



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.23 OF 2024

Afsarbee Rabbani Patel (Died) Through L.Rs. Shari Atik
Rashedsab Patel And Ors.

VERSUS

Farjanabee Ilahibaksh Pathan And Ors.

...

Advocate for Appellants : Mr. Kazi S S

Advocate for Respondent 1 : Mr. Shaikh R.R.

Advocate for Respondent no.2,3 & 5 : Mr. T.R. Quadri

Respondent nos.4/1 to 4/10 deleted.

Respondent no.6- served.

...

WITH

CIVIL APPLICATION NO. 1469 OF 2024 IN SA NO.23 OF 2024

...

CORAM : S. G. CHAPALGAONKAR, J.

Dated : November 27, 2024

ORDER :-

1. Appellants/original defendant nos.1,6 and 7 impugns judgment and decree passed by the District Judge-2, Nilanga dated 18.10.2023 in R.C.A. No. 43 of 2018 so also judgment and decree dated 10.9.2008 passed by the Civil Judge J.D. Nilanga in R.C.S.no.106 of 2017. Respondent no.1 Farzanabee Pathan instituted R.C.S. no.106 of 2017 claiming relief of partition and separate possession of the suit land bearing Survey Numbers 88 and 89 situated at village Jau, Tq. Nilanga. According to plaintiff, her mother Bipasha inherited

share in suit property from her grand father Bandagi and grand mother Wahidbee alongwith her sister Ruqayyabee and Afsarbee. Her grand father expired in 1948. Her grand mother expired in the year 2004. Her mother Bipasha expired in the year 1960. Her grand mother was cultivating said land during her lifetime. After death of the grand mother Wahidbee, defendant nos.1 to 5 were cultivating the land. However, in the year 2011, when plaintiff asked defendant no.1 to partition the land and hand over possession of her share, she refused to do so and asserted her own right on the basis of compromise decree in R.C.S. No.264 of 1998 and also informed that she has transferred land in favour of defendant nos.6 and 7 by way of sale-deed. Consequently, plaintiff filed suit claiming aforesaid relief.

2. Defendant nos.1, 6 and 7 contested the claim by filing written statement and denied claim of the plaintiff. They specifically denied that defendant nos.2 to 5 and plaintiff are legal heirs of late Bandagi Jigar Patel. They pleaded that daughters of Wahidbee i.e. Ruqayyabee, Bipasha and Afsarbee relinquished their right in entire immovable property. Wahidbee was the sole owner and possessor of suit property of

late Bandagi Jigar Patel. She gifted property by way of Hiba in favour of defendant no.1-Afsarbee. Mutation entries were recorded on the basis of Hiba in favour of defendant no.1. Subsequently, Wahidbee obstructed Afsarbee i.e. defendant no.1. Hence, R.C.S. no.264 of 1998 was filed by her for declaration of ownership and injunction. In that suit compromise is recorded. Consequently, decree is passed, which is intact till this date. Afsarbee acquired exclusive ownership after Wahidbee. She sold same to defendant nos.6 and 7. As such, plaintiff has no locus standi to claim the relief.

3. The Trial Court framed issues, recorded evidence of the parties and concluded that plaintiff has right in the suit land and the decree in RCS no.264 of 1998 is not binding on right of plaintiff and approved plaintiff's share to the extent of 7/24. Trial Court further declared that sale-deed dated 14.12.2006 executed by defendant no.1 in favour of defendant nos.6 and 7 is nominal and not binding on right of the plaintiff. Defendant nos.1,6 and 7 filed R.C.A. No.43 of 2018 before District Court, at Nilanga. Appellate Court confirmed the finding of the Trial Court and dismissed the appeal.

4. Mr. S.S. Kazi, learned advocate appearing for appellants submits that Courts below have erroneously rejected case of defendants that Wahidbee was absolute owner of the property as her daughters had relinquished their shares in her favour. Thereafter, Wahidbee made oral gift in favour of defendant no.1. Further, there was a compromise in R.C.S. No.264 of 1998 conferring right in favour of defendant no.1. Courts below have erroneously discarded voluminous evidence and granted decree in favour of plaintiff. Mr. Kazi would further submit that, both the Courts have wrongly decided issue of limitation and Muslim Succession while carving out the shares. Mr. Kazi would submit that when deceased Bandagi was survived by widow and daughters without any male issue, widow is entitled to get 1/8th share and sisters would together take 2/3rd share. Rest of the property will go to residue. This particular aspect is not taken care of by the Courts below while carving out shares. In support of his contentions, he relies upon judgment of this Court in case of **Mubarakunnis Mohammed Naseem and others Vs. Moinuddin Mohd. Usman Khan and others reported in 2009(3) Bom.C.R.2** and judgment of High Court of Karnataka in case of **Smt. Razia**

Begaum Vs. Abdul Khadar and others reported in (2008) 3 AIR Kant 190.

5. Per contra, Mr. R.R. Shaikh, learned advocate appearing for respondent no.1 supports concurrent finding recorded by both the Courts and consequential decree.

6. Having considered submissions advanced and after going through reasoning adopted by the Courts below, it can be observed that, there is no dispute that suit lands were originally owned by Bandagi Jigar Patel, who died leaving behind widow Wahidbee and three daughters namely Ruqayyabee, Bipasha and Afsarbee. Plaintiff is daughter of Bipasha, who died in the year 1960. Bandagi died in the year 1948, whereas Wahidbee died in the year 2004 as per pleadings in the plaint.

7. Naturally, as per succession, plaintiff would be entitled to receive share in the property left behind by Bandagi or Wahidbee alongwith her maternal aunts namely Ruqayyabee and Afsarbee.

8. Defendant no.1-Afsarbee claims that, her mother Wahidbee was owner of the property after death of her father

Bandagi. Name of Wahidbee was entered in revenue record. Mother of plaintiff Bipasha or plaintiff have no concern with the suit land. In the year 1998 Wahidbee gifted suit land in her favour in presence of the witnesses. Accordingly, she became owner of the suit land. It is also contended that right in respect of suit property was relinquished in favour of Wahidbee by her three daughters. However, some dispute arose. Therefore, defendant no.1 Afsarbee filed R.C.S. No.264 of 1998 seeking relief of injunction and in view of compromise, rights have been acquired by defendant no.1.

9. Trial Court, after considering pleadings of parties recorded finding that plaintiff is entitled to claim property being legal heir of Bipasha. Trial Court recorded finding that defendant no.1 failed to prove her claim as regards to oral gift (Hiba). Similarly, decree in R.C.S. no.264 of 1998 would not create any right in favour of defendant no.1; particularly, in exclusion of right of the plaintiff, who was not party to that suit. Trial Court also endorsed aforesaid finding of fact. Consequently, applying principles of succession Act, Trial Court worked out the shares and passed the decree of 7/24th share in favour of plaintiff, which is endorsed by the Appellate Court.

10. Mr. Kazi, learned advocate appearing for appellants submits that, there is patent error in working out shares since as per Muslim Law, widow would get 1/8th share, daughters would be entitled for cumulative share of 2/3rd of Estate left by father and rest of portion must go back to residue. In support of his contentions, he relied upon judgment of the Karnataka High Court in case of Smt. Razia Begaum. In the said case, it is held that in view of provisions of section 63 of Mohammedan law when other sharer is not available, residue will go back to surviving legal heirs. Apparently, aforesaid judgment has no application in facts of the present case. In this case, no other legal heir of Bandagi is coming before Court. No details of residuary are mentioned in written statement. Further, defendant no.1 herself is one of the daughter of Bandgi and, therefore, her sisters would derive equal share from estate left by her father. Therefore, there is no force in the contentions of Mr. Kazi in this regard.

11. Trial Court has rightly approved 1/8th share of Wahidbee being widow of Bandagi and 7/24th share to each of daughter of Bandagi. Trial Court has accordingly approved right of defendant no.1 on 7/24th share being one of the

daughter in addition gift of 1/8th share of Wahidbee. Plaintiff is given only 7/24th share from the suit property, which is in consonance with law governing the succession. No material is placed before this Court depicting fault in the shares carved out by the Trial Court.

12. Mr. Kazi would further submit that suit filed by the plaintiff in the year 2018 was hopelessly barred by limitation. It is pertinent to note here that, plaintiff has claimed relief of partition of undivided share that has been received being legal heir from her father Bandagi alongwith defendant no.1. Trial Court as well as Appellate Court considered aforesaid aspect in detail and held that there is no limitation prescribed for filing the suit of partition. Admittedly, in view of law of succession, mother of plaintiff Bipasha, defendant no.1-Afsarbee would get right by way of succession on death of their father. They would be termed as 'tenant in common' or joint owners. In case of **Gafur Bhai Chhotabhai Maniyar vs Smt. Sugrabai Fakir Mohamed reported in 1995(2)BOMCR61**, it is held that joint owner under Mohammedan law cannot claim adverse possession against co-owner. In that view of the matter, issue

of limitation would not be obstacle to claim right of the plaintiff.

13. Mr. Kazi relying upon judgment of this Court in case of Mubarakunnis Mohammad Naseem and others (supra) submits that, in view of Article 58, 65 and 113 limitation of three years from the date of accrual of right would apply. However, said case relates to suit for administration of the estate of father. Court on interpretation of provisions of law and looking to relief claimed therein concluded that Article 113 and 58 of the Limitation Act would apply in facts of the case for claiming relief of declaration from the date of accrual of cause of action. Apparently, law laid down in aforesaid judgment has no application in the facts of this case. Here, plaintiff is claiming partition and separate possession of joint share in the property/estate left by her grand father. Consequently, there is no merit in this second appeal. No substantial question of law is raised. Hence, second appeal stands **dismissed**. No costs. Pending civil application, if any, also stands disposed off.

14. At this stage, Mr. Kazi, learned advocate appearing for the appellants submit that, execution of the decree under

appeal was stayed by this Court vide order dated 12.3.2024. Similarly, there was interim protection. He would urge to continue the same for a period of *eight weeks (8)* since appellants wish to approach the Apex Court.

15. Perusal of order dated 12.3.2024 passed on civil application no.1469 of 2024 shows that order was not passed on merit, but it was interim arrangement in the wake of date fixed for handing over of possession to plaintiff and immediate hearing for admission of appeal was not possible. However, after considering concurrent finding of fact, second appeal is dismissed on merit. There is no propriety in continuing the interim relief. Hence, prayer stands rejected.

(S. G. CHAPALGAONKAR, J.)

...

aaa-