

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 79 OF 1995

Lalkha Aminkha Pathan	}	
Age 73 years, Occu-Service	}	..Appellant
R/o. Andersul, Tal-Yeola, District-Nashik.	}	(Ori. Defendant no.1)

V/s.

1. Shri. Mehaboob Dulekha Pathan	}	
Age-57 years, Occu-Service,	}	
R/o.Andhersul, Tal-Yeola, District-Nashik	}	
At present Rui (Swali Vihir, Tal-Kopergaon)	}	

2. Shri. Motibarkha Dulekha Pathan	}	
Age-54 years, Occu-Agri,	}	
R/o.Andhersul, Tal-Yeola, District-Nashik	}	
At present Kolgaon, Tal-Niphad, District-	}	
Nashik.	}	

3. Bashir Dulekha Pathan since deceased-	}	..Respondents
through his heirs and Ors.	}	(Ori. Plaintiffs and
		defendant no.2)

Ms. Rukmini Khairnar I.by Mr. P.N. Joshi for the Appellant.

None for the Respondents.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 27th JANUARY 2020.

ORAL JUDGMENT :

1. Heard.

2. None appeared for the respondent on 21st January 2020 and in fact at the request of learned senior counsel Mr. Dani the appeal was fixed for hearing on 21st January 2020, by way of last chance. However, it appears that no arrangement has been made by the respondent.

3. The appellant herein impugns the judgment and order dated 22nd February 1994 passed by the Additional District Judge, Nashik in Civil Appeal No. 283 of 1989 thereby quashing and setting aside the judgment and decree passed by Civil Judge Junior Division, Yeola in Regular Civil Suit No. 178 of 1984 vide judgment and order dated 26th April 1989.

4. The appellant herein happens to be the original defendant no. 1 in Regular Civil Suit No. 178 of 1984. The original defendant no. 2 happens to be the plaintiff no.3. Since the original plaintiff no.3 did not support the case of plaintiff nos. 1 and 2 he was transposed as defendant no.2.

5. The suit was filed for possession of the suit property against the original defendant no.1 i.e. the present appellant. It was the case of the plaintiff that the suit property happens to be the ancestral property of the plaintiff. That, prior to 1976 the appellant herein used to tie his she-goats in the suit property and used to sleep there. It is also the case of the plaintiff that his father had expired in the year 1953. That he had requested defendant to vacate the suit premises by issuing a notice. The reply was filed by the defendant no.1

on 31st July 1984, by which, he had contended that he had become an owner by adverse possession since he had purchased the suit property for a consideration of Rs.1000/- from the father of the plaintiff and the defendant no.2. It was admitted by the defendant no.1 in his written statement that the suit property is the ancestral property of the plaintiff. He was residing there since long i.e. for more than 30 years. The learned Civil Judge Junior Division had observed that the defendant had placed on record the tax receipts from the year 1967 i.e. almost 14 years after the demise of father of the plaintiff. The defendant no. 2 had categorically stated before the Court that his father had given the suit house to the defendant no.1 for the purpose of residence and that the defendant is in possession of the suit property much prior to 1953. It was never pleaded in the plaint that the defendant no. 1 was put into possession only in the year 1976 on the occasion of the marriage of the daughter of defendant no.1 the status of the defendant no. 1 as a licensee was also never pleaded in the plaint and therefore, no issue was framed to that effect.

6. It is pertinent to note that according to the plaintiff all the plaintiffs are having $\frac{3}{4}$ th share in the suit property. This would naturally include the defendant no. 2. There was no partition between the parties, it was further demonstrated that the defendant no. 2 had given his $\frac{1}{4}$ th share to the defendant by way of gift deed.

7. It is further pertinent to note that the plaintiffs had prayed for possession of $\frac{3}{4}$ th share of the suit property. According to the learned counsel for the appellant this would exclude the share of

defendant no. 2 as according to the defendant no. 1 he had entrusted the possession in favour of the defendant no. 1. As per the Mohammedan Law a written gift deed is not necessary as it would be governed by the law of Hiba. In that eventuality, the suit would take the nature of a suit for partition and possession. Section 208 of Mohammedan Law, contemplates as follows:-

208. Gift how made –

(1) A gift may be made-

(a) by a declaration made orally or in writing of the gift by the donor or his agent;

(b) by the acceptance of the gift expressly or impliedly by or on behalf of the donee: except in the case of a gift of a debt to the debtor or by a guardian to his ward; and

(c) by the delivery of possession of the subject of the gift to the donee in the manner required by Secs 209 and 210.

(2) A gift shall take effect from the date on which possession is delivered.

8. It is pertinent to note that the plaintiffs had not arraigned the other heirs as party to the suit and therefore, the suit was bad for non-joinder of necessary parties. The plaintiff had claimed $\frac{3}{4}$ th share in the said property by way of partition without adding the sisters as party to the suit.

9. Similarly, it is not the case of the plaintiffs that the suit property was the only property owned by the family and therefore, non-inclusion of all the properties was also fatal to the plaintiffs claim.

10. In substantive evidence the plaintiff had admitted that defendant no. 1 is in possession of the suit property since the lifetime of the father of the plaintiffs. Needless to say that the suit was instituted in the year 1984 whereas the father of the plaintiff had expired in the year 1953 it was in these circumstances that the court had dismissed the suit. Facts admitted need not be proved.

11. Being aggrieved by the said judgment and order the plaintiff had preferred Civil Appeal No. 283 of 1983. The Appellate Court held that although the tax receipts were placed on record by the defendant the ownership column had shown the name of the father of the plaintiff. The Appellate Court has denied title by virtue of adverse possession since the defendant had claimed to be in possession of the suit property by virtue of a sale deed. It was incumbent upon the plaintiff to prove his case especially since the defendant no.2 had specifically pleaded that he had gifted his own $\frac{1}{4}^{\text{th}}$ share in favour of the defendant no.1. The Appellate Court had held that the plaintiff has proved that the defendant was a licensee and his licence has been terminated by affidavit dated 31st August 1984. In fact, the plaintiff had not given the exact date since when he was as licensee. Defendant had entrusted the possession in favour of the defendant as a licensee. The said issue has not been discussed by the Appellate Court and as far as adverse possession is concerned, the Appellate Court has held that

the defendant no.1 had claimed his right through the father of the plaintiffs by contending that he had purchased the property for a consideration of Rs. 1000/-. However, the defence of the defendant no.1 is not only supported by the defendant no.2 but it was the case of the defendant no.2 that he had entrusted the possession of the suit property in favour of the defendant no.1.

12. The following substantial questions of law need to be framed for determination.

“Whether the suit was bad for non-joinder of necessary parties and non inclusion of all the properties”.

“Whether the plaintiff was entitled to claim $\frac{3}{4}^{\text{th}}$ Share in the suit property especially when it was contended that the defendant no.1 is a licensee and the license was terminated in 1984”.

13. According to the plaintiff, the plaintiff and the defendant no.2 were the co-owner of the suit property and the defendant no.2 had been transposed as defendant only because he had not supported the claim of the plaintiff and in fact defendant no.2 contended to the contrary.

14. In fact the plaintiff's claim was inconsistent seeking the relief of possession from defendant no.1 on the ground that his licence was terminated and secondly seeking $\frac{3}{4}^{\text{th}}$ share in the same suit

15. That the Appellate Court has not taken into consideration the fact that the appellant herein was in possession of the suit property

prior to 1953 and therefore, he was in possession of the suit property for more than 30 years on the date of issuance of the notice as well as on the date of the institution of the suit and therefore, the Appellate Court ought to have discussed the issue of adverse possession in accordance with law.

16. That there is an admission by the plaintiff which has not been considered in its proper perspective by the Appellate Court and the admission is to the effect that the defendant no.1 was tying the she-goats in suit property during the life time of their father.

17. It is a matter of record that the plaintiffs had not proved that they had terminated licence by the notice dated 31/08/1984 and moreover, the nature of the suit had undergone a change after the plaintiff had claimed $\frac{3}{4}$ th share in the suit property excluding the share of the defendant no.2. The prayer clause of the plaintiff claiming $\frac{3}{4}$ th share is against the pleading in the plaint and it would be inconsistent with the claim of the plaintiff. Both the issues are answered accordingly.

18. In view of the above discussion, the appeal deserves to be allowed and stands disposed of. The judgment and decree dated 22nd February 1994 passed by the Appellate Court is quashed and set aside and there shall be no order as to cost. Decree be drawn accordingly.

(SMT. SADHANA S. JADHAV, J)