



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

**SECOND APPEAL No. 452 of 2023
WITH
CIVIL APPLICATION NO. 8746 OF 2023
WITH
CIVIL APPLICATION NO. 8745 OF 2023
WITH
CIVIL APPLICATION NO. 1274 OF 2023**

1. Yasmin Begum W/o Syed Ibrahim,
Age : 48 Years, Occ. Agriculture,
R/o. Noorani Masjid,
Dr. Zakir Hussain Nagar,
Marathwada Plot, Tq. & Dist. Parbhani.
2. Syed Ibmran s/o Syed Ibrahim (Died)
Through Legal heirs

Yasmin Begum W/o Syed Ibrahim
(Appellant No.1 as above)
3. Nazema Begum d/o Syed Ibrahim,
Age : 29 Years, Occ. Education,
R/o. Parbhani
4. Sayed Saleem S/o Sayed Basheer,
Age : 55 Years, Occ. Agriculture,
R/o. Parbhani
5. Sayed Kaleem S/o Sayed Basheer,
Age : 53 Years, Occ. Agriculture,
R/o. Parbhani
6. Sayed Nayeem S/o Sayed Basheer,
Age : 48 Years, Occ. Agriculture,
R/o. Parbhani,
7. Sayed Qayyum S/o Sayed Basheer,
Age : 31 Years, Occ. Agriclture,
R/o. Parbhani
8. Sultana d/o Sayed Basheer,
Age : 53 Years, Occ. Household,

R/o. Parbhani

9. Irfana d/o Sayed Basheer,
Age : 51 Years, Occ. Household,
R/o. Parbhani
10. Afsana d/o Sayed Basheer,
Age : 44 Years, Occ. Household,
R/o. Parbhani
11. Heena d/o Sayed basheer,
Age : 51 Years, Occ. Household,
R/o. Parbhani
12. Raziya w/o Sayed Basheer,
Age : 83 Years, Occ. Household,
R/o. Parbhani.

..APPELLANTS
(Ori. Defendants)

VERSUS

1. Aminabi w/O Syed Moinuddin
Age : 55 Years, Occ. Agri & Household,
R/o. Parbhani.
2. Hameed Ahmed Khan S/o Abdul
Raheem Khan (Died L.Rs.)
- 2/1 Sajeda begum W/o Hameed Ahmed Khan,
Age : 70 Years, Occ. Household
- 2/2 Sayeeda Begum w/o Hameed Ahmed Khan,
Age : 68 Years, Occ. Household,
- 2/3 Rafesa Begum W/o Anwar Khan,
Age : 48 Years, Occ. Household
- 2/4 Rabina Begum W/o Hamid Khan,
Age : 38 Years, Occ. Household
- 2/5 Mohasin Khan S/o Hamid Khan,
Age : 32 years, Occ. Agriculture
- 2/6 Yasin Khan S/o Hamid Khan,
Age : 32 Years, Occ. Agriculture
All R/o. Parbhani.

3. Syed Meraj S/o Sd. Abdul Raheman,
Age : 63 Years, Occ. Household,
R/o. Near Shahi Masjid, Parbhani
4. Mugni S/o Syed Meraj,
Age : Major, Occ. Agriculture
R/o. Parbhani. ... Respondents
(Resp. Nos. 1 Original Plaintiff
& Resp. No.2 to 4 original defendant
Nos. 13,14 and 15)

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Shri. S.B. Deshpande Senior Advocate i/b Shri. A.B. Dhongade, Advocate for the Appellants.
Shri. P.R. Katneshwarkar, Advocate holding for
Shri. P.N. Kalani, Advocate for Respondent No.1
Shri. Shaikh Shoyab, Advocate for Applicant in
application for intervention.

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CORAM : SANDIPKUMAR C. MORE, J.
DATED : 13th AUGUST, 2024

ORDER :

1. Heard rival submissions on admission.
2. The present Second Appeal is filed against the concurrent findings of both the learned Courts below.
3. The present respondent No.1, i.e. original plaintiff has filed Special Civil Suit No. 33 of 2005 before the learned 2nd Joint Civil Judge, Senior Division, Parbhani (herein after referred to as the “learned trial Court”) for declaration, perpetual injunction, partition and separate possession against the appellants, who are the original defendants and other respondents. The learned trial Court, after conducting

the trial in the aforesaid civil suit, partially allowed the same by declaring respondent No.1/plaintiff as owner of Gut No. 175, to the extent of 14 Acres situated at village Parbhani as shown in the plaint map. The original defendants also restrained from disturbing peaceful possession of respondent No.1/plaintiff over the aforesaid portion of Gut No. 175. In addition to that, shares of the rival parties are also decided in the remaining suit properties. Being dissatisfied with the aforesaid judgment and decree dated 03.11.2014 in Special Civil Suit No. 33 of 2005, the appellants/defendants preferred an appeal before the learned District Judge-2, (herein after referred as to “ the learned First Appellate Court”) Parbhani bearing RCA No. 163 of 2014. However, vide the judgment and order dated 10.12.2021, the learned First Appellate Court dismissed the same by confirming the judgment and decree dated 03.11.2014 passed by the learned trial Court. Hence, this Second Appeal.

4. The learned Senior counsel for the appellants vehemently argued that both the learned Courts below have not considered the documentary as well as oral evidence on record and wrongly inferred that deceased Halimabee had given area of 14 Acres out of Gut No. 175 to the plaintiff under ‘Hiba’. According to him, the mutation entries in respect of transfer of

the said lands in favour of the plaintiff in fact indicated that the aforesaid portion of Gut No. 175 was given to plaintiff as per partition and not as a gift. He pointed out that the original plaintiff did not enter into the witness box and in her place her husband has deposed, who had no personal knowledge about the matter. He submitted that following substantial questions of law are involved in this matter,.

(i) Whether the learned Trial Court as well as learned First Appellate Court were right in holding that respondent No.1 became owner of the suit property in Gut No. 175 admeasuring 14 H 41 R situated at Parbhani Tal and Dist. Parbhani on the basis of Hiba, particularly in the light of lack of any corroboration in the nature of any witness and or any documentary proof in this regard ?

(ii) Whether both the learned Courts below erred in not appreciating properly and applying the principles of Hiba laid down by the Ho'ble Supreme Court in case of **Mehbub Saheb Vs. Sayyad Ismile and others** Reported in **AIR 1995 SC 1205** ?

(iii) Whether entire disposition of the property by Halimabi in favour of present Respondent No.1 Aminbai, that too in exclusion of all other heirs, is permissible under the Muslim law or not ?

(iv) Whether both the learned Courts below committed grave illegality in relying upon deposition of Power of

Attorney holder of Respondent No.1 viz; Sayyed Moinoddin to arrive at the conclusion of Hiba in favour of present Respondent No.1 ?

(v) Whether absence of deposition by principal Power of Attorney can prove execution of Hiba, particularly when no explanation regarding non-examination of plaintiff/present Respondent No.1 is given ?.

(vi) Whether both learned Courts below should have dismissed the suit in the light of statement made by (PW 1) Sayyed Moinoddin that Halimabi had executed two Hibanamas in writing neither the written Hibanama is produced on record and not pleading to that effect ?

(vii) Whether both learned Courts below are right in relying upon Mutation Entry for accepting the contention of the Respondent No.1 that Halimabai executed Hiba in her favour in absence of any corroborative evidence ?

5. On the contrary, the learned counsel for the respondent No.1/plaintiff vehemently opposed the submissions made on behalf of the appellants/defendants. He pointed out that there is dispute only in respect of 7 Acres land out of Gut No. 175, as it was admitted by the appellants that Halimabee had gifted 7 Acres land to the plaintiff. He pointed out that the learned trial Court has rightly held that 14 Acres land was gifted to the plaintiff by her mother Halimabee and in the remaining lands of Sayed Ali, plaintiff is having 1/3rd share as per the

provision of Mohammedan Law. According to him, no substantial questions of law as raised by the learned counsel for the appellants are involved in this matter, in view of the concurrent findings of both the learned Courts below. As such, he prayed for dismissal of the appeal. He also relied on the following judgment:-

Kerrala High Court in the case of **Smitha Vallil Chandrashekharan Vs. Anil Kumar Ambujakshi Amma and others** in OP(C)No. 154 of 2024 IA 3/2023 in OS No.106 of 2010

6. Admittedly, as per the judgment in the case of **Chandrabhan (Deceased) Through Lrs. And Others Versus Saraswati and others 2022 SCC OnLine SC 1273** (supra) relied upon by the learned Senior counsel for the appellants, the substantial question of law is the one which is as follows :-

“(W)hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court though it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law”.

7. Here in this appeal, the learned Senior counsel submits that both the learned Courts below did not appreciate the evidence at the time of applying principle of Hiba as per Mohammedan Law and contrary to the documentary evidence held that Halimabee had gifted 14 Acres land of Gut No. 175 to the plaintiff. According to him, the husband of the plaintiff, who had deposed in her place was not able to establish the contention of Hiba. Admittedly, it cannot be doubted as to what means a substantial question of law as observed by the Hon'ble Apex Court in the case of **Chandrabhan (Deceased) Through Lrs. And Others Vs. Saraswati and others** (supra) as mentioned above. However, what amounts to substantial question of law would depend upon the findings of both the learned Courts below and evidence on record.

8. It is extremely important to note that it was admitted by the rival parties that the property in dispute was owned and possessed by Sayed Ali and Halimabee i.e. wife of Sayed Ali had obtained area of 14 Acres 12 Gunthas from Gut No. 175 from Sayed Ali as per compromise in the suit filed by her on account of Mehar. Further, from the evidence and pleadings of the parties, it is also admitted that Halimabee had gifted 7 Acres of land to the plaintiff out of aforesaid 14 Acres 12 Gunthas land. As such, only question before the learned trial

Court was, whether the remaining 7 Acres land was also gifted by Halimabee to the plaintiff under 'Hiba'.

9. The learned Senior counsel for the appellants vehemently argued that the learned trial Court wrongly came to the conclusion that mutation entry Nos. 4073 and 4070 on the basis of which inference of 'Hiba' is drawn, were in fact entries regarding the partition. Nothing was mentioned in those entries that 14 Acres land out of Gut No. 175 was given to the plaintiff under a gift. However, it is extremely important to note that the appellants themselves had not raised any objection about gift of 7 Acres land given to the plaintiff by Halimabee from the said Gut Number under first mutation entry No. 4073 certified on 02.05.1993. There appears dispute in respect of transfer of remaining part of 7 Acres as per mutation entry No. 4070 certified on 07.12.1995. Admittedly, in the mutation entry No. 4073 it is mentioned that Halimabee had partitioned 7 Acres lands from Gut No. 175 to the plaintiff and given the same in her possession. The appellants have already admitted the fact that 7 Acres land is gifted by Halimabee to the plaintiff. It is important to note that second mutation entry No. 4070 also indicates that Halimabee had given her share of 7 Acres to the plaintiff on the basis of partition deed on stamp paper of Rs. 10/- and also given

possession of the same to the plaintiff. The learned Senior counsel vehemently argued that both these mutation entries are in respect of partition and nothing is mentioned about the Gift Deed (Hibanama) by Halimabee to the plaintiff. However, when the earlier transfer of 7 Acres land under Gift Deed by Halimabee to the plaintiff is admitted by the appellants, then on the basis of same mode of transfer, the remaining part of Gut No. 175 falling to the share of Halimabee cannot be objected by the appellants/defendants, especially by considering the fact that after earlier transfer of 7 Acres lands, Halimabee was having only 7 Acres lands as her share in the Survey No. 175, which she had transferred to the plaintiff. Though, it is shown to be given to the plaintiff under the style of partition, but when the appellants had treated earlier transfer of 7 Acres as 'Hibanama' though it was shown as partition, they cannot raise the contention that the subsequent mutation entry No. 4070 was in fact in respect of partition and not in respect of 'Hibanama'.

10. Even otherwise also, D.W. No.1 has deposed that after giving 7 Acres lands to the plaintiffs from Gut No. 175, Halimabee had given her remaining land to the extent of 7 Acres 12 Gunthas to her grandson Ibrahim by oral 'Hiba'. However, there is nothing on record in support of the said

contention. Thus, no reliable evidence is there on record to that effect. Therefore, the observations of both the learned Courts below that Halimabee during her life time had gifted to the plaintiff 14 Acres lands from Gut No. 175, which she had got from her husband under a compromise in a civil suit, appears definitely proper.

11. Even otherwise also, the learned First Appellate Court has observed that as per Mohammedan Law, concept of notional partition was not present in this matter and the appellants could not prove that Halimabee died before death of Sayed Bashir i.e. brother of the plaintiff and therefore, the legal heirs of Sayed Bashir were not able to inherit the property of Halimabee and on that ground also plaintiff became owner of the remaining land of Halimabee. It is to be noted here that after the death of Sayed Ali, shares of Halimabee, Sayed Bashir i.e. predecessor of the defendants and the plaintiff were already determined. Therefore, the apportionment made by both the learned Courts below in respect of share of the plaintiff in the suit properties is appropriate one. Moreover, as per the observation of Kerla High Court in the case of **Smitha Vs. Anil Kumar** relied upon by the learned counsel for the plaintiff, the husband of plaintiff was competent witness on her behalf. Therefore, considering all these facts, no

substantial questions of law as raised by the learned counsel for the appellants appear to be involved in this matter.

12. In view of the same, the Second Appeal stands dismissed at admission stage along with pending civil applications.

(SANDIPKUMAR C. MORE, J.)

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