

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 1175 OF 2014

Balchand Jairamdas Lalwant

Aged 68 years

residing at D/302, Bafna Apartments,

3rd floor, Mogul Lane, Near Magnet

Shopping Mall, Matunga (West)

Mumbai – 400 016.

... Appellant

Vs.

Nazneen Khalid Qureshi

aged 54 years

residing at 17/12, Sterling Cooperative

Housing Society Ltd., Bhavani Nagar,

Marol Maroshi Road, Andheri (E)

Mumbai – 400 059.

... Respondent

Mr. Subhash Jha a/w. Ms. Sanjana Pardeshi, Hare Krishna Mishra
i/b. Law Global, Advocates for the appellant.

Mr. Chinmay Gupte a/w. Manoj Prajapati i/b. Mohit Gadkari & Co.,
Advocate for the respondent.

CORAM	: MRS.MRIDULA BHATKAR, J.
RESERVED ON	: 22nd February, 2018.
PRONOUNCED ON	: 6th March, 2018.

JUDGMENT:

In this Appeal from Order, a question required to be addressed
whether a Hindu converted into Islam is disqualified to receive a
property of a father, who died intestate?

2. The respondent/plaintiff is a sister of the appellant/defendant. The respondent has filed Suit No. 3480 of 2010 pursuant to Notice of Motion No. 956 of 2010 in Suit No. 3480 of 2010 (H.C. Suit No. 928 of 2010 for injunction restraining the defendants from creating third party right of whatever nature in respect of the suit premises, i.e., residential flat situated at Matunga (West), Mumbai. It is the case of the respondent/plaintiff that the suit flat and one shop is a property of her deceased father, however, the appellant has sold the shop after father's death and now he wants to sell the flat also. The respondent/plaintiff has averred that she being a daughter has right in the said property. Including the respondent/plaintiff, the appellant/defendant has five sisters and so the respondent/plaintiff claims her share in the suit property and therefore sought that the flat is not to be sold and the appellant/defendant is in exclusive possession of the suit flat. The appellant/defendant while contesting the Notice of Motion has submitted that the respondent/plaintiff got married to Muslim in the year 1979 and as she has changed the religion, she lost the right in the suit property. It is also submitted that the suit flat is also purchased out of his own income. The trial Court considering the *prima facie* case allowed the Notice of Motion and

defendant nos. 1 to 5 were restrained from creating third party right in respect of suit flat. Hence, this Appeal.

3. The learned counsel Mr. Jha, at the outset, has submitted that the suit is not maintainable, as the plaintiff is converted to Islam and therefore, she cannot claim any proprietary right in the father's property. He submitted that this is the main challenge in this Appeal. He submitted that under section 2(1)(a)(c) of Hindu Succession Act, 1956, this Act is not applicable to the persons who are Muslim, Christian, Parsis and Jews by religion. He submitted that Section 2(1)(a) & (b) are inclusionary by which Hindu, Jain, Buddhist, Sikh are covered under the Hindu Succession Act and Section 2(1)(c) of the Hindu Succession Act is exclusionary by which Muslim, Christian, Parsis and Jews are excluded. In support of his submissions, the learned counsel relied on the following decisions:

- (i) Judgment of the Supreme Court in the case of **The Controller of Estate Duty Mysore, Bangalore vs. Haji Abdul Sattar Sait & Ors.**¹
- (ii) Judgment of the Supreme Court in the case of **Sultana Begum vs. Prem chand Jain**²

1 (1972) 2 SCC 350

2 (1997) 1 SCC 373

- (iii) Judgment of Madras High Court in the case of **K. Sivanandam & Anr. vs. Maragathammal**³
- (iv) Judgment of Andhra Pradesh High Court at Hyderabad in the case of **Jujjavarapu Yesurao vs. Nadakuduru Kamala Kumar & Ors.**⁴

The learned counsel has submitted that in the case of **Nayanaben Firozkhan Pathan @ Nasimbanu Firozkhan Pathan vs. Patel Shantaben Bhikhabhai & Ors in Special Civil Application No. 15825 of 2017**, which is relied upon by the respondent/ plaintiff, Justice Pardiwala of Gujarat High court has relied on the Caste Disabilities Removal Act, however, the said act is repealed and therefore, the observations made by the Single Judge of the Gujarat High Court in that context cannot be taken into account while appreciating the issue on convert. He argued that under no circumstances, Hindu Succession Act can be made applicable to Muslim convert, as the application of the Act is expressly barred to Muslim, Christian and Parsis under section 2(1)(c). He argued that the scheme of the Act as a whole is to be taken into account and therefore, Section 26 cannot be read in isolation by ignoring Section 2(1)(c) of the act. On reading of Section 2(1)(c), the application of

³ CDJ 2012 MHC 2346

⁴ (2007) 5 ALD 140

the Act is explicitly clear that it is not applicable to Muslim. He, therefore, argued that the Act requires harmonious construction between Section 26 and 2(1)(a), 2(1)(c) of the Act. He further submitted that a convert otherwise will get benefit from two laws which is not allowed. He further submitted that the trial Court has not taken into account all these factors and has erroneously granted interim relief in favour of the respondent/plaintiff and enjoined the appellant from creating any third party interest in the suit property.

4. Per contra, the learned counsel for the respondent/plaintiff, while supporting the order passed by the trial Court and meeting the objection of the applicability of Hindu Succession Act to the convert, heavily relied on Section 26 of the Hindu Succession Act. He submitted that Section 26 states that Convert's descendants are disqualified and there is no mention about disqualification of the converts himself or herself. He has further submitted that the respondent is a sister and is entitled to the property of her father and the conversion does not disqualify convert to claim proprietary right of his or her father's property. The learned counsel relied on the following decisions:

- (i) judgment of Single Judge of Gujarat High Court in the case of **Nayanaben Firozkhan Pathan @ Nasimbanu Firozkhan Pathan vs. Patel Shantaben Bhikhabhai & Ors in Special Civil Application No. 15825 of 2017.**
- (ii) Judgment of Division Bench of the Andhra Pradesh High Court in the case of **Shabana Khan vs. D.B. Sulochana & Ors.**⁵
- (iii) Judgment of Division Bench of Madras High Court in the case of **E. Ramesh & Anr. vs. P. Rajini & Ors.**⁶
- (iv) Judgment of Division Bench of Calcutta High Court in the case of **Asoke Naidu vs. Raymond S. Mul**⁷

5. It is useful to reproduce Section 2 of the Hindu Succession Act.

“2. Application of Act.—

(1) *This Act applies—*

(a) *to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;*

(b) *to any person who is a Buddhist, Jaina or Sikh by religion; and*

(c) *to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of*

5 2007 DGLS(A.P.) 755

6 2002 (1) MLJ 216

7 AIR 1976 Calcutta 272

any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression “Hindu” in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.”

6. In the present case, a property is not an ancestral property but it is a self-acquired property of deceased father, who has died intestate. The respondent-brother claims that it is his property, but it is disputed. However, it is not an ancestral property. Section 2 states about the application of the Act. Section 2 does not define who is Hindu. It states that Hindu Succession Act is applicable to a

person who is Hindu by religion and also to the persons like Buddhist, Jains or Sikhs by religion, however, it is not applicable to persons who are Muslim, Christian, Parsi or Jew by religion. Conversion from Hindu to Muslim, Christian so also from other religion to Hindu creates other class of persons because by birth they belong to one religion and by choice of other religion.

7. In the case of **Nayanaben Firozkhan Pathan @ Nasimbanu Firozkhan Pathan** (*supra*), an identical issue in respect of applicability of Hindu Succession Act to convert has emerged before the Single Judge of Gujarat High Court. The applicant in the said case was born Hindu and thereafter embraced Islam. The family was the owner of the ancestral landed property. After her father's demise, her name was entered in the revenue record but the entry was challenged substantially on the ground of her conversion and hence non-applicability of Hindu Succession Act. The said entry was challenged before the Deputy Collector and it was dismissed. However, it was taken up before the Collector and the Collector allowed the Revision and impugned entry was cancelled. Therefore, the lady preferred Revision application before SSRD, which was rejected. Being dissatisfied with the order, she filed Writ invoking the

writ jurisdiction of the High Court. The Single Judge of the Gujarat High Court has considered Section 2(1)(c) and the Explanation under the Section, so also section 26 of the Act. The learned Judge observed that a change of religion and loss of caste was at one time considered as grounds for forfeiture of property and exclusion of inheritance. However, this has ceased to be the case after passing of Caste Disabilities Removal Act, 1850.

8. In the case of **K. Sivanandam & Anr.** (*supra*), the Single Judge of the Madras High Court considered the conversion under the Hindu Act and also the effect of Caste Disabilities Removal Act of 1850.

9. It is rightly pointed out by the learned counsel Mr. Jha that the Caste Disabilities Removal Act was repealed on 8th August, 2017. The learned Single Judge of Gujarat High Court passed the judgement in **Nayanaben Firozkhan Pathan @ Nasimbanu Firozkhan Pathan** on 26th September, 2017, i.e., one and half month after the Act was repealed. It is to be noted that the Ministry of Law & Justice, Government of India have found that many Acts in India have become unusable and obsolete either due to sufficient constitutional provisions or existence of other parallel laws or on

account of social or technological changes. Thus, by notification dated 8th August, 2017, the Law Ministry collectively repealed nearly 91 acts and 10 ordinances by common Notification.

10. In the case of **The Controller of Estate Duty Mysore, Bangalore** (*supra*), the Full Bench of the Supreme Court, while dealing with the issue held that a property can be chargeable to estate duty or not, also considered a question whether converts retain part of their original personal law relating to inheritance of property. The Hon'ble Supreme Court took a view that if there is wholesome conversion, then the convert is seized from the original religion and therefore, Mahomedan law is applicable not only to the person by birth but by religion also. Under the Mahomedan Law, person converted to Mahomedan, changes not only his religion but also his personal law. A question before this Court is different i.e., about right of inheritance of a convert, who was Hindu, in father's property under the Hindu Succession Act.

11. In the case of **Sultana Begum** (*supra*) on the interpretation of statute, the Hon'ble Supreme Court has held that the statute has to be read as a whole to find out the real intention of the legislature. This

settled principle of law cannot be disputed.

12. In the case of **Jujjavarapu Yesurao** (*supra*) the question was upon conversion from Hindu to Christianity, whether Hindu law is applicable and the Court gave finding that on conversion, the Hindu law ceases to have any continuing obligatory force upon the convert. It is further held that if one member of Joint Hindu Family converts to Christian, it would result in complete dissolution of entire family and from that time, the members of Hindu family cannot be treated as members of Joint Hindu Family. Thus, the facts in the said case and of the case is hand vary.

13. At this stage, let me advert to Section 26 of Hindu Succession Act, which reads thus:

26. Convert's descendants disqualified.—Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

14. The Andhra Pradesh High Court, Madras High Court, Calcutta High Court and Gujarat High Court which are relied by the learned

Counsel for the respondent in all the respective judgments (supra), have considered Section 26 of Hindu Succession Act and held that the Hindu Succession Act is not applicable to the children of the convert. However, a convert himself or herself is not excluded from the application of the Act by virtue of this Section. The submission of the learned counsel Mr. Jha that Section 2 and Section 26 are to be read together and not in isolation, is correct and therefore, the provisions under section 2, especially Explanations, can be read alongwith Section 26. The Section disqualifies the converts descendants. Thus, in Explanation (a) and (b) of Section 2, it is stated that child either legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion, this Act is applicable and thus it expresses the converse situation that the children born to converts are not covered under Section 26 of the Act. Therefore, they are disqualified from inheriting the property of any of their Hindu relatives. The last portion of Section 26 is a rider to disqualification, which reads that "Unless such children, i.e., children of converts themselves or their descendants are Hindus at the time when succession opens". This portion is consistent with Explanation (c) which states about the application of Act to a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion. It means

that if the child of a convert after attaining majority embraces either to Hindu, Buddhist, Jain or Sikh religion before succession opens, then the act is applicable to such child of convert to Hindu. Similarly, if a convert again prefers re-conversion to being a Hindu or the religion covered under section 2 when succession opens, then on account of reconversion to Hindu is again qualified to inherit the property of Hindu also his descendants will be qualified to claim property of their ancestral. The legislature did not include the convert under the caption of disqualification. Section 26 is a specific section on the point of disqualification due to conversion wherein the legislature could have mentioned the “convert” along with the “converts descendants”, however, the convert himself is not included under the ambit of section 26 and hence not disqualified. It is logically also very consistent as discussed earlier. The Personal Law is applicable to a person who is converted into Islam, Christian or any other religion for the purpose of marriage, guardianship etc., however, while deciding the inheritance, the fact of the religion of the person at the time of birth has to be taken into account to eliminate legal anomaly. Therefore, under section 26, the children of converts are not Hindu by birth due to conversion of their parents and so they are not covered under the Hindu Succession Act. However, their

parents, who are Hindu by birth, cannot be disqualified for inheritance of their father who is Hindu because their father's property and inheritance governed under the Hindu Succession Act.

15. In the case of **Asoke Naidu** (*supra*), adoptive Hindu mother had left property for adopted son who was muslim and therefore his inheritance was challenged on the ground of applicability of Hindu Succession Act to Muslim. The Division Bench of Calcutta High Court took a view that disqualification does not affect the convert himself or herself but it may affect their children.

16. While dealing with the aspect of conversion, a basic question emerges why a person needs to get converted. The conversion may be due to force or it may be a free choice. Why person chooses to change religion and accept other religion? For most of the people in the world, the religion is a way of life which regulates a particular life style, beliefs and culture. A person may think by adopting particular way of life and faith, his search of many unknown questions like existence of universe, who he is etc. can be answered. He may think that following a particular religion is a correct path, which may lead to a spiritual journey. Therefore, the constitution of India has

guaranteed right to religion as fundamental right and in our secular country, any person is free to embrace and follow any religion as his or her conscious choice. Hence, Hindu converted into other religion is not disqualified to claim the property under Section 26 of the Act.

17. When the issue of succession is considered, one cannot lose sight that minimum two persons are involved in the process. One, who is the owner or has property and on the other hand, there is a person who claims or receives property, a successor. In the absence of these parties, Succession Act cannot be enforced. Assuming before conversion to Islam or Christianity, a convert was going to receive the property from Hindu, then that Hindu owner has every right to get governed by the personal law of which he belongs to. It is a legitimate expectation of the owner of the property that his property to be governed, distributed and inherited as per personal law of the religion he belongs to. So far as Hindu Succession Act is concerned, if Hindu owner dies intestate, then the distribution or inheritance of his property is to be necessarily governed by Section 8 of the Hindu Succession Act. If he makes will of his self-acquired property, then his will to prevail. However, if he dies intestate, i.e., without making a testamentary disposition of the property, then Section 8 is to be

pressed into service. It is useful to reproduce at this stage Section 8 of the Hindu Succession Act.

“8. General rules of succession in the case of males.

—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

lastly, if there is no agnate, then upon the cognates of the deceased”.

Thus, devolution of property of such Hindu male shall be as per the specified Class-I and Class-II Schedule or sub-section (c) and (d) of Section 8. Son, daughter, widow, mother etc. fall in Class-I Schedule. Suppose a widow embraces Christianity or Islam religion after death of her Hindu husband, then the conversion shall not come in the way of devolution of the property of her husband.

18. The right to inheritance is not a choice but it is by birth and in some case by marriage, it is acquired. Therefore, renouncing a

particular religion and to get converted is a matter of choice and cannot cease relationships which are established and exist by birth. Therefore, Hindu convert is entitled to his/her father's property, if father died intestate.

19. I hereby rely on the ratio laid down by the Single Judge of the Gujarat High Court in the case of **Nayanaben Firozkhan Pathan @ Nasimbanu Firozkhan Pathan** (*supra*) wherein the learned Judge has held that :

“The disqualification does not affect the convert himself or herself. This being the position, I have no hesitation to hold that the applicant who is admittedly a sister of the private respondents, i.e., the daughter of late Bhikhabhai Patel, is entitled to succeed in getting her name mutated in the record of rights as one of the legal heirs. The provisions contained in Section 26 of the Hindu Succession Act is the only provision dealing with the right of succession of children born to a convert after the conversion. However, this provision does not disqualify the convert himself from succeeding to the property of the Hindu father.”

20. In the case of **Shabana Khan** (*supra*) the lady converted into Islam before her father's death and after death of her father, she claim father's property. In the case of **E. Ramesh & Anr.** (*supra*), due to conversion by Hindu sister into Islam, her right of inheritance to father's property was challenged. The Division Bench of the

Andhra Pradesh High Court in **Shabana Khan** and the Division Bench of Madras High Court in **E. Ramesh** relied on Section 26 of the Hindu Succession Act and said that she is entitled to inheritance.

21. In the present case, the respondent/plaintiff is a sister who has converted to Islam. She claims the suit property as her father's self-acquired property. The appellant/brother has disputed the same. However, this can be tested on the basis of evidence of the parties at the time of trial. The suit is maintainable. The objection raised by Mr. Jha is not sustainable in view of the findings given above. The trial Court has rightly passed the order of injunction against the appellant/defendant with a view to keep the property in tact and available. No interference is required in the order of the trial Court. Hence, Appeal from Order is dismissed.

(MRIDULA BHATKAR, J.)