour of these appellants / brothers. The trial Court blindly believed these appellants / plaintiffs and concluded that the sisters have relinquished their shares. The first appellate Court after considering the record and proceedings, noticed

that these four sisters were not shown in the family tree, were obviously not arrayed as defendants and two more sisters were not before the Court in view of the contention that one sister Khamar Sultana had passed away after Fasiyoddin died.

7. The Mohammedan Law mandates that the legal heirs will not have any right of inheritance as long as their father or the landlord parent is alive. The moment the landlord parent passes away, each brother and sister and widow or widows will have their shares in the property. As such, had Khamar Sultana per-deceased her father, she would not have been entitled to any share. But if she has passed away after the demise of her father, she would be instantly entitled to a distinct share and after her passing away, the share would pass on to her legal heirs.

8. The appellate Court noticed that on the one hand, these four sisters were kept away from the litigation and on the other hand, one sister was produced as a witness purportedly deposing on behalf of all the sisters, which would include the deceased sister, declaring that they had relinquished their claim. If such relinquishment was oral, the plaintiffs should have produced their sisters as witnesses and the ideal situation was that they could have been arrayed as defendants so as to support and strengthen the case of the plaintiffs. Neither the L.Rs. of

deceased Khamar Sultana were before the Court, nor the two sisters were brought forth. One sister was introduced by these four brothers as a witness, which apparently was to create an eye wash before the Court. Since this was rightly noticed by the appellate Court, a remand of the suit was directed and the plaintiffs were further directed to add the sisters.

9. I do not find that the trial court has erred on this count since the suit would now be better adjudicated upon in view of substantive evidence as the sisters would be at liberty to make any claim before the trial Court. If they have really relinquished their shares, they could file a written statement declaring before the Court that they have relinquished their shares. It has to be left to the L.Rs. of deceased Khamar Sultana to take a particular stand before the trial Court. In this backdrop, the additional issue framed by the appellate Court at Clause 1A cannot be faulted with.

10. I find that the appellate Court has considered that the defendants have claimed their ownership on the property which they are presently possessing. After considering the evidence recorded and the pleadings of the parties, the appellate Court concluded that the issue as to whether the defendants have become owners of the property by adverse possession, needs to be considered. The trial Court, therefore, would be

at liberty to deal with the evidence recorded in pursuance thereof and would arrive at a conclusion in the light of the Mohammedan Law. Merely because a second view is possible, would not mean that the appellate Court has committed an error in framing additional issue in the form of issue No.1B.

11. In so far as the appellate Court framing issue No.1C is concerned, I find from the record that the appellate Court noticed, on the basis of the evidence, that the defendants had filed RCS No.384 of 2005 for seeking partition and separate possession with reference to land Gut No. 159 in village Vaitagwadi, Taluka and District Beed as the plaintiffs as well as the defendants claimed a right to the property and the plaintiffs had alienated the said property excluding the right of the defendants. The suit was decreed on 26.6.2009. The defendants have also put up a case that one portion of land S.No.726/A to the extent of 29 Ares was acquired for the purpose of Ashti - Khadkat Road and the remaining portion was in the exclusive possession of the defendants since the death of Fasiyoddin. Defendant No.1 was residing in the said property for more than 15 years after the death of his father and defendants 2 and 3 also started residing therein. Structures were erected as residences in the said land. The defendants, therefore, putforth a case which had the semblance of becoming owners of the said suit properties due to adverse possession. It was in this backdrop that the first appellate

Court framed the said issue.

12. In the case of Ibrahim (*supra*), this Court has held in paragraph No.16 that under the provisions of the Mohammedan Law, the estate of the deceased owner devolves upon his heirs at the moment of his death and the estate vests immediately in each heir in proportion to the share as is ordained by the Mohammedan Law. It was then concluded in paragraph Nos.20 and 21 on the basis of the reported judgments that even if any plaintiff omits to implead one or more co-heirs, the suit would not be barred as the claim in the suit would be decided to the extent of the claims put forth and the shares and interests acquired by those co-heirs who are omitted from the proceedings, would remain safe and secured. It was observed that under the Mohammedan Law the interests acquired by the heirs of the deceased in his property are always definite, distinct and assertive.

13. It requires no debate that if any judgment is delivered *de hors* the evidence, the judgment would be rendered unsustainable. In Sri Gangai (*supra*), the Honourable Apex Court has recorded that the obligation and duty to frame the issues is cast solely on the Court and the Court is expected to discharge this primary function by perusing the pleadings of the parties, analyze the allegations of the parties and consider the contents of the documents produce by them. As such, it is obvious that

the appellate Court has considered the pleadings and the evidence of the parties and has concluded that three additional issues need to be cast.

14. In view of the above, I do not find that the impugned judgment could be branded as being perverse or erroneous. This Appeal from Order is, therefore, dismissed. Pending Civil Application does not survive and stands disposed off.

15. At his juncture, the learned Advocate for the appellants prays that the pending suit - RCS No.865 of 2010 be expedited and the trial Court be directed to decide the same as per the provisions of law and the Mohammedan Law within a particular time frame. I find that the request of the appellants deserves to be entertained since the suit is more than eight years old and the litigating sides are in litigation for settling their shares from 2005 when RCS No.384 of 2005 was lodged. As such, the trial Court would endeavour to decide the said suit as expeditiously as possible and preferably on/or before 30.9.2019. The litigating sides will cooperate with the trial Court for such disposal.

(RAVINDRA V. GHUGE, J.)

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