

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

**SECOND APPEAL NO.599 OF 2018 WITH
CIVIL APPLICATION NO.9147 OF 2018**

Rajendra s/o Devidasrao Giri

... APPELLANT

VERSUS

Amir s/o Musa Pathan & ors.

... RESPONDENTS

.....

Shri S.S. Manale, Advocate for appellant

Shri S.N. Rodge, Advocate for respondents No.1 to 3

Shri B.R. Kedar, Advocate for respondents No.3 to 6

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CORAM : R. G. AVACHAT, J.

Date of reserving order : 21st June, 2022

Date of pronouncing order : 5th July, 2022

ORDER :

This Second Appeal is being decided finally at admission stage with the consent of learned Advocates for the parties. I have considered the substantial questions of law formulated by the learned Advocate for the appellant herein. The gist thereof is one and the same. The following substantial question of law arise in this appeal :-

Whether both the courts below have considered that since the plaintiffs and defendants No.1 to 3 are tenants in common,

the limitation for filing the suit to set aside sale is independent to each of them and one of them cannot seek a discharge for others, therefore, the starting point of limitation would be different for each of them, the suit is therefore barred by limitation ?

2. For the sake of convenience, the parties to this appeal are referred to as per their status in the suit. This appeal has been preferred by the original defendant in the suit, being Regular Civil Suit No.89/2011. Parties to the suit are Muslims, except the defendant No.4 (purchaser). The suit is basically filed for partition and separate possession with other consequential reliefs such as restraining the defendant No.4 from creating third party interest in respect of the suit properties.

3. Musa was a common ancestor. He died in the year 1995. He was survived by his widow Goribee (defendant No.1), three sons namely Amir, Nabi and Jainu (plaintiff No.1 and defendants No.2 and 3 respectively) and plaintiffs No.2 and 3 are his daughters. Deceased Musa was the owner, in possession of 6 Hectors 73 R land in Gut No.216. He also owned a house, being Grampanchayat property No.17. Both these properties are the subject matter of the suit. On the

demise of Musa, all these heirs inherited the suit properties. Musa is stated to have effected partition of some of the suit land among himself and defendants No.1 to 3. As per the said partition, 1 Hectore 87 R land was allotted to Nabi and 1 Hectore 66 R land was allotted to the defendant No.3 Jainu. The name of their mother, defendant No.1, was recorded as a guardian of these two sons in the revenue record since they were minors. It is the case of the plaintiffs, that such partition has never been effected. If at all it is said to have been effected, the same is not binding on any of the heirs of the deceased Musa.

4. The defendant No.1 sold 1 Hectore 25 R land in Gut No.216 to the defendant No.4 under a registered sale deed dated 19/4/2001. The plaintiff claimed to have realised about the said transaction at the time of sanction of mutation entry pertaining thereto. The suit, therefore, came to be filed for the reliefs stated hereinabove.

5. The defendant No.4 contested the suit contending it to be a collusive suit among heirs of deceased Musa. It is also his case that, while Musa effected partition of the agricultural land, those who were not given the share, necessarily came to be excluded. The plaintiff No.2 was

major when the sale deed was effected in his favour. The defendant No.1 sold the land for family needs. The suit was mainly contested on the ground of having been barred by limitation.

6. The trial Court decreed the suit. It, however, refused to grant decree for partition in respect of the suit agricultural land for want of its description. The defendant No.4 preferred the first appeal. He has, however, been unsuccessful therein. The first appellate Court allowed the appeal and cross-objection therein. Main terms of the decree passed by the appellate Court are as under :

“6. It is hereby declared that the plaintiff No.1 and defendant Nos.2 and 3 have $14/64^{\text{th}}$ each share, plaintiff Nos.2 and 3 have $7/64^{\text{th}}$ each share and defendant No.1 has $1/8^{\text{th}}$ share in the suit properties i.e. suit field bearing Gat No.216 admeasuring area 6.73 Hectares situated at Mouza Kharola, Tq. Renapur, Dist. Latur and suit house property i.e. G.P. House property No.17, admeasuring area South-North – 178 fts., East-West – 46 fts. situated at village Kumbharwadi, Tq. Renapur, Dist. Latur.

7. The $1/8^{\text{th}}$ share of defendant No.1 in suit field bearing Gat No.216 to the extent of 0.84 Hectare only shall be merged in the sale transactions of 1.25 Hectares land made by her in favour of defendant No.4 as per the registered sale deed dated 19.04.2001 vide Exh.76/84.”

7. Heard. Learned Advocate for the defendant No.4 (appellant) would submit that, the plaintiff No.2 was major on the date the sale deed was executed. The sale deed was, therefore, voidable at his option. A prayer for setting aside the sale deed ought to have, therefore, been made in the plaint. Since no such prayer was there, the suit was not maintainable at the instance of plaintiff No.2. According to learned Advocate, the plaintiffs and defendants except him, were tenants in common. Each one of them did, therefore, have a separate cause of action for taking exception to the sale deed dated 19/4/2001. In support of his submissions, he relied on Section 7 of the Limitation Act. The learned Advocate would further submit that, both the trial and first appellate Court have found the suit to be collusive among the members of the family. There is evidence to indicate that all of them were residing under one roof. The defendant No.4 has purchased the land for valuable consideration. According to him, the family was in financial distress. Although the concept of legal necessity is not applicable to Muslims, the analogy thereof need to be invoked to hold the sale deed to be legal and valid one. He would further submit that, no description of the suit land has been given in the plaint. It is as such a breach of Order VII Rule 3 of the Code of Civil

Procedure. The decree passed by the trial Court and affirmed by the first appellate Court is, therefore, liable to be set aside.

The learned Advocate has relied on the following authorities :-

- (1) Devara Hegde Vs. Vaikunt Subaya Sonde
AIR 1917 Bombay 253
- (2) Isap Ahmad Mogaria Vs. Abhramji Ahmadji Mogaria
AIR 1917 Bombay 254
- (3) Dagadu Walad Govinda Bidake & anr. Vs. Sakubai Nana Bodake [AIR 1924 Bombay 31]
- (4) Siddappa Nagappa Divale Vs. Vishvanathasa Ramchandrasa Kabadi [AIR (30) 1943 Bombay 419]
- (5) Nagubai Ammal Vs. B. Snama Rao
1956 AIR (SC) 593
- (6) Sukhnandan Singh, etc. Vs. Jamiat Sing & ors.
1971(1) Supreme Court Cases 707
- (7) Shrisht Dhawan Vs. Sham Brothers
1992 AIR (SC) 1555
- (8) Amruta Kaluji Shejul, Since Dead, through his L.Rs. & ors. Vs. Vithal Ganpat Wadekar & ors.
2016(5) AIR Bom R. 641
- (9) Bhaskarrao Onkar Deshpande Vs. Pushpa Prabhakar Joshi & ors. [1997(Supp.1) Bom.C.R. 46]
- (10) Sunder Das & ors. Vs. Gajananrao & ors.
(1997) 9 Supreme Court Cases 701
- (11) Ram Chandra Singh Vs. Savitri Devi & ors.
(2003) 8 Supreme Court Cases 319
- (12) Pratibha Singh & anr. Vs. Shanti Devi Prasad & anr.
(2003) 2 SCC 330.

8. Learned Advocate for the respondents would, on the other hand, submit that, under Muslim Personal Law, mother has not been recognised as a legal guardian of her minor children unless and until she is Court appointed guardian of a minor's property. Any transfer of a minor's property at her instance is void. According to him, no prayer for setting aside sale deed is required to be made in the plaint in such circumstances. Learned Advocate has placed reliance on the judgment of the Hon'ble Supreme Court in case of **Meethiyan Sidhiqu Vs. Muhammed Kunju Pareeth Kutty [1996 AIR (SC) 1003]**.

9. Considered the submissions advanced. Perused the citations relied on. Admittedly, the parties except defendant No.4 are Muslims. They are of Sunni sect. There is no such thing as a joint Mahomedan family nor does the law recognise the concept as tenants in common. In a Mahomedan family, there is a presumption that property belongs to the husband. The personal law of Muslims does not recognise system of joint holding as is common amongst Hindus. (Mulla Principles of Mahomedan Law 23rd Edition).

Sections 52 and 359 of the Principles of

Mahomedan Law (By Mulla) 23rd Edition reads thus :-

“52. Birth-right not recognised:- The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor.

359. Legal guardians of property:- The following persons are entitled in the order mentioned below to be guardians of the property of a minor :-

- (1) the father;
- (2) the executor appointed by the father’s will;
- (3) the father’s father;
- (4) the executor appointed by the will of the father’s father.

Mother, brother, uncle, etc., not legal guardian.

The four guardians mentioned in this section are hereinafter called legal guardians. The only relations who are legal guardians of the property of a minor are (1) the father and (2) the father’s father. No other relation is entitled to the guardianship of the property of a minor as of right, not even the mother, brother or uncle. But the father or the paternal grandfather of the minor may appoint the mother, brother, uncle, or any other person as his executor or executrix, in which case they become legal guardians and have all the powers of a legal guardian as defined in Sections 362 and 366. The Court also may appoint any one of them as guardian of the property of the minor, in which case they will have all the powers of a guardian appointed by the Court, as stated in Sections 363 and 367.”

Mother cannot be a guardian of a minor of his property unless and until she is so appointed by the competent Court.

Section 364 of the Mulla Principles of Mahomedan Law 23rd Edition reads thus :-

“364. Alienation of immovable property by de facto guardian :- A de facto guardian (S. 361) has no power to transfer any right or interest in the immovable property of the minor. Such a transfer is not merely voidable, but void.”

10. In the case in hand, the mother is said to have been de facto guardian of her minor children. Since the concept of joint family and joint family property is alien to Muslim Personal Law, and the concept of birth right has not been recognised, the suit property exclusively belonged to Musa. Whatever transfer he has made of part of the property in favour of his two sons during his lifetime by simply giving application to the revenue authorities could, therefore, be not recognised as valid transfer. Admittedly, the unregistered instrument of transfer of land by Musa to two of his children was effected. On the demise of Musa, the plaintiffs and the defendants (except defendant No.4) inherited the suit

property as joint tenants.

11. Each one had a separate and definite share. Even though it is assumed that on the demise of Musa all of them were joint in mess and residence, the property inherited by them cannot partake character of either joint property or joint family property.

12. True, the Full bench of this Court, way back in 1917, has observed in case of Isap Ahmed (supra) that :

“We are wholly unable to agree with what seems almost to the implied in this judgment that the change potentially brings every “person” within reach of the article because the article may now apply to the property of some persons who are not Hindus, it does not follow that it must apply to the property of every one who is a Mahomedan. And as to the sweeping generalization tht property of the kind then in suit is “till it is divided joint family property” we can discover no ground which appeals to our reason for such a conclusion.”

There may be a joint family among Muslims. The reliance on the said authority would be of no assistance to the appellant herein because it is not his case that the land purchased by him was jointly acquired by legal representatives of deceased Musa. Admittedly, the suit properties have been inherited by the plaintiffs and

defendants (except the appellant herein) as successor to deceased Musa.

13. True, it may sound that the plaintiffs and the defendants (except the appellant herein) were in collusion with each other. Even if they are held to be in collusion, their statutory right cannot be defeated thereby.

14. Whether really the case is governed by Section 7 of the Limitation Act would be a question. Section 7 of the Limitation Act, 1963 reads thus :

“7. Disability of one of several persons :-

Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.”

15. The facts in case of Bhaskarrao Deshpande (supra) indicate that the parties thereto were governed by Hindu Law. In that view of the matter, it was observed therein :-

“As succession governed under provisions of Hindu Succession Act, respondent Nos.1 to 7 succeeded to property as tenants in common under Section 19. In tenancy in common each sharer having independent share cannot act for others. Hence no joint cause of action under Section 7 of Limitation Act. Section 7 to be considered along with Article 60 of Limitation. Period of limitation for each of respondent 1 to 6 to be considered separately. Respondent Nos.1 to 5 major on date of filing of suit and more than 21 years of age and hence suit filed by each of them not within limitation. Matter remanded to trial Court to ascertain age of respondent No.6 and to decide whether suit filed by respondent No.6 within limitation.”

16. It is reiterated that, under the Muslim Law, mother is not recognized as a natural guardian of her minor children nor she can be a guardian of a property of her minor child/ children unless so appointed by a competent Court. She, therefore, did not have authority to transfer in whatsoever manner a property of her minor child/ children. Any such transfer is void.

17. Let us see whether Goribee (defendant No.1) has in fact sold her minor children's property in her capacity as a de facto guardian. A perusal of the sale deed (Exh.84) is, therefore, necessary. The recitals thereof indicate that Goribee executed the sale deed in her own right. She claimed

to be the owner in possession of the land that was being sold to the appellant herein. It is a known principle of law that no one can give better title than he himself has. Although it has been recited in the sale deed that the land was sold for family needs/ necessity, the sale deed was not executed of a property of her minor children in a capacity as of de facto guardian. The appellant, therefore, cannot be heard to say that it was a sale for legal necessity. As such, Goribee sold the land in excess of her share. Necessarily, the appellant would not get the right, title and interest to the land in excess of his vendor's share. Admittedly, the land purchased by the appellant in excess of his vendor's share belonged to Musa's children. The sale deed in excess of Goribee's share would, therefore, be void in view of Article 364 of the Mahomedan Law above. Void is void. It is only in case of an instrument being voidable, relief to have it set aside on that ground is required to be prayed for in a suit. Although the plaintiff No.2 was major, her consent for the sale deed cannot be inferred. She is neither an executant nor an attesting witness to the sale deed. The suit has been filed in July 2011 i.e. before the period of 12 years is over from the date of execution of the sale deed. There is, therefore, no question of the appellant to have perfecting title to the excess land by adverse possession.

So is also not his claim. The learned Advocate for the respondent has rightly relied on the judgment of the Apex Court in case of Meethiyan Sidhiqu (supra). The Hon'ble Apex Court, in paragraph No.10 of the said judgment, observed as under :

“Father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence, property guardian appointed by the competent court would be competent to alienate property of the minor with the permission of the Court. When a sale is to be made on behalf of the minor the necessary ingredients are that the sale must be for the benefit of the estate of minor and, therefore, the competent person entitled to alienate the minor's property would be, subject to the above condition, either the natural guardian or the property guardian appointed by the Court. In this case after the demise of the father no property guardian was appointed. The mother, therefore, is not guardian for the alienation of the property of the minor. The sale made by the mother, therefore, is void.”

18. Since Goribee (mother) did not have an authority to alienate which would be binding on her children, none of her children are required to file a suit for setting aside the sale effected by Goribee in excess of her share. A suit simplicitor for partition would be maintainable. Such a suit would necessarily be governed by Article 65 of the Limitation

Act and none other. As such, it is not a case of exclusion from joint family property. The substantial question of law is, therefore, answered accordingly. The Second Appeal fails. It is dismissed. Consequently Civil Application stands dismissed.

**(R. G. AVACHAT)
JUDGE**

After pronouncement of the order, learned Advocate for the appellant prayed to continue the ad-interim relief for three weeks.

Ad-interim relief granted pending Second Appeal to continue for next three weeks.

**(R. G. AVACHAT)
JUDGE**

fmp/-