

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO. 269 OF 2018
AND
CIVIL APPLICATION NO. 4878 OF 2018**

Gulam Magdum s/o. Gulam Sarvar,
Age 47 years, Occupation Agriculture,
Resident of Dargapura Kandhar,
Taluka Kandhar, District Nanded.

.. Appellant
(Defendant No.1)

Versus

1. Niyamatibi w/o. Gulam Sarvar
DIED.
2. Nasima Begum w/o. Gulam Afzal .. **(Died)**
Age 31 years, Occupation Household
- 2/1 Shoukera Begum w/o. Gulam Arif,
Age 31 years, Occupation Household
- 2/2 Waheda Begum w/o. Abdul Taslim,
Age 28 years, Occupation Household,
Both resident of Hatai, Karbala road,
Nanded.
- 2/3 Md. Iftekar s/o. Mohd. Afzal,
Age 26 years, Occupation Household,
Resident of Dargapur, Kandhar,
Taluka Kandhar, District Nanded.
- 2/4 Akila Begum w/o. Syed Afsar,
Age 22 years, Occupation Household,
R/o. Tarodanaka, Nanded.
- 2/5 Md. Nisar s/o. Mohd. Afzal,
Age 22 years, Occupation Education
- 2/6 Md. Amer s/o. Mohd. Afzal,
Age 20 years, Occupation Education
- 2/7 Md. Shahnawaz s/o. Md. Afzal,
Age 18 years, Occupation Education

- 2/8 Md. Jaher s/o. Md. Afzal,
Age 15 years, Occupation Education
- 2/9 Md. Ibrahim s/o. Md. Afzal,
Age 7 years, Occupation Education
- 2/10 Ajama Begum d/o. Md. Afzal,
Age 19 years, Occupation Educaiton
- 2/11 Md. Wahid @ Afroz s/o. Md. Afzal,
Age 8 years, Occupation Education
u/g. Of Father of legal heir of
Respondents No.2/8, 2/9, 2/11 and 2/12
- 2/12 Mohd. Afzal s/o. Mohd. Nawaz,
Age 63 years, Occupation Labourer,
Respondent no. 2/5 to 2/12 resident of
Dargapura, Tq. Kandhar,
District Nanded
3. Gulam Sattar s/o. Gulam Sarvar,
Age 33 years, Occupation Agriculture
Resident of Ward No. 6, Dargapura,
Kandhar, District Nanded.
4. Bismilla Begum w/o. Gulam Jilani,
Age 50 years, Occupation Household
5. Gulam Ayub s/o. Gulam Jilani,
Age 35 years, Occupation Labour
**(Respondent no. 5 is abated as per
Court's order dated 25.07.2018)**
6. Gulam Asif s/o. Gulam Jilani,
Age 30 years, Occupation Labour,
7. Gulam Mahmood @ Aarefa s/o.
Gulam Jilani, Age 28 years,
Occupation Labour,
Respondent No. 4 to 6 resident of
Hatai Karbala Road, Nanded.
8. Kanis Fatima w/o. Mohammed Aansar,
Age 27 years, Occupation Household,
Resident of Gadipura, Nanded

.. Respondents
(Plaintiff Nos. 1 to 3 and
defendant Nos. 3 to 7)

9. Gulam Dastagir s/o. Gulam Sarvar,
Age 43 years, Occupation agriculture,
Resident of Dargapura, Kandhar,
Taluka Kandhar, District Nanded.
.. (Formal Respondent
Appellant in R.C.A.No.7/2014)

...
Mrs. A.N. Ansari, Advocate for the appellant
Mr. M.D. Narwadkar, Advocate for the respondent nos. 2/1 to 2/12 and 3
Respondent nos. 4, 6 to 8 served – absent
Respondent no. 5 abated as per court's order dated 25-07-2018
Respondent no. 9 – formal party
...

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 24 FEBRUARY 2022
PRONOUNCED ON : 06 APRIL 2022

JUDGMENT :

This is a second appeal by the original defendant no. 1 who is aggrieved by the concurrent findings of the courts below.

2. Respondents nos. 1 and 2 who died during pendency of the appeal before the lower appellate court were the original plaintiffs nos. 1 and 2 and the respondent no. 3 who was the plaintiff no. 3. They claimed separation of their shares in the properties left behind by their common ancestor - Gulam Sarvar who was husband of the respondent no. 1 and father of the respondents no. 2, 3, appellant and respondent no. 9 who was the original defendant no. 2.

3. Shortly stated the facts leading to the filing of this second appeal, are to following effect :

(a) Gulam Sarvar, Mohammed Sharif and Mohammed Khaja were the three brothers belonging to Sunni Muslim Community and governed by *Hanafi* law. Mohammed Sharif and Mohammed Khaja died 5 years and 30 years prior to the suit which was filed in 2008 leaving behind no other immediate heirs. Averring that all the suit properties were acquired and left behind by Gulam Sarvar alone, his widow Niyamatbi (PW1), daughter – Nasima Begum and son Gulam Sattar filed the suit against his other two sons Gulam Magdum – appellant and Gulam Dastgir. It was averred that couple of suit properties were purchased by Gulam Sarvar in their names when they were minors.

(b) Gulam Magdum and Gulam Dastgir contested the suit. They admitted the relationship but denied rest of the averments. They contended that the couple of properties which were purchased in their names were actually purchased by Mohammed Sharif and he was the exclusive owner and after his demise they became the owners. They further averred that Mohammed Sharif and Mohammed Khaja had gifted one of the suit properties and a house respectively to them. Thus, they contended that they were the owners of the suit properties and Niyamatbi, Nasima Begum and Gulam Sattar have no right or share in the suit properties.

(c) They further contended that there were few other landed properties which were not included in the suit and the suit was bad for non-inclusion of those properties.

(d) The plaint was thereafter amended and all those lands which were earlier excluded were included in the array of suit properties.

(e) It is also necessary to note that in the plaint it was specifically averred that Gulam Sarvar had two wives. One Gulam Jilani was his son from the second wife. During his lifetime, Gulam Sarvar allotted 40 Are portion from one of the suit properties to this Gulam Jilani who was no more and his widow and issues were arrayed as defendants nos. 3 to 7 (respondent nos. 4 to 8).

(f) Both the sides led evidence on the issues framed by the trial court. The trial court decreed the suit, refuted the claim of Gulam Magdum and Gulam Dastgir of they being the exclusive owners of the suit properties. It also refuted their stand that the claim in the plaint was hit by the provisions of Benami Transactions (Prohibition) Act, 1988. It was thus held that couple of landed properties which were purchased in their name were actually purchased by Gulam Sarvar and not by Mohammed Sharif. It also refuted the theory of gift propounded by them. It then worked out the shares of all the five persons

Niyamatbi, Nasima Begum and these three brothers – Gulam Sattar, Gulam Magdum and Gulam Dastgir as 1/8th, 1/7th, 2/7th and 2/7th each, respectively.

(g) Being aggrieved and dis-satisfied with the decree of the trial court, Gulam Mohammed and Gulam Dastgir preferred appeal before the District Court which concurred with all the conclusions drawn by the trial court and dismissed the appeal. Hence this second appeal.

4. I have heard the learned advocates of both the sides on the point of admission.

5. Mrs. Ansari would submit that both the courts below have miserably failed to consider the fact that the parties are Mohammedan and unlike Hindus, the concept of joint family property is alien to Mohammedan law. The courts below have proceeded to treat the suit as one for usual partition by Hindus. She further submitted that without there being cogent and convincing evidence both the courts below have refuted the well founded case of the appellant – Gulam Magdum and Gulam Dastgir regarding Mohammed Sharif having acquired the couple of suit properties in their names. There was ample evidence to demonstrate that the consideration had proceeded from Mohammed Sharif. Niyamatbi (PW1) had also admitted this fact during her cross-examination. There was no reason for the courts below to brush aside

such clinching admission branding it as stray one. She then submitted that even the gift of couple of properties was duly proved. Still, the lower courts failed to consider the evidence in the proper perspective. The claim that was being put forth was clearly barred by the provisions of the Benami Transactions (Prohibition) Act, 1988.

6. Mrs. Ansari would further submit that since Gulam Sarvar had died during lifetime of Mohammed Sharif and Mohammed Khaja, his heirs i.e. the parties to the suit had become *Mahrumal-virs*, so far as the properties left behind by Mohammed Sharif and Mohammed Khaja. Even this fact was not taken into consideration by the courts below. She, therefore, submitted that substantial questions of law arise in the second appeal and it be admitted.

7. Per contra, learned advocate Mr. Narwadkar supported the judgments of both the courts below.

8. He submitted that the evidence was meticulously scanned by the courts in arriving at concurrent findings of facts and this court cannot undertake fresh scrutiny which, in the facts and circumstances, is barred by the provisions of section 100 of the Code of Civil Procedure.

9. He would further submit that even otherwise, there was ample evidence supporting the decision of the two courts below. They had rightly discarded the stand of the claim being put forth being hit by

the Benami Transactions (Prohibition) Act, 1988. No substantial question of law arises for determination by this court and the appeal may be dismissed in *limine*.

10. Needless to state that the law regarding the powers of this court to be exercised under section 100 of the Code of Civil Procedure are limited and more so after the provision was amended in the year 1976. It would be apt to refer to the following observations of the supreme court in the matter of **Narayanan Rajendran and Ors. Vs. Lekshmy Sarojini and Ors.; (2009) 5 SCC 264**. After painstakingly going through the catena of decisions post amendment in Section 100 of the Code of Civil Procedure and after considering the legislative background in the form of 54th report of Law Commission and the historical perspective the scope of the powers under that provision were crystallized in following words :

“64. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically

incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question."

11. In the matter of **Hero Vinoth (Minor) Vs. Seshammal; (2006) 5 SCC 545**, the supreme court held that it is quite trite that while exercising the powers under section 100 of the Code of Civil Procedure, this court cannot interfere merely because the findings of the two courts below are incorrect. If two views on the basis of the evidence are possible, merely because another view is available to be taken, this court cannot exercise the jurisdiction under that provision. Even erroneous findings cannot be interfered with more so when it is concurrent finding and based on the plausible appreciation of the evidence on the record.

12. There is no dispute about the relationship between the parties. There is also no dispute that couple of landed properties being

survey no. 18/3 and survey no. 8/B were purchased in the names of Gulam Dastgir and Gulam Magdum respectively. There is no dispute about the fact that going by the date on which those properties were purchased, both of them were around the age of 10 years. There is also no dispute about the fact that in these sale deeds, Gulam Sarvar was shown to be their next friend who for and on their behalf became a purchaser. There was also ample evidence to demonstrate that out of one of these lands, land survey no. 18/3 a 40 Are portion was allotted by Gulam Sarvar during his lifetime to his son from the second wife - Gulam Jilani, the predecessor of the respondent nos. 4 to 8. Referring to all these facts, which were borne out from the evidence the two courts below have recorded a concurrent finding that these two properties were purchased by Gulam Sarvar and not by Mohammed Sharif.

13. True it is that Niyamatbi (PW1) during her cross-examination gave an admission about Mohammed Sharif having paid the consideration for purchasing these two lands. Apparently, both the courts below have refused to give any importance to such admission for variety of reasons mentioned in the judgment. They have found that she herself was not present at the time of execution of the sale deed and may not have personal knowledge as to who actually paid the consideration. Pitted against such a tentative admission, they also noticed that one Venkati (PW4) from whom one of these two properties

was purchased specifically admitted that Gulam Sarvar had purchased that suit property from him. He being the vendor of the suit property (survey no. 8/B), it was but obvious for the courts below to refute the claim of Gulam Magdum and Gulam Dastgir about Mohammed Sharif having paid the consideration.

14. As regards the other sale, Shaikh Gous (DW6) had acted as an attesting witness and stated about Mohammed Sharif having paid the consideration to its owner Shivaji Shankarrao Lungare. There was also one more witness Mohammed Hidyatuallah (DW7) who stated that Mohammed Sharif was a fruit and vegetable vendor and had purchased three different lands from his income in the name of these three brothers Gulam Sattar, Gulam Magdum and Gulam Dastgir. He went on to state that even Mohammed Sharif allotted an agricultural land to Gulam Jilani who was also son of Gulam Sarvar from second wife.

15. True it is that the courts below did not give clear reasons to discard testimonies of these two witnesses, however, conspicuously, the courts below referred to several other attending circumstances to discard their testimonies. Though in the written statement, it was not admitted about Gulam Sarvar having allotted 40 Are portion to Gulam Jilani from survey no. 18/3, this witness Mohammed Hidayatullah (DW7) admitted this fact *albeit* stating that it was Mohammed Sharif who had allotted that portion to Gulam Jilani. This was precisely noted

by the trial court by observing that at no point of time, any dispute was raised regarding such allotment of 40 Are portion by Gulam Sarvar to Gulam Jilani from survey no. 18/3.

16. Apart from the above state-of-affair, evidence and the plausible conclusion arrived at by the courts below in holding that these two properties survey no. 18/3 and survey no. 8/B were purchased by Gulam Sarvar, there is one more impediment in the way of the brothers Gulam Magdum and Gulam Dastgir. The courts below seem to be oblivious of the scope and importance of section 92 of the Evidence Act which recognizes the principle of exclusion of oral by documentary evidence. When, admittedly, the sale deed was executed in the name of these two sons of Gulam Sarvar by showing him as their next friend or guardian and when the name of Mohammed Sharif was not mentioned anywhere in the sale deeds, no amount of evidence could have been led to prove that the consideration had proceeded from Mohammed Sharif and not from Gulam Sarvar. The very stand in the written statement was contrary to the principle recognized by section 92 of the Evidence Act and the trial court ought to have refused any evidence being led to prove this fact. The plea was not falling under any of the exceptions to section 92 of the Evidence Act. The documents were not sought to be invalidated or the evidence that was sought to be led was not in respect of something about which the sale deeds were silent or the evidence was in respect of any plea regarding

existence of any oral agreement. In the absence of the plea falling under any of the provisos of section 92, the plea itself was clearly hit by this provision. Though the courts below have not referred to this provision, it would be appropriate to make it a point to remember that this provision would run counter to the plea regarding these two suit properties having been purchased by Mohammed Sharif when his name does not appear in the sale deeds and nobody is seeking to take any exception to it.

17. As far as the other plea in the written statement regarding couple of other suit properties, namely, a shop and a house property having been orally gifted by Mohammed Sharif and Mohammed Khaja to Gulam Sarvar and Gulam Dastgir, both the courts have refused to believe the stand *albeit* an attempt was made to lead some evidence to prove those.

18. Though the courts below have recorded a perverse finding that the written statement did not refer to one such gift having been made in presence of one Kasim Gafoor (DW4) for discarding his testimony, there were ample other circumstances which justify the overall conclusion drawn by the courts below refuting that there were such gifts by Mohammed Sharif and Mohammed Khaja. It was specifically noted that under Mohammedan law, though the oral gift is permissible, it should be followed by the actual delivery of possession and cessation of interest of the donor. It was found on the basis of the

testimonies of the defendants' witnesses that in spite of such stand, there were ample admissions to the effect that all these three brothers Gulam Sarvar, Mohammed Sharif and Mohammed Khaja were staying jointly.

19. Though the courts below have not used the word 'commensality', in all probability they were alive to this intricate phenomenon recognized by Mohammedan law where there could be blood relations enjoying the property in common. Though the concept of joint family property is not recognized, the concept of commensality is a circumstance which can have its own importance while considering the case of gift. Precisely for this reason, the courts below specifically noted that these three brothers continued to stay together during their lifetime and there was no complete renunciation of the control and title by the donor.

20. Even if one intends to scrutinize this aspect minutely, three necessary ingredients for constituting valid gift under Mohammedan law are :

- i) Declaration of gift by the donor;
- ii) Acceptance of the gift, express or implied, by or on behalf of the donee and
- iii) Delivery of possession.

Though some attempt was made to prove these ingredients by examining Kasim (DW4), it can be clearly noticed that at

least his name appeared in the written statement as the person in whose presence this property was gifted. However, there is no whisper in the written statement regarding gift having taken place in presence of Mohammed Hidyatullah (DW7), who came forward to testify regarding such gift.

21. The courts below have recorded concurrent findings refuting this stand in the written statement taking into account the inconsistencies in the testimonies of the defence witnesses coupled with the fact that the ingredients were not duly proved inasmuch as apart from such shaky oral evidence, the circumstances were indicative of the fact that the properties which were allegedly gifted were never mutated in the name of Gulam Magdum and Gulam Dastgir, coupled with the fact that Mohammed Sharif and Mohammed Khaja continued to enjoy the properties stated to have been gifted till their death, which is indicative of their conduct in not treating these suit properties as the ones gifted to these two persons. They have taken a plausible view based on the correct appreciation of the evidence on record barring the circumstance regarding absence of name of Kasim (DW4) in the written statement.

22. As regards the plea that the claim being barred by the Benami Transactions (Prohibition) Act, the courts below have rightly pointed out that couple of agricultural lands were purchased in the

name of sons by Gulam Sarvar, the transactions were not hit by the provisions of that Act.

23. In the light of the discussion, in my considered view, the conclusions drawn by the courts below concurrently are based on plausible appreciation of the evidence which cannot be interfered with by resorting to a further scrutiny of facts.

24. Therefore, the second appeal deserves to be dismissed.

25. Before parting, it is necessary to note that considering the fact that there is no dispute as to the relationship between the parties and once having concluded that all suit properties have been inherited from Gulam Sarvar, Niyamatbi being his wife and a sharer would take 1/8th share in all the suit properties. After deducting such 1/8th share, Gulam Sarvar's daughter Nasima Begum and these three sons Gulam Sattar, Gulam Magdum and Gulam Dastgir being residuaries, Nasima Begum would get one share and these brothers would take double her share respectively. Consequently, Nasima Begum would be entitled to 1/7th and these three brothers would get 2/7th share each in all the suit properties.

26. Though, admittedly, Niyamatbi has died during pendency of the appeal, the lower appellate court has refused to re-work the shares to the extent of her 1/8th share. Her daughter Nasima Begum and these three sons would inherit her estate as residuaries in the

absence of any sharer. Consequently, again Nasima Begum would take $1/7^{\text{th}}$ of this $1/8^{\text{th}}$ share whereas the three sons would take $2/7^{\text{th}}$ each from this $1/8^{\text{th}}$ share. Thus, the calculation would be :

- (a) Nasima Begum would get $1/7^{\text{th}}$ share ($1/8^{\text{th}} + 1/56^{\text{th}}$) and
- (b) These three sons would each get $2/7^{\text{th}}$ ($2/8^{\text{th}} + 2/56^{\text{th}}$).

27. With such modification in the decree, the second appeal is dismissed.

28. Pending civil application stands disposed of.

[MANGESH S. PATIL]
JUDGE

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