

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

**FIRST APPEAL NO. 2772 OF 2016
WITH
CIVIL APPLICATION NO. 10181 OF 2016**

Mohd. Rafat Afandi s/o Mohd. Ismail Afandi
Age: 72 years, Occu: Business,
R/o. Buddi Lane, Near Nehru Bhavan,
Aurangabad

... Appellant
(Ori. Resp. No.2/
Ori. Objection
Petitioner No.2)

Versus

- | | | |
|----|---|---|
| 1] | Nikhath Shabana w/o Abrar Ahmed
(d/o Late Mohd. Shameem Afandi)
Age: 47 years, Occu: Household,
R/o. Plot No.21-22, N-13, CIDCO,
Behind Maulana Azad Society,
Aurangabad | (Ori.Applicant No.2) |
| 2] | Mohd. Dawood Jamil s/o Mirza Rashid Baig
Age: 47 years, Occu: Service,
R/o. 5, Hina Complex, Juna Bazar,
Aurangabad | (Ori.Respondent/
Ori.Objection
Petitioner No.1) |
| 3] | The State of Maharashtra
Through Collector,
Collector Office, Aurangabad | (Ori.Resp.No.1) |
| 4] | Billiquis Jahan Begum w/o
Mohd. Shamim Afandi (Died) | ... Respondents |

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Mr. M. M. Joshi, Advocate for petitioner
Mr. A. D. Kasliwal, Advocate for respondent No.1
Mr. S. B. Ghute, Advocate for respondent No.2
Mr. A. M. Phule, AGP for respondent No.3

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WITH

FIRST APPEAL NO. 2773 OF 2016

WITH

CIVIL APPLICATION NO. 10182 OF 2016

Mohd. Dawood Jamil s/o Mirza Rashid Baig
Age: 47 years, Occu. Service,
R/o. 5, Hina Complex, Juna Bazar,
Aurangabad

... Appellant
(Ori. Applicant)

Versus

- 1] The State of maharashtra
Through Collector,
Collector Office, Aurangabad
- 2] Nikhat Shabana w/o Abrar Ahmed,
(d/o Late Mohd. Shameem Afandi)
Age: 47 years, Occu. Household,
R/o. Plot No.21-22, N-13, CIDCO,
Behind Maulana Azad Society,
Aurangabad
- 3] Mohd. Rafat Afandi s/o Mohd. Ismail Afandi
Age: 72 years, Occu. Business,
R/o. Buddi Lane, Near Nehru Bhavan, (Ori. Objection
Aurangabad Petitioner No.4)
- 4] Farzana Begum w/o K. M. Minuddin
Age: 62 years, Occu: Household, (Ori. Objection
R/o. Buddi Lane, Petitioner No.5)
Near Azad High School, Aurangabad
- 5] Kazi Mohd. Faizanuddin
s/o Kazi Mohd. Moinuddin
Age: 35 years, Occu. Nil, (Ori. Objection
R/o. Buddi Lane, petitioner No.6)
Near Azad High School,
Aurangabad

- 6] Billiquis Jahan Begum w/o
Mohd. Shamim Afandi (Died) ... Respondents

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Mr. S. B. Ghute, Advocate for petitioner
Mr. A. M. Phule, AGP for respondent No.1
Mr. A. D. Kasliwal, Advocate for respondent No.2
Mr. M. M. Joshi, Advocate for respondent No.3

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**WITH
FIRST APPEAL NO. 3352 OF 2017**

Mohd. Rafat Afandi s/o Mohd. Ismail Afandi
Age: 72 years, Occu. Business,
R/o. Buddi Lane, Near Nehru Bhavan,
Aurangabad ... Appellant
(Ori. Objection
Petitioner No.4)

Versus

- 1] Mohd. Dawood Jamil s/o Mirza Rashid Baig,
Age: 47 years, Occu. Service,
R/o. 5, Hina Complex, Juna Bazar,
Aurangabad
- 2] The State of Maharashtra
Through Collector,
Collector Office, Aurangabad
- 3] Nikhat Shabana w/o Abrar Ahmed,
(d/o Late Mohd. Shameem Afandi)
Age: 47 years, Occu. Household,
R/o. Plot No.21-22, N-13, CIDCO,
Behind Maulana Azad Society,
Aurangabad
- 4] Farzana Begum w/o K. M. Minuddin
Age: 62 years, Occu: Household,
R/o. Buddi Lane,
Near Azad High School, Aurangabad (Ori. Objection
Petitioner No.5)

5] Kazi Mohd. Faizanuddin
s/o Kazi Mohd. Moinuddin
Age: 35 years, Occu. Nil,
R/o. Buddi Lane,
Near Azad High School,
Aurangabad (Ori. Objection
petitioner No.6)

6] Billiquis Jahan Begum w/o
Mohd. Shamim Afandi (Died) ... Respondents

....
Mr. M. M. Joshi, Advocate for appellant
Mr. S. B. Ghute, Advocate for respondent No.1
Mr. A. M. Phule, AGP for respondent No.2
Mr. A. D. Kasliwal, Advocate for respondent No.3
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**WITH
FIRST APPEAL NO. 3354 OF 2017**

Mohd. Dawood Jamil s/o Mirza Rashid Baig
Age: 47 years, Occu: Service,
R/o. 5, Hina Complex, Juna Bazar,
Aurangabad ... Appellant
(Ori. Respondent/
Ori. Objection
Petitioner No.1)

Versus

1] Nikhat Shabana w/o Abrar Ahmed (Ori.Applicant No.2)
(d/o Late Mohd. Shameem Afandi)
Age: 47 years, Occu: Household,
R/o. Plot No.21-22, N-13, CIDCO,
Behind Maulana Azad Society,
Aurangabad

2] Mohd. Rafat Afandi s/o Mohd. Ismail Afandi
Age: 72 years, Occu: Business,
R/o. Buddi Lane, Near Nehru Bhavan,
Aurangabad (Ori.Respondent No.2./
Ori.Obj.Petitioner. No2)

3. The State of Maharashtra
Through Collector,
Collector Office, Aurangabad (Ori.Resp.No.1)

4] Billiquis Jahan Begum w/o
Mohd. Shamim Afandi (Died) ... Respondents

....

Mr. S. B. Ghute, Advocate for appellant

Mr. A. D. Kasliwal, Advocate for respondent No.1

Mr. Milind M. Joshi, Advocate for respondent No.2

Mr. A. M. Phule, AGP for respondent No.3

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 24th AUGUST, 2021

PRONOUNCED ON : 01st SEPTEMBER, 2021

JUDGMENT:-

These four appeals are being decided by this common judgment, since common questions of facts and law arise therein. Moreover, the parties to these appeals are almost common.

2. The challenge in First Appeals No.2772/2016 and 3354/2017 is to the order dated 02.03.2016, passed by 4th Jt. Civil Judge, Senior Division, Aurangabad in Civil M.A. No.856/2004. By the order impugned in both these appeals, the application preferred by the respondent No.1 in both these appeals (applicant No.2 in Misc.C.A.No.856/2004) for grant of heirship certificate was allowed. While challenge in First Appeals No.2773/2016 and No.3352/2017

is to the order dated 2/3/2016, passed by the same Court, rejecting the application (Civil M.A. No.258/2006) for grant of probate.

3. Facts necessary to decide these appeals are as follows :-

Mohammad Shameem Afandi died on 17.08.2003. He was survived by his widow Billquis and daughter Nikhat. Both the widow and the daughter of deceased Shameem filed application (No.856/2004) for heirship certificate. In response to a proclamation, inviting all persons who dispute the right of these applicants, Mohd. Dawood Jameel Mirza (appellant in First Appeal No.3354/2016) and Mohd. Rafat Afandi (appellant in First Appeal No.2772/2016) offered objections. It is their contention that the deceased and his wife Billquis had estranged relationship between them. They, therefore, did not live together. Daughter Nikhat stayed with her mother. As such, both the applicants had neither been living with the deceased nor have they ever taken his care. The deceased was a Cancer patient. The appellant - Mohd. Rafat Afandi (in F.A. No.2772 of 2016 and F.A. No.3352 of 2016) is the real brother of the deceased, while the appellant-Mohd. Dawood Jamil (in F.A.No.2773 of 2016 and F.A.No.3354 if 2016) is the son of the cousin sister of the deceased. Both of them had taken care of the deceased. The

deceased executed his last Will on 27.02.1998 bequeathing his immovable properties in favour of the appellants and the daughter of the deceased as well. The appellant - Mohd. Dawood Jamil s/o Mirza Rashid Baig, (in F.A. No.2773 of 2016 and 3354 of 2017) preferred application for grant of probate/letters of administration of the Will executed by the deceased.

4. Pending the applications, the widow of the deceased passed away. The appellants and the daughter of the deceased produced oral and documentary evidence in both the applications. The learned Judge, vide its two separate judgment and orders, rejected the application for grant of probate and allowed the application for heirship certificate. Both the judgment and orders have been under challenge in these appeals.

5. Learned Advocates for the appellants would submit that the learned Judge did not consider their objections in the right perspective. The appellant (F.A. No.2772 of 2016), mother and two paternal nephews of the deceased were also his (deceased) legal heirs. The house property situated at Buddi Lane is self acquired property of the appellant – Mohd. Rafat Afandi. Moreover, the deceased also executed an oral gift-deed of one of the immovable

properties in his favour. The memorandum of the oral gift was later on executed on 07.10.2002. The agricultural land Gut No.114, at Kannad, was the property of the father of the deceased. The appellant (F.A.No.2773 of 2016) Mohd. Dawood Jamil s/o Mirza Rashid Baig, was the adopted son of the deceased. The deceased, therefore, brought him up. It is this appellant who took all the care of the deceased during his last days. Since complicated questions had been raised in a proceeding for grant of heirship certificate, the learned Judge ought not to have allowed the application. According to the learned Advocates, provisions of the Code of Civil Procedure, applied for a proceeding for grant of heirship certificate. The learned Judge ought to have framed the issues as decided the proceeding as per the procedure provided for hearing of contested suit.

6. In a proceeding for grant of probate, the Will has been duly proved. Both the attesting witnesses of the Will, were examined. It is because of passage of time, one of the witnesses could not give evidence consistent with the other evidence in the case. The Will runs into three pages. Writings and endorsement on the last page of the Will are of the officials of the office of Sub-Registrar. They committed mistakes in recording the names of the

attesting witnesses. The learned Judge should not have relied on the record made available by the officials in the Registrar's office. The original Will was lost. A certified copy thereof, was therefore produced in evidence. The attesting witnesses cannot be supposed to have photographic memory. The learned Advocates, therefore, urged for allowing the appeals.

7. Shri A. D. Kasliwal, learned Advocate for the respondent–Nikhat, daughter of the deceased would, on the other hand, submit that the appellant Mohammad Rafat Afandi has already filed suit (Regular Civil Suit No.198 of 2019) in the Court of Civil Judge, Junior Division, at Kannad. The learned Judge, on appreciation of the evidence in the matters, came to a perfect conclusion. The heirship certificate has been granted in favour of the daughter (next of kin) of the deceased. He took me through the evidence of the attesting witnesses and the Will itself to ultimately submit that the Will has not been duly proved. The learned Advocate, therefore, urged for dismissal of the appeals.

8. Chapter I of the Bombay Regulation VIII of 1827 speaks of Rules for the recognition of heirs, executors and Administrators when there is a competent claimant.

“1. Legal heir, etc., of person deceased competent to represent him without recognition from court :

Whenever a person dies leaving property, whether moveable or immovable, the heir or executor, or legal administrator, may assume the management, or sue for the recovery, of the property, in conformity with the law of usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognized.

2. First. But if such recognition requested, proclamation will be issued :

But if an heir, executor or administrator is desirous of having his right formally recognized by the Court, for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation, in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court within one month from the date of the proclamation and enter their objections, and declaring that, if no sufficient objection is offered, the Judge will proceed to receive proof of the right of the applicant, and, if satisfied, grant him a certificate of heirship, executorship or administratorship.

Second. Publication of proclamation :

[Rep. Act XII of 1873.]

3. If no objection appears, recognition to be granted :

If, at the expiration of the time mentioned in the proclamation, no sufficient objection has been made, the Court shall forthwith receive such proof as may be offered of the right of the person making the claim, and, if satisfied, shall grant a certificate in the form contained in Appendix B, declaring him the recognized heir, executor or administrator of the deceased.

4. First : Objection appearing to be examined and recognition given or refused accordingly :

If, before the expiration of the time, any objection is made to the right of the person claiming as heir, executor or administrator, the Judge, on a day to be fixed (of which at least eight days' previous notice shall be given to the parties), shall summarily investigate the grounds of the objections on the one hand, and of the right claimed on the other; examining such witnesses or other evidence as may be adduced by the parties, and either grant or refuse a certificate, as the circumstances of the case may require.

Second : If question is complicated or difficult, matter to be left for adjudication:

But if from the evidence adduced, it appears that the question at issue between the parties is of a complicated or difficult nature, the Judge may suspend proceedings in the application for a certificate until the question has been tried by a regular suit instituted by one of the parties.

5. Authenticity of wills and recognitions how certified :

Whenever an executor is formally recognised, under the rule contained in section 4, the authenticity of the will, if any, by which he is appointed, shall be proved, and the certificate of executor ship shall be endorsed thereon.

6. Wills and recognitions to be registered :

[Rep. Act. XII of 1873.]

7. First : Recognized heirs, etc., competent to manage property :

An heir, executor or administrator, holding the proper certificate, may do all acts and grant all deeds competent to a legal heir, executor or administrator, and may sue and obtain judgment in any Court in that capacity.

Second : But recognition gives no title to property :

But, as the certificate confers no right to the property, but only indicates the person who, for the time being, is in the legal management thereof, the granting of

such certificate shall not finally determine nor injure the rights of any person; and the certificate shall be annulled by the Zilla Court, upon proof that another person has a preferable right.

Third : No relief from responsibility to claimants :

An heir, executor or administrator, holding a certificate, shall be accountable for his acts done in that capacity to all persons having an interest in the property, in the same manner as if no certificate had been granted.

8. Refusal of a recognition no judgment against claim of applicant :

The refusal of a certificate by the Judge shall not finally determine the rights of the persons whose application is refused, but it shall still be competent to him to institute a suit for the purpose of establishing his claim.”

9. It is a settled legal position that based on the heirship certificate simpliciter, the certificate holder cannot be said to have acquired any right, title and interest in the estate of the deceased.

10. An heir/executor administrator, holding the proper certificate may do all acts and grant all deeds competent to a legal heir and may sue and obtain judgment in any Court in that capacity. As such, person holding heirship certificate is no less than a trustee of the property of the deceased. The certificate in no case grant the certificate holder, any right, title and interest in the property of the deceased. It is true that in view of Clause Second of Rule 4 of Chapter I of the Bombay Regulations, if a question is complicated or

difficult in nature, the Judge may suspend proceedings in the application for certificate until the question has been tried by regular suit instituted by one of the parties. The learned Judge, here, considered the relationship of Nikhat with the deceased as a daughter and exercised his discretion in granting the certificate in her favour with the condition directing her to enter into a bond. In a proceedings for grant of heirship certificate, no issues may be framed. By virtue of Section 390 of the Indian Succession Act, 1925 (for short, 'the Act of 1925'), the provisions of Section 370, sub-section (2), section 372, sub-section (1), clause (f) and sections 374, 375, 376, 377, 378, 379, 381, 383, 384, 387, 388 and 389 with respect to certificates under this Part and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply to the proceedings for grant of heirship certificate. An appeal against the judgment and order granting or refusing to grant heirship certificate lies to the District Judge (Section 384 of the Indian Succession Act, 1925). The appeals have been filed way back in 2016. Appeal against judgment and order granting or refusing to grant probate/letters of administration lies to the High Court. Since the matters were connected with each other,

this Court heard the appeals against the order granting heirship certificate.

11. The dispute between the parties is over the family silver left behind by the deceased. The claims are based on a Will, oral gift and succession as well. It is, therefore, desirable to relegate the parties to a remedy of substantive suit to have their right, title and interest decided therein. Since the learned Judge has granted heirship certificate in favour of the daughter of the deceased on condition of her entering into a bond and since such a certificate does not confer her any right, title and interest in any property of the deceased, this Court is not inclined to interfere with the order granting the heirship certificate.

12. **PROBATE** :-

The deceased was a Muslim. Part VI of the Act of 1925 speaks of testamentary succession. By virtue of Section 58, the provisions of the said Part shall not apply to testamentary succession to the property of a Mohammedan. Part VI is comprised of Chapter I to Chapter XXIII. As such, Section 63, which is part of Chapter III of Part VI has no application to Will executed by a Mohammedan.

13. Although, no right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right has claimed or has granted letters of administration with the Will, Section 213 shall not apply in case of Wills made by a Mohammedan. As such, for establishing a Will executed by a Mohammedan, no probate or letter of administration is required to be obtained. Moreover, in a proceeding for grant of probate, no question of a title to the property bequeathed under the Will, can be gone into. In view of this position of law, this Court do not propose to decide the application for probate. Suffice it to say, there is *prima facie* evidence to indicate that the deceased executed a registered Will. All was not well between him on one hand and his wife and the daughter on the other. It appears that about five immovable properties have been comprised in the Will.

14. Both the attesting witnesses to the Will, have been examined in proof thereof. Attesting witnesses are not expected to know contents of the Will. The last page of the Will bears entries and endorsements made by the officials from the office of Sub-Registrar with which the Will was registered. Whatever mistakes, if any,

committed by these officials may not be attributed to the executants or the attesting witnesses of the Will. Be that as it may. Since the provisions of Part VI of the Act of 1925 has no application to a Will executed by a Mohammedan and no probate of letters of administration is required to be obtained in respect of a Will of Mohammedan, it is desirable to direct the parties to have their respective claims settled/decided in a substantive suit. It would not be out of place to mention that Chapter XIII of the Mohammedan Law (14th Edition, Author : B.R. Verma) speaks of Wills. Section 184 thereof speaks of Will how to be made. Mohammedan is not entitled to dispose of his property by Will in favour of a person who is not heir in excess of one-third, subject to four exceptions contained in Section 190 of the Mohammedan Law. Mohammedan who dies intestate, his property inherited by sharers, residuaries and distant kindred. Wife/widow gets 1/8th share where there is a son. Daughter inherits ½ share. If there are more than one daughters, they take 2/3rd shares when there is no son. The reference to aforesaid legal proposition is made only with a view to observe that a Will executed by the deceased is required to be proved and acted upon in the light of the provisions of the Mohammedan law and not the provisions of Part VI and/or Section 213 of the Act of 1925.

15. Needless to mention, the trial Court shall not be influenced by the aforesaid observations. Suit, if any, filed by any of the parties shall be decided on its own merits.

16. For the foregoing reasons, the appeals stand disposed of in terms of the following order:

The parties to these appeals are at liberty to have their claims decided in a substantive suit to be filed, if so advised. The order granting heirship certificate in favour of the daughter of the deceased is maintained. However, she shall not create any right, title and third party interest in the property of the deceased on the strength of the heirship certificate.

17. Pending civil applications are disposed of.

[R. G. AVACHAT, J.]

SMS