

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 110 OF 2017

Yakub Kadarbhai Pathan (died)

- (a) Roshanbi Yakub Pathan,
Age 70 years, Occ. Nil.
- (b) Ayub Yakub Pathan,
Age 47 years, Occ. Labourer,
- (c) Rehana Javed Shaikh,
Age 35 years, Occ. Nil.

All R/o. Aradgaon, Tq. Rahuri,
District Ahmednagar.

... Appellants
(Orig. Deft. No. 1)

VERSUS

- 1) Nasir Kadar Pathan (died)
- (1a) Kulsum Nasir Pathan,
Age 63 years, Occ. Household.
- (1b) Hamid Nasir Pathan,
Age 44 years, Occ. Labourer work.
- (1c) Dilawar Nasir Pathan,
Age 40 years, Occ. Labour work.
- (1d) Saira Nasir Pathan,
Age 42 years, Occ. Household.
- 2) Bashir Kadar Pathan,
Age 52 years, Occ. Agriculture.
- 3) Shabbir Kadar Pathan, (died)
through his legal representatives :
- 3a) Issaq Shabbir Pathan,
Age Major, Occ. Agriculture,
R/o. Majleshahar, Post Sahar Takali,
Tq. Shevgaon, Dist. Ahmednagar.

- 3b) Mussa Sabbir Pathan,
Age Major, Occ. Agriculture,
R/o. Majleshahar, Post Sahar Takali,
Tq. Shevgaon, Dist. Ahmednagar.
- 3c) Mumtaj Razzak Pathan,
Age 41 years, Occ. Household,
R/o. Sonoshi, Tq. Pathardi,
Dist. Ahmednagar.
- 3d) Munnubi Yakub Shaikh,
Age 40 years, Occ. Household,
R/o. Jatap Pedhegaon,
Tq. Rahuri, Dist. Ahmednagar.
- 3e) Taslim Shaukat Shaikh,
Age 40 years, Occ. Household,
R/o. Bramhani, Tq. & Dist.
Ahmednagar.
- 3f) Asma Salim Shaikh,
Age 23 years, Occ. Household,
R/o. Shahu Nagar, Kedgaon,
Tq. Nagar, Dist. Ahmednagar.
- 4) Ajij Kadarbhai Pathan,
(died) through his legal
representatives :
- 4a) Madina Ajij Pathan (died)
- 4b) Dagadubhai Ajij Pathan,
Died, Through his legal
representatives :
- 4b-1) Yasmin Dagadu Pathan,
Age 50 years, Occ. Household.
- 4b-2) Javed Dagadu Pathan,
Age 32 years, Occ. Service.
- 4b-3) Asif Dagadu Pathan,
Age 29 years, Occ. Service.
Respondent No 4b-1 to 4b-3
R/o. Nivdunge, Tq. Pathardi,
Dist. Ahmednagar.

4b-4) Karishma Ijaj Pathan,
Age 26 years, Occ. Household,
R/o. Karajgaon, Tq. Rahuri,
Dist. Ahmednagar.

... **Respondents**
(Resp. Nos. 4 to 7 are
orig. defts. No. 2 to 5)

...
Advocate for the Appellants : Mr. P. R. Katneshwarkar h/f Mr. A.G.
Ambetkar.
Advocate for the Respondent Nos. 1A to 1D, 2, 4B , 5 to 7 : Mr. P. R.
Nangare.

CORAM : **MANGESH S. PATIL, J.**
DATE : **25.03.2022.**

PER COURT :

This is a second appeal by the legal representatives of the original defendant No. 1 challenging the judgment and order passed by the lower appellate court dismissing his appeal and confirming the judgment and decree passed by the trial court in a suit filed by the predecessor of respondent Nos. 1 and 3 and the respondent No. 2.

2. For the sake of convenience the parties are herein referred to by their names.

One Kadarbhai was the common ancestor. He had six sons namely, original plaintiff No. 1 Nasir, plaintiff No. 2 Bashir, plaintiff No. 3 Shabbir, defendant No. 1 Yakub, defendant No. 2 Aziz and one Jafar. The defendant No. 3 Rabiya is Jafar's widow and defendant No. 4 Akbar and defendant No. 5 Shahid are his sons from Rabiya. Nasir, Bashir and Shabbir filed the suit averring that the suit property was purchased on 31.05.1967 for a consideration of Rs. 600/- only in the name of defendant No. 1 Yakub since he was the eldest amongst the siblings. But it was purchased from and out of the income earned by the entire family. They further claimed that they have 1/6th each and prayed for declaration to that effect and to separate the

share by metes and bounds with a perpetual injunction against defendant No. 1 Yakub not to create any third party interest.

3. Defendant No. 1 Yakub defended the suit by filing a written statement. He did not dispute the relation and also the fact about the sale-deed having been executed in his sole name. However, he denied that it was purchased from the family income and was a joint property. He contended that he had purchased it from the financial aid provided by his brother in law and was his separate and self acquired property.

4. The trial court decreed the suit by holding that the suit property was purchased from the family income and was not the separate and self acquired property of defendant No. 1 Yakub.

5. The lower appellate court by the judgment and order under challenge has concurred with the observations and conclusions of the trial court.

6. Learned advocate Mr. Katneshwarkar for the appellants would vehemently submit that the lower courts have proceeded unmindful of the fact that the concept of joint family is alien to a Muslim community to which the parties belong. They have decided the dispute under wrong premise and applying the principles of Hindu law. They have erroneously cast burden on the defendant No. 1 Yakub to prove that the suit property was his separate and self acquired property when it was for the plaintiffs Nasir, Bashir and Shabbir to substantiate their stand that it was purchased from the family income. Their pleading was deficient to disclose any source of income for the family. A vague pleading was made about having purchased the suit property from the income of all due to their physical labour, whereas the evidence was led that the income was derived by the family members from their family occupation of a 'band party'. Thus there was a variance between the pleading and the evidence and the courts below have erred in appreciating such a lapse on their part.

7. He would, therefore, submit that following substantial questions of law arise for determination in this second appeal, which deserves to be admitted :

(I) Whether in view of the admission in plaint Para 3 that defendant No. 1 being Karta of family which is a joint family has purchased the suit land can be said to be joint family property having share of all the brothers more particularly when all the parties to the suit are Mohammedan and there is no joint family property concept in the Mohammedan law involve substantial question of law ?

(ii) Whether concept of joint family is recognized by Mohammedan law and if not whether plaintiff is entitle for any share in the suit property in was substantial question of law ?

(III) Whether in absence of any pleading about the purchase of suit property from the income of six brothers can it be said that it is a joint family property involve substantial question of law ?

8. Mr. Katneshwarkar would place reliance on the decision in **Mohammed Ibrahim Vs. Syed Muhammad Abbubakkar and others; AIR 1976 Madras 84** and **Gulab Babalal Ugare and Ors. Vs. Husainalli Dastgir Ugare & Ors; 2010(2) Bom.C.R. 188.**

9. Per contra, Mr. Nangare learned advocate for the respondents supports the judgments of both the courts below. He submits that it is erroneous to submit that the courts below have proceeded under a wrong premise and have applied the principles of Hindu law when the parties are Muslim. He would submit that the courts below were

alive to the fact that the parties were Muslim. They have mindfully used the word 'joint property' since according to plaintiffs it was acquired from the joint income of the family. He would further submit that there was evidence before the lower courts showing that though the sale-deed was executed in the name of defendant No. 1 Yakub alone, he never resided after it was purchased at the native where the property situates which factor was sufficient to demonstrate that he never asserted his exclusive right and title to the suit property and allowed it to be treated as a joint one. The learned advocate would submit that there are concurrent findings of facts and this court in exercise of power under Section 100 of the Code of Civil Procedure cannot go into the disputed questions of fact, more so when the observations and conclusions of the courts below do not demonstrate any perversity in appreciating the evidence.

10. I have carefully considered the rival submissions and perused the papers. There is no dispute about relationship between the parties *inter se*. There is also no dispute about the fact that the suit property was purchased in the year 1967 for a consideration of Rs. 600/- only in the name of defendant No. 1 Yakub. The only dispute is as to whether the property was purchased from the common stock in the form of income of the family or was it purchased by him alone from his own source.

11. At the outset, it is necessary to bear in mind that though some arguments are advanced by the learned advocate Mr. Katneshwarkar for the appellants as regards wrong committed by the lower courts in placing the burden to prove that the suit property was acquired by the defendant No. 1 Yakub from his own income, to my mind when it is trite that both the sides have led evidence, the issue of burden of proof loses its significance. Though the plaintiffs had averred and tried to prove that the suit property was purchased from the income

of the family, simultaneously, the defendant No. 1 Yakub also tried to prove that it was acquired from his separate source in the form of financial aid from his brother in law. If this was the state of affairs, it cannot be said that any prejudice was caused to the defendant No. 1 Yakub by indicating in the issues/points for determination that burden was on him to prove that it was his separate property.

12. True it is that there was a variance between the pleadings in the plaint and proof inasmuch as the former merely read that the income of the family was earned from the physical labour of all the members and evidence was led regarding a family occupation of a 'band party'. But to my mind when the courts below have not given any importance to such discrepancy which atleast does not seem to be a contradictory stand, considering the trite principle that the pleadings in the mufasil are to be liberally construed, one cannot allow the point to be stretched any further.

13. Defendant No. 1 Yakub claimed to have raised the money for purchasing the suit property by borrowing it from his brother in law. However, the conspicuous absence of the brother in law from the witness box has been rightly noticed and commented upon by the courts below in disbelieving him.

14. It was therefore apparent that the evidence led by both the sides in respect of the source from which the suit property was purchased was not very significant.

15. Obviously, it was inevitable for the courts below to even refer to and discuss the attending circumstances including as to how the suit property was treated and cultivated. Admittedly, the property situates at the native place of the family. Defendant No. 1 Yakub admitted that except the revenue entries there was no evidence to demonstrate that he was in exclusive possession of the suit property

though he stated that he was cultivating it by engaging couple of individuals. But he did not examine any such individual. As against this, the plaintiffs had examined couple of individuals viz. Mohan Ghatage and Dattatraya Godhane who specifically stated that they were cultivating the suit property on behalf of plaintiffs. Based on such evidence, the courts below have rightly concluded that the suit property has been in possession of the plaintiffs.

16. On the basis of such evidence the courts below have reached a conclusion that in all probability the suit property must have been purchased from the income of the family members collectively.

17. Once having reached such a conclusion it was but inevitable to treat the property as a joint property may be held by all these persons as tenants in common. The prayer to get their equal share separated cannot be said to be something which is inconsistent with the principles of Mohammedan law. It would not be appropriate to describe that the plaintiffs were asserting that it was a joint family property with a notion as is recognized under the Hindu law. Even the courts below cannot be attributed with such an approach. Rather they were alive to the fact that the concept of joint family property is not recognized in Mohammedan law and is a concept peculiar to Hindus.

18. As has been laid down in the case of **Mohammed Ibrahim** and **Gulab Ugare**, the concept of co-heirs ad co-sharers is alien to the Muslim law, and in a sense the plaintiffs were seeking to establish the fact that the suit property was purchased as a benami in the name of defendant No. 1 Yakub, and though no specific issue under the Benami Transaction Prohibition Act was framed, apparently none was insisted for even by the defendant No. 1 Yakub and as has been laid down in the matter of **Gulab Ugare** , evidence was led by the

plaintiffs to prove that the suit property was purchased in the name of defendant No. 1 Yakub alone in a fiduciary capacity.

19. In view of such state of affairs, merely because the lower appellate court has recorded an incorrect observation and has proceeded on a wrong premise that the defendant No. 1 Yakub was 12 years of age at the time when the suit property was purchased even when the trial court had correctly noted that he was 27 years of age, such error by the lower appellate court only needs to be overlooked inasmuch as reasoning given by the trial court does not get altered.

20. In the result, none of the substantial questions of law as indicated by the learned advocate Mr. Katneshwarkar arise.

21. There are concurrent findings of fact by the courts below and in the absence of any substantial question of law this court in exercise of power under Section 100 of the Code of Civil Procedure cannot undertake any further scrutiny.

22. The second appeal is dismissed.

(MANGESH S. PATIL, J.)

mkd/-