

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

955 SECOND APPEAL NO.729 OF 2015
WITH CA/16183/2015 IN SA/729/2015

SARWARKHA FATTEKHA PATHAN AND OTHERS
VERSUS
JAIBUNNISA FATTEKHA PATHAN

...
Advocate for Appellants : Mr. Ajeet B. Kale
Advocate for the respondent : Mr. A.S. Abhyankar with Mr. N.S. Shah
h/f. Mr. S.V. Natu
...

CORAM : MANGESH S. PATIL, J.

DATE : 27 APRIL 2022

ORDER :

This is a second appeal by the original defendants in a suit filed by the respondent for separation of her share in the suit properties inherited from her father Fattekha. The appellants no. 1 and 2 are her real brothers.

2. The respondent averred that all the suit properties were owned by Fattekha. He died in the year 1994 and she along with the appellants no. 1 and 2 is entitled to inherit properties in accordance with the Mohammedan law.

3. The appellants contested the suit. They admitted the relation and also the fact that their father Fattekha was the owner of the suit properties. They contended that when Fattekha went to Haj for pilgrimage, he effected partition of the suit properties and allotted shares to the appellants no. 1 and 2. Even the respondent was paid

certain amount as her share. In view of the fact that Fattekha was the exclusive owner of the suit properties he had every right to deal with those according to his own wish. One of the suit house properties was subsequently purchased by the appellant no. 1 out of his separate income. Only as a favour, the respondent was allowed to occupy one of the suit house properties. Mutation entries were effected pursuant to such partition and the respondent was not entitled to claim any share.

4. The respondent examined herself and also examined her son as a witness. The appellants did not examine any witness.

5. The trial court decreed suit partly and directed separation of the shares in all the suit properties except couple of lands Gat no. 6/4 and 6/5 and held that the respondent had 1/5th share.

6. The appellants challenged the judgment and decree passed by the trial court before the lower appellate court. By the judgment and order under challenge in this second appeal, it dismissed the appeal.

7. Learned advocate Mr. Kale for the appellants would vehemently submit that when during his lifetime Fattekha has distributed his properties between appellants no. 1 and 2 and had even paid some cash to respondent way back in the year 1982 and since thereafter had never raised any objection to the mutation effected on that basis till his demise in the year 1994, the lower courts have grossly erred in overlooking this clinching circumstance.

8. Mr. Kale would submit that the respondent during her cross-examination had also admitted about Fattekha having allotted separate shares to the appellants no. 1 and 2 and they were cultivating the suit properties as owners. This clinching admission was sufficient for the courts below to reach a logical conclusion that the suit properties were already partitioned by Fattekha during his lifetime which could not have been re-opened at the instance of the respondent. Mr. Kale would submit that whether Fattekha was legally entitled to effect such partition during his lifetime was an important issue that ought to have been addressed to by the courts below but they have ignored it. As a result, a substantial question of law arises in that respect.

9. Mr. Kale would then submit that Fattekha had died in the year 1994 but the suit was filed in the year 2005 and was clearly barred by limitation but the court's below even did not consider this aspect which again gives rise to a substantial question of law. Lastly, Mr. Kale would submit that though there are concurrent findings by the court's below, this is a fit case where the second appeal deserves to be admitted on the substantial questions.

10. The learned advocate Mr. Natu for the respondent submits that there is a concurrent finding of the court's below holding that the properties belonged to Fattekha and there was no legal disposition of the suit properties by him. Merely recording of mutation would not

amount to transfer of the suit properties. It could be a family arrangement as well. The concept of partition is alien to the Mohammedan law which does not recognize any right or share in the properties by birth. In the absence of clear stand demonstrating legal devolution of or transfer of a share in the suit properties to the appellants no. 1 and 2, their stand of partition itself was not sustainable in law. The facts were clearly borne in mind by the court's below while dislodging the stand of the appellants and directing partition and separation of respondent's share.

11. Mr. Natu would further submit that even the question of limitation was considered by the trial court which clearly concluded that the suit was brought within twelve years from the date of death of Fattekha and was within limitation.

12. I have carefully considered the rival submissions and perused the papers.

13. As can be appreciated, there is no dispute about the fact that Fattekha was the father of the appellants no. 1 and 2 and the respondent. He died on 09-09-1994 leaving behind the suit properties, except the suit properties Gat No. 6/4 and 6/5 in which no share has been allotted to the respondent and even she has not challenged that fact.

14. It is pertinent to note that though the appellants have been coming with a specific stand about Fattekha himself during his lifetime having effected partition and allotted shares to the appellants no. 1 and 2, their conspicuous absence from the witness box was sufficient to discard their such stand. If the appellants had not graced the witness box to testify about any such partition, no error can be found in the conclusions drawn by the court's below refuting such stand of previous partition.

15. Pertinently, according to the appellants, in the alleged partition the respondent was also paid some money. But not even a specific suggestion giving all the particulars was put to her during her cross-examination on their behalf.

16. True it is that the respondent during her cross-examination had given some shaky answers inasmuch as she initially admitted the suggestion that Fattekha during his lifetime had partitioned the suit properties. However, as has been rightly pointed out by the lower appellate court, the subsequent replies and the over all stand of the respondent was demonstrative of the fact that such an admission was a stray one and deserved to be overlooked.

17. Assuming for the sake of arguments that respondent did admit the fact of partition, still, once it is understood that though a Mohammedan can deal with his properties during his lifetime according to his wish, it has to happen by way of some recognized mode of

transfer. As has been rightly submitted by learned advocate for the respondent, the concept of partition presupposes an existing right in the sharer. In view of the peculiar concept of the Mohammedan law when a person during his lifetime is an absolute owner of the property, and in the absence of a right in his heirs to have a share in his properties during his lifetime, the very stand of the appellants about Fattekha having distributed the suit properties between appellants no. 1 and 2 will have no legal basis.

18. It is not the appellants' case that Fattekha had gifted these shares to them. In the absence of such plea even if it is assumed for the sake of arguments that Fattekha had during his lifetime allowed the appellants no. 1 and 2 to possess the suit properties, that would not constitute any legal devolution or transfer of the suit properties.

19. In view of such state of affairs, the observations and conclusions of the court's below holding that Fattekha having died intestate and since he was the owner of the suit properties except Gat No. 6/4 and 6/5, the respondent would be entitled to succeed to the suit properties along with the appellants no. 1 and 2 as a residuary and would get half share to which the appellants no. 1 and 2 would be entitled to inherit.

20. As far as the question of limitation is concerned, according to the trial court the suit was brought within twelve years from the date when the succession opened on Fattekha's death on 09-09-1994 and

the suit was within limitation in view of Article 110 of the Limitation Act, 1963. I find no hesitation in concurring with and endorsing such a conclusion by the trial court.

21. In the result, no substantial question of law arises in this second appeal. It is dismissed with costs.

22. Pending civil application stands disposed of.

[MANGESH S. PATIL]
JUDGE

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