

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.381 OF 2016
WITH
CIVIL APPLICATION NO. 8277 OF 2016
IN
SECOND APPEAL NO. 381 OF 2016

1. Umrao s/o Ibrahim Pathan,
Age :- Major, Occ. Agri.,

2. Bapu s/o Ibrahim Pathan,
Age :- Major, Occ. Agri.,

3. Rasul s/o Ibrahim Pathan,
Age :- Major, Occ. Agri.,

All above R/o:- Chorakhali,
Tq. Kallam, Dist. Osmanabad.

....Appellants
(Original deft.no.1 to 3)

Versus

1. Lailabee w/o Isak Muzawar,
Age :- 50 years, Occu. Agri. & Household,
R/o: Wagholi, Tq. & Dist. Osmanabad.

2. Rubab @ Fatema w/o Zaheer Shaikh,
Age :- Major, Occu. Agri.
R/o: Andora, Tq. Ausa,
Dist. Latur.

...Respondents
(resp. no. 1 is orig. plaintiff
and resp. no.2 is orig.
defendant no.4)

Mr. V.S. Undre, Advocate for Appellants
Mr. R.B. Temak Advocate for Respondent Nos. 2

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 25th JULY, 2019

ORAL ORDER:

1. Present appeal has been filed by the original defendant Nos. 1 to 3 challenging the concurrent judgment and findings in Regular Civil Suit No. 619/2006 by Joint Civil Judge, Junior Division, Kallam, Dist. Osmanabad dated 01.08.2011 and Regular Civil Appeal No. 174/2011 by learned District Judge-2 dated 16.02.2016, whereby the suit for partition and separate possession filed by present respondent No.1 came to be decreed and the appeal filed by the present appellants came to be dismissed.

2. Heard learned Advocate Mr. V.S. Undre appearing for the appellants and learned Advocate Mr. R.B. Temak representing respondent No. 2. Respondent No. 1 though served, remained absent. It has been vehemently submitted on behalf of the appellants that both the Courts below have not considered and appreciated the evidence properly and dealt with the law points involved in the matter. The defendants herein had come with the case that their father Ibrahim had given Hiba on Ramjan-Id of 2000 of the suit property in favour of the sons i.e. original defendant Nos. 1 to 3. At that time, the plaintiff and another sister i.e. deft. No. 4 were present. Both the Courts have failed to consider that the Hiba was permissible in Muslim law. So also, a fact was not taken into consideration that at the same time, the plaintiff and the sister had relinquished their share from suit property. Another fact which has

not been considered by both the Courts below is that Ibrahim had sold certain portion of land in the year 1975 and 1977, in order to mitigate the expenses of marriage of the plaintiff. So also, thereafter, when he became ill, the original defendant Nos.1 to 3 had incurred huge amount for his treatment. Taking into consideration the power with Ibrahim to dispose of his property during his life time, when he has granted Hiba in favour of the defendant Nos. 1 to 3, they had become exclusive owner of the said property, and therefore, the plaintiff had no share in the same. The learned trial Court erred in granting $1/8^{\text{th}}$ share to the plaintiff and defendant No. 4 and $2/8^{\text{th}}$ share each to defendant Nos. 1 to 3. Therefore, according to the learned Advocate for the appellants, substantial question of law arises in this case.

3. Learned Advocate for respondent No. 2/original defendant No. 4 is supporting the submissions on behalf of the appellants.

4. At the outset, it is to be noted that present appeal has been filed under section 100 of CPC, and therefore, raising of substantial questions of law, and framing thereof by the Court is *sine qua non* for entertaining the second appeal. On this point, help can be taken from the decision by Apex Court in ***Gurnam Singh (Dead) by LRs. and Ors. Vs. Lehna Singh (Dead) by L.Rs. (Civil Appeal No. 6567/2014 decided on 13th March, 2019)***, wherein after taking

note of catena of judgments of the Apex Court, it has been observed "We have noticed and even repeatedly observed by this Court and even in the case of ***Narayan Rajendran Vs. Laxmi Sarojini 2009 (5) SCC 264***, despite the catena of decisions of this Court and even the mandate under section 100 of CPC, the High Court under section 100 of CPC are disturbing the concurrent findings of the facts and/or and even the findings recorded by the appellate Court, either without formulating substantial question of law or on framing erroneous substantial question of law". Further note can be taken in respect of another decision of the Hon'ble Supreme Court in ***Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar 1999 (3) SCC 722***, wherein, it has been observed "In a second appeal under section 100 of CPC, the High Court cannot substitute its own opinion for that of the first appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being; (1) contrary to the mandatory provisions of the applicable law; or (2) contrary to the law as pronounced by the Apex Court; or (3) based on inadmissible evidence or no evidence." "If first appellate Court has exercised discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Civil Appeal. The trial Court could have decided differently is not a question of law justifying interference in second appeal".

5. With this position of law, we are required to consider as to whether any case is made out for framing substantial question of law. What is not in dispute is, agricultural land bearing Gut No. 688 admeasuring 9 Hectors 98 R situated at village Chorakhali, Taluka Kallam, District Osmanabad was owned by Ibrahim, who was the father of the plaintiff as well as the defendants. He expired on 27.04.2006, and therefore, on 09.11.2006, plaintiff filed suit for partition and separate possession. The defendants had come with the case that Ibrahim was suffering from cancer and defendant Nos. 1 to 3 had incurred huge expenses towards treatment. Ibrahim had gifted the suit property by executing Hiba in presence of two witnesses in their favour. It was also contended that at that time, plaintiff and defendant No. 4 were present, and they had relinquished their share in favour of defendant Nos. 1 to 3. Thereby, defendant Nos. 1 to 3 canvassed that they are the exclusive owners of the suit property. Under such circumstance, when the defendants had come with the case of Hiba, the burden was on them to prove the same. Perusal of the cross-examination of the plaintiff would show that there was absolutely no suggestion in respect of Hiba to her. When in the written statement it was contended by defendant Nos. 1 to 3 that she was present, then at least there would have been suggestions. On the contrary, suggestions have been given in respect of partition of the suit property. Therefore, those suggestions

which were given to plaintiff in the cross were beyond the pleadings. As regards the contention that plaintiff and defendant No. 4 had relinquished their share, it is to be noted that when Ibrahim was alive at the time of alleged Hiba, which is stated to have been made on Ramjan-Id of 2000, there could not have been any occasion for his daughters to relinquish their share in favour of brothers. The share of the daughters would be carved out as per Mohammedan Law, after the death of the father.

6. As regards proof of Hiba is concerned, apart from their own evidence, defendant Nos. 1 to 3 have examined DW Abbas Shaikh. Perusal of his examination-in-chief would show that though he was supporting the fact which defendant Nos. 1 to 3 intended to contend, yet, he has made interested statements, thereby stating that plaintiff has no right in the suit property. In his cross-examination, he has admitted that he is a relative of the plaintiff and defendants. If at all there would have been Hiba, his presence at that time might not have been objected to or could have been said to be natural, but from his cross-examination, it can be seen that he was supporting defendant Nos. 1 to 3 for some ultimate cause. He has stated that on the day of Hiba, Ibrahim had 30 acres of land and then, he had gifted 5 acres each to defendant Nos. 1 to 3. This appears to be a factually incorrect statement, taking into consideration the fact that in 2000 or 2006, Ibrahim was the owner of

the land admeasuring 9 Hectors 98 R only. Under such circumstance, the evidence of said witness is absolutely not believable.

7. The immediate conduct of defendant Nos. 1 and 3, after Hiba would have been to get their name mutated in the record of rights of the suit property. However, in this case, no such attempt has been made till it appears that the suit was filed. It was tried to be explained that since Ibrahim was ill since 2004, the defendant Nos. 1 to 3 could not get time to have that mutation. This appears to be a lame excuse, when the Hiba was allegedly given in 2000 and the alleged fact of illness of Ibrahim is from 2004 onwards. Therefore, from the conduct part of the defendant Nos. 1 to 3 is concerned, there appears to be no evidence for Hiba.

8. On the other hand, what is also required to be considered is that, whether there can be a collective Hiba in the name of defendant Nos. 1 to 3. If it is a gift, then it has to be specific. Defendant Nos. 1 to 3 ought to have given the boundaries of the land or the extent of each of their holding, may be by strips and then to whom which strip is given. In like manner, the Hiba was executed. But here the defendants have neither given boundaries of the portion of the land gifted to each one of them nor they have said that Ibrahim had asked them to have strips of the land and then take

specific portion of the same. Under such circumstance, taking into consideration the facts of this case, there appears to be no support to the contention of the defendants that there was a collective Hiba in their favour by Ibrahim.

9. Both the Courts below have considered the evidence as well as the law points properly. The calculation of share to each one of them is also correct. Under such circumstance, there is absolutely no error on the facts or on law. No substantial question of law is arising in this case. Hence, the Second Appeal is disposed of as '**not admitted**'. Pending Civil Application stands disposed of accordingly.

[SMT. VIBHA KANKANWADI]
JUDGE

mta