

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

SECOND APPEAL NO.690 OF 2009

Abdul Samad s/o Gulam Rasool (Died)
Through his LR.

... **Versus** ...

Mohammad Yousuf s/o Shaikh Dagdu Gulam Rasool (Died)
Through his LR.

...

Mr. D.V. Soman, Advocate for the appellants

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 25th FEBRUARY, 2019

PRONOUNCED ON : 02nd MAY, 2019

ORDER :

1 Present appeal has been filed by original plaintiffs. They had filed Regular Civil Suit No. 287 of 1979 before learned 7th Joint Civil Judge Junior Division, Aurangabad for declaration of ownership over house No. 165, Tofkhana Bazar, Cantonment, Aurangabad and for recording their name to the register with Cantonment Board, Aurangabad.

2 Plaintiffs had come with a case that one Smt. Zainabee w/o Gulam Rasool was the mother of original plaintiff Abdul Samad. She expired

on 04.07.1975. Plaintiff is the son and only legal heir of deceased Zainabee. Suit property house No.165 was owned and possessed by Zainabee. It consists of two rooms, kitchen, dallan and W. C. - bathroom with open space in surrounding. The suit house was transferred in the name of plaintiff on 23.10.1978 for taxation purpose. After death of Zainabee, plaintiff has become owner of the suit house by virtue of will dated 22.12.1974 left by her. Plaintiff had applied for mutation of suit house in his name. Cantonment Board issued public notice and invited objections. Original defendant Mohd. Yousuf raised objection by saying that he is the son of Zainabee and brother of plaintiff. Thereafter, he made applications to record his name to the house. Board asked plaintiff to get the dispute settled through Court. Plaintiff has denied the fact that defendant is son of Zainabee and his brother. However, later on it appears that he has come with a case that taking into consideration the need of defendant, he was allowed to occupy a room and kitchen, area of 6ft. x 8 ft.. Then plaintiff is claiming possession of the said premises from defendant.

3 Defendant denied the claim of the plaintiff by filing written statement Exh.11. It has been specifically denied that plaintiff is the only heir of Zainabee and after her death, plaintiff has become owner of the suit

premises. The will is stated to be forged, bogus and fabricated. He has claimed that he is the son of Zainabee and brother of plaintiff. It is also denied that he was put in permissive possession of the property in 1974. According to him, he is residing in the suit premises since the life time of Zainabee. The suit has been filed with mala fide intention to grab the property.

4 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration, the pleadings, evidence adduced and submissions of both sides, learned Trial Court has dismissed the suit on 18.09.1999.

5 Plaintiff has challenged the said judgment and decree by filing Regular Civil Appeal No. 6 of 2000. It was heard by learned Ad-hoc Additional District Judge, Aurangabad. It was allowed. The suit was partly decreed. It was held that plaintiff is entitled to get possession of the suit property to the extent of $2/3^{\text{rd}}$ share in the suit house by effecting partition. It was also directed that Commissioner be appointed to effect the partition. The legal representatives of original plaintiffs have filed this second appeal, challenging the said judgment and decree passed by the learned First Appellate Court.

6 Heard learned Advocate Mr. D.V. Soman for appellants. Though respondents Nos.1, 4 to 9 were represented by Advocate, said learned Advocate was absent when the matter came up for hearing. The appeal had abated on 29.09.2000 as against respondent No.2 and appeal was dismissed as against respondent No.3 by order dated 11.02.2009.

7 It has been submitted by learned Advocate for appellants that Zainabee had purchased the suit property in 1939. It was her exclusive property. She has executed will in favour of plaintiff on 22.12.1974. She expired on 04.07.1975. Defendant had failed to prove his relationship with Zainabee. In the will, which has been proved by the plaintiff, it is clearly stated that plaintiff is her only son. The learned First Appellate Court has relied on Para 117 and 118 of Mulla's Principles of Mohemmadan Law, in which it is stipulated that a Muslim person cannot bequeath more than 1/3rd of his or her property. Under that provision, the learned First Appellate Court has granted 1/3rd of the suit property to defendant. However, what has been not considered is that the defendant is not an heir of Zainabee. She could not have given any portion of the property to him. Even if she would not have left the will, plaintiff being sole heir was entitled to the ownership and possession of entire property. Learned First Appellate Court went wrong in

converting the suit into partition suit.

8 Per contra, the learned Advocate for respondents supported the reasons given by learned First Appellate Court. He submitted that the defendant had established that he is the son of Zainabee and brother of plaintiff. When the relationship is established, it is not in dispute that parties are muslims; then Zainabee had no authority to dispose of her property entirely. She could have disposed of only 1/3rd of the property by will. There was no conversion of the suit in partition suit, when both the parties to the suit have share in the property. Plaintiff has not explained as to how defendant came in possession of the portion of the suit premises. There is no substance in his say that after death of Zainabee, he had permitted defendant to occupy the portion. Defendant has proved that since the life time of Zainabee, he is residing in that premises and she had not taken any objection. Therefore, the possession of the defendant has been protected by learned First Appellate Court. No substantial question of law is arising in this matter.

9 It can be seen from the pleadings of the parties that, there is no dispute between them on the point that Zainabee was the exclusive owner of the property, which she had received from her parental side. Plaintiff contended that he is the only heir left by her; whereas defendant was

claiming to be the son of Zainabee and brother of plaintiff. Zainabee expired on 04.07.1975. Interesting point to be noted is that plaintiff had claimed exclusive ownership on the basis of sole successor and also by way of will. If there would not have been any other heir to Zainabee, then she would have left any will bequeathing entire property in favour of that sole successor ? The property would have automatically devolved on him. Here itself, the story put forward by plaintiff is rendered unbelievable. However, since the status of defendant was denied, it was for him to prove the same.

10 Both the Courts below have concurrently held that defendant has proved that he is the son of Zainabee and Gulam Rasool. Plaintiff had contended that defendant is the son of one Rahamatbai and Shaikh Dagadu. Rahamatbai was the sister of Zainabee. However, the evidence shows that since the lifetime of Zainabee, defendant is staying in suit house in half portion. There is no dispute that since 1974 he is residing with his family there. His kitchen is separate, but he used to share bathroom and W. C. unit with plaintiff and family. The marriage of legal heirs have taken place, when defendant is residing in the said premises. Initially, plaintiff had come with a case of unauthorized occupation of defendant, but later on amended that same and came with a case of permissive possession since 1974. The suit

premises consists of two rooms only. It is unbelievable that for a stranger, the plaintiff and his family will adjust themselves by parting with the possession of half portion. Another fact is that plaintiff himself has described the name of defendant as Mohammad Yousuf s/o Shaikh Dagadu @ Gulam Rasool. Why name of Gulam Rasool has been added is not explained. Another fact to be noted is that plaintiff himself was witness to the marriage of daughter of defendant by name Munnibegum. Her marriage certificate has been produced at Exh.120. It was signed by plaintiff in the capacity as uncle of the bride. Other documents on record also show that defendant was posing himself as son of Gulam Rasool since birth. At no point of time, it was objected by plaintiff or Zainabee. Therefore, both the Courts have rightly held that defendant is the son of Zainabee and brother of plaintiff.

11 Thus, when plaintiff cannot be said to be the only heir left by Zainabee, then he is not entitled to get the declaration as exclusive owner of the suit premises on the ground of sole successor. Now it is required to be seen as to whether he can be said to be the exclusive owner on the basis of will left by Zainabee. The factual aspect about proof of the will is concerned, there is no consistency in the findings of the Courts below. Learned Trial Court held that plaintiff failed to prove the will; whereas the learned First

Appellate Court has held that it is proved to the extent of 1/3rd share only. Original defendant has not challenged the said finding by the learned First Appellate Court. Therefore, now the said aspect about proof of will cannot be gone into. What is required to be seen, as to whether Zainabee could have legally disposed of the entire suit premises by way of will. In Para No.39 of Chapter V Succession and Administration of Mulla's Principles of Mohammedan Law, 22nd Edition (2017 print) it is stated that the estate of a deceased Mohammedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration, or succession certificate; (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant; (4) other debts of the deceased according to their respective priorities (if any); and (5) **legacies not exceeding one-third of what remains after all the above payments have been made**. We must also read said provision No.39 together with para No.40, which prescribes since a Mohammedan cannot dispose of by will more than one-third of what remains of his property after payment of his/her funeral expenses and debts, and since the remaining two-thirds must go to his/her heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when she has realized the

estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate irrespective of the will, the other by the will established by the probate. Further, Para 117 in Chapter IX Wills, Bequests to heirs provides that the bequest in excess of one-third of an estate cannot take effect unless such bequest is consented to by the heirs after death of testator and further Para 118 in unequivocally puts limit on testamentary power. It provides, a Mohammedan cannot by will dispose of more than a third of the surplus of his/ her estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator. Therefore, the conjoint reading of these provisions would make it clear that Zainabee had no authority or right to bequest the entire property to anybody. Hence, the learned First Appellate Court has rightly held that plaintiff can be said to be the owner of the said property to the extent of $1/3^{\text{rd}}$ by virtue of said will left by Zainabee. On the basis of said finding, the decree has been passed.

12 Reliance can be placed on **Gurnam Singh (D) by LRs. & Ors. vs. Lehna Singh (D) by LRs. in Civil Appeal No.6567 of 2014** decided by the Apex Court on 13.03.2019; wherein it has been observed that the existence

of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of CPC. Reliance also can be placed on the decision in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, wherein it has been held that

“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 :

- (i) Contrary to the mandatory provisions of the applicable law;
OR
- (ii) Contrary to the law as pronounced by the Apex Court;
OR
- (iii) Based on in-admissible evidence or no evidence.

Present appeal does not satisfy the parameters laid down above.
Hence, the Second Appeal is dismissed.

(Smt. Vibha Kankanwadi, J.)