

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

Civil Application No. 07703 of 2018
(In Second Appeal No. 0460 of 2017)

District : Osmanabad

1. Ibrahim s/o. Babulal Shaikh,
Age : 39 years,
Occupation : Agriculture,
R/o. Amrawatiwadi,
Taluka Tuljapur,
District Osmanabad.
2. Babulal s/o. Gulab Shaikh,
Age : 69 years,
Occupation : Agriculture,
R/o. as above.
3. Hashmabee w/o. Akbarkasim
Siddiqui
(Since Died. Deleted as her
L.Rs. are already on record).
4. Mahaboobbi w/o. Akbarkasim
Siddiqui,
Age : 70 years,
Occupation : Agriculture,
R/o. as above.

.. Applicants
(Original
defendants)

versus

Abbas Kadri
s/o. Shabbir Hussain Siddiqui,
Died through L.Rs.:

- 1-A. Mahmoodbee w/o. Abbaskadri
Siddiqui,
Age : 67 years,
Occupation : Household,
R/o. Amrawatiwadi,
Taluka Tuljapur,
District Osmanabad.

... Contd.

- 1-B. Maheboob s/o. Abbas Kadri
Siddiqui,
Age : 53 years,
Occupation : Contractor,
R/o. Kalewadi Phata,
Bharat Society,
Near Jagtap Dairy, Pune,
Taluka Pune, Dist. Pune.
- 1-C. Mahamad Sharif
s/o. Abbas Kadri Siddiqui,
Age : 53 years,
Occupation : Labour,
R/o. Malewadi,
Taluka Haweli, Dist. Pune.
- 1-D. Bebi d/o. Abbas Kadri
Siddiqui,
Age : 57 years,
Occupation : Household,
R/o. Padmawati,
Shankar Nagar-1,
Taljai, Pune,
Taluka Pune, Dist. Pune.
- 1-E. Shakirbi w/o. Gaibilal Shaikh,
Age : 55 years,
Occupation : Household,
R/o. as above.
- 1-F. Ashabee w/o. Babu Shaikh,
Age : 52 years,
Occupation : Household,
R/o. as above.
- 1-G. Peer Ahmed s/o. Kadri
Siddiqui,
Age : 51 years,
Occupation : Agriculture,
R/o. Amrawatiwadi,
Taluka Tuljapur,
Dist. Osmanabad.
- 1-H. Ujeer Ahmad Abbas Kadri
Siddiqui,
Age : 25 years,
Occupation : Agriculture,
R/o. as above.

... Contd.

- 1-I. Wahedabee w/o. Balekhan
Shaikh,
Age : 37 years,
Occupation : Household,
R/o. as above.
- 1-J. Umedabi d/o. Abbas Kadri
Siddiqui,
Age : 26 years,
Occupation : Household,
R/o. as above.
- 1-K. Rahimunisa d/o. Abbas
Kadri Siddiqui,
Age : 27 years,
Occupation : Household,
R/o. as above.
- 1-L. Dadima Shaukat Mujawar,
Age : 33 years,
Occupation : Household,
R/o. Uple (R),
Taluka Barshi,
District Solapur.

.. Respondents
(Original
plaintiffs)

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Mr. Y.R. Mahajan, Advocate, for the applicants.

*Ms. A.N. Ansari, Advocate, for respondents no.1-A
to 1-C.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 18TH JANUARY 2019

O R D E R :

01. Present application has been filed for granting certificate of fitness for filing appeal before the Hon'ble Supreme Court of India, under Article 134A of the Constitution of India, along with Articles 132 and 133 of the Constitution, as well as

relevant provisions of the Supreme Court Rules and the Bombay High Court Appellate Side Rules, 1960.

02. Present applicants are the original defendants. They want to challenge the order of this Court dated 18-07-2017 passed in Second Appeal No. 460 of 2017, confirming the judgment and decree dated 28-02-2017, passed by learned District Judge-2, Osmanabad, in Regular Civil Appeal No. 37 of 2009, thereby dismissing their appeal and confirming the judgment and decree passed by learned Civil Judge (Junior Division), Tuljapur, District Osmaabad, on 17-01-2009 in Regular Civil Suit No. 102 of 1997.

03. The facts are required to be taken into consideration in nutshell. Plaintiff claim that one Akbar Kasim was his brother, who had died issue-less on 26-03-1997, leaving behind two widows i.e. defendants no.03 and 04. Defendant no.03 is the brother defendant no.04. Defendant no.02 was having two sons, namely, Ibrahim and Ismail and three daughters, namely, Hamidabee, Nafisa and Ahmadbee. Aadam is the son of Hamidabee, that means, grandson of defendant no.02. Akbar was the owner of land Gut No. 131, admeasuring 09 hectares 20 R. Out of that, he alienated 03 hectares 88 R to different persons. It is stated that, those alienations are without consideration. At the time of his death, he was having 05 hectares 32 R. It is stated that,

defendant no.02 was residing with Akbar since the marriage of defendant no.04 and he had intention to grab the property of the deceased by defeating rights of the plaintiff. Defendants no.03 and 04 colluded with each other and got the sale deed executed on 24-02-1997 in the name of fictitious person by name, Ibrahim Akbar Kasim Siddiqui. The said sale deed is sham, bogus and without consideration. Defendant no.01 is posing himself to be the son of deceased Akbar. However, he has no right, title and interest over the suit land. As per the plaintiff, after demise of Akbar, defendants no.03 and 04 inherited 1/4th share in land Gut No. 131 and he is owner of rest 3/4th share as per the provisions of Muslim Law. Thus, he filed the suit for declaration of title and in the alternative, for partition and separate possession.

04. The suit was resisted. It is denied that Akbar died issue-less. However, they have admitted that defendant no.02 is the natural father of defendant no.01. Since Akbar had no good relations with plaintiff, he had no intention that his property should go to him and with the consent of defendant no.02, he had taken defendant no.01 in adoption on 14-02-1997 by virtue of registered adoption deed executed before Sub-Registrar, Tuljapur. Thereafter, on 24-02-1997, Akbar had executed sale deed in favour of defendant no.01 by accepting consideration. Since

then, defendant no.01 is holding the land as owner and possessor. It is also contended that Akbar had left will bequeathing the property to him.

05. Parties went to trial and after hearing both sides, learned trial Court had decreed the suit. It was held that the plaintiff is the owner of 3/4th share and, therefore, he is entitled to get his share partitioned and possession of the same. The said decree was challenged in appeal. The said appeal came to be dismissed on merits. Thereafter, second appeal was preferred by present applicants. After hearing both sides, this Court dismissed the second appeal at the stage of admission holding that no substantial question of law has been made out. Now, the present applicants intend to file appeal before the Hon'ble Supreme Court.

06. It has been contended that this Court has not considered the documentary evidence, especially Exhibits 48 and 49 by which defendant no.01 received the title and possession. Those documents are registered documents which presupposes that Akbar was present before the Sub-Registrar. There was no question of his ill-health or incapability to execute those documents. Those documents have been challenged on the ground that they were executed without consideration, bogus and sham. In fact, passing of consideration is not a *sine qua non* for

passing the title of the suit property. Under such circumstance, provisions of Section 54 of the Transfer of Property Act, 1882, ought to have been considered and not Section 29 of the Contract Act. Since the parties were Muslims, partition would have opened only after death of Akbar and till then, nobody else would have had any right to challenge the acts of Akbar to dispose of his property. The definition of 'gift' in Gift Tax Act, 1958, could have also been considered while considering documents Exhibit 48 and 49. The courts below had failed to consider the legal points and, therefore, the second appeal was filed. Substantial questions of law were raised. It ought to have also been considered that the property was given by way of Hibba which contemplates gift and acceptance. When all these facts were important and substantial question of law has been raised, the applicants have prayed that the fitness certificate be issued.

07. The application has been objected orally by respondents no.1-A to 1-C to the application.

08. Heard learned Advocate Mr. Y.R. Mahajan appearing for the applicants. So also, heard Ms. A.N. Ansari appearing for respondents no.1-A to 1-C.

09. It will not be out of place to mention here that, the order of dismissal of second appeal, on the

question of non-existence of any substantial question of law in the second appeal, was passed by this Court on 18-07-2017 by Hon'ble Shri N.W. Sambre, J. At present, he is not available on this Bench and, therefore, the matter is assigned as per roster.

10. Article 134A of the Constitution of India is hereby reproduced for the sake of convenience :-

"Certificate for appeal to the Supreme Court —
Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of article 132 or clause (1) of article 133, or clause (1) of article 134 —

(a) *may, if it deems fit so to do, on its own motion; and*

(b) *shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence,*

determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of article 132, or clause (1) of article 133 or, as the case may be, sub-clause (c) of clause (1) of article 134, may be given in respect of that case. "

We are not concerned with sub-clause (a) of Article 134A because this Court on its own motion has not decided to grant any certificate. We are more concerned with sub-clause (b) of Article 134A. Admittedly, when the said order was pronounced, no oral application was made by or on behalf of the

party aggrieved. It was tried to be submitted that the judgment was reserved and thereafter it was pronounced. However, that does not appear to be the factual position. It was an oral order dated 18-07-2017. No doubt, the said provision also prescribes that an application can be made, but the words used are *"as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of article 132, or may be given in respect of that case."* Article 132 of the Limitation Act, 1963, prescribes period of limitation of 60 days for making such kind of application from the date of the decree or order or sentence. No doubt, the present application has been filed within limitation. However, it has not been made immediately and that fact is definitely required to be considered while considering the fact that whether case is made out to grant fitness certificate. At the same time, we are required to consider Article 133 of the Constitution of India which prescribes that, *an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under article 134A, (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.* Here, we are more concerned with Article 133(1)(a) which specifically says about the existence of substantial question of law of general importance. Here, all the points of arguments which were submitted by the

appellants were considered by this Court in the said order and after giving reasons, a conclusion has been arrived at, that no substantial question of has been made out in the appeal.

11. Now, while dealing with this application to grant fitness certificate, this Court cannot review or re-visit those arguments which have been already dealt with in the said order. The provisions of Order XLV Rule 03 of the Code of Civil Procedure, 1908, are similar to Article 133 of the Constitution of India. When this Court has already come to the conclusion that no substantial question of law has been shown, now fitness certificate cannot be issued stating that grounds are made to issue the fitness certificate as contemplated under Article 134A read with Article 133 of the Constitution of India.

12. Learned Advocate appearing for the applicants has tried to demonstrate with the help of Transfer of Property Act, 1882; Indian Contract Act, 1872 as well as Gift Tax Act, 1958 and the documentary evidence Exhibits 48 and 49, as to how those provisions are applicable. However, it can be noted that all those provisions were pointed out by him when the matter was decided on 18-07-2017. Therefore, I am restraining myself from reproducing those arguments and dealing with them again. The short point that would be, when this Court has

already formed an opinion that no substantial question of law has been shown and on that day itself before the same Bench, prayer was not made, for grant of certificate; though the present application is within limitation, no such certificate can be issued.

13. It will not be out of place to mention here that the learned Advocate appearing for respondents no.01A to 01C has also stated that the decree that had been passed, has been executed and necessary mutation entries have been taken. She has also filed copy of the mutation entry on record. Though that may be a fact, right of appeal in spite of execution of the decree would be a separate subject. Since the certificate cannot be issued for the aforesaid reasons, the subsequent point as regards right to appeal is not addressed.

14. Hence, for the aforesaid reasons, the civil application is rejected.

(Smt. Vibha Kankanwadi)
JUDGE

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