



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

**SECOND APPEAL NO.87 OF 2022
WITH
CIVIL APPLICATION NO.2396 OF 2022**

Sajid Fakir s/o Mahhmad Fakir,
Age : 49 years, Occu.: Agril.,
R/o.: Nipani Wadgaon
Tq. Shrirampur, Dist. Ahmednagar ... **APPELLANT**
(Orig. Defendant No.1)

VERSUS

1. Balam Fakir Mahhmad Fakir,
Age : 50 years, Occu.: Agril.,
2. Ashabi Fakir, w/o Mahhmad Fakir,
Age : 70 years, Occu.: Household,
3. Asma w/o Samsheer Pathan,
Age : 45 years, Occu.: Household

All R/o.: Nipani Wadgaon,
Tq. Shrirampur, Dist. Ahmednagar

4. Shamma w/o Isaq Shaikh,
Age : 56 years, Occu.: Household,
R/o.: Gondhwani, Tq. Shrirampur,
District : Ahmednagar
5. Zuma w/o Zubar Shaikh,
Age : 52 years, Occu.: Household,
R/o.: Padhegaon, Tq. Shrirampur,
District : Ahmednagar

... **RESPONDENTS**
(Resp. No.1 is Orig. Plaintiff,
the respondent No.2 to 5
Orig. Defendants No.2 to 5)

Advocate for the Appellant : Mr. Rahul R. Karpe
Advocate for the Respondents : Mr. A. D. Sonkawade h/f
Mr. Ashwin V. Hon

....
....
....

CORAM : SANDIPKUMAR C. MORE, J.

DATED : 06/03/2024.

ORDER :

1. The present appellant, who is the original defendant No.1 in RCS No.135 of 2018, has challenged the judgment and decree dated 23/09/2021 passed by the learned District Judge, Shrirampur i.e. the learned first appellate court in RCA No.3 of 2018.

2. The background facts are as under :

Present respondent No.1 i.e. original plaintiff- Balam Fakir had filed RCS No.135 of 2011 for partition of ancestral property against the present appellant as well as respondent Nos.2 to 5 claiming through his father Fakir Mahhmad in respect of four agricultural lands namely 1-A Gut No.138/4, 1-B Gut No.110, 1-C Gut No.113 and 1-D Gut No.112, situated at Nipani Wadgaon, Taluka Shrirampur, District Ahmednagar. The said suit was dismissed by the learned trial court i.e. learned Civil Judge (Senior Division), Shrirampur, District Ahmednagar vide judgment and decree dated 01/01/2018. However, the learned first appellate court allowed the RCA No.3 of 2018 against the said judgment and

decree and granted 1/4 share to the present respondent No.1 / plaintiff only in the suit property 1-A i.e. Gut No.138/4. Feeling aggrieved by the said judgment, the present second appeal is filed.

3. The learned counsel for the present appellant / defendant No.1, submits that the learned first appellate court has definitely erred in granting share to the present respondent No.1 / plaintiff despite there was a *Will* executed by the common ancestor - Fakir Mahhmad in favour of respondent No.1 regarding entire suit property 1-A i.e. Gut No. 138/4. According to him, following substantial questions of law are involved in this second appeal.

- i) *Whether the finding of the learned first appellate court of giving 1/4 share to respondent No.1 / plaintiff in Block No.134/4 is justified when the said property was already bequeathed to the present appellant by Fakir Mahhmad through Will dated 08/11/1995 ?*
- ii) *Whether the finding of the learned first appellate court that the said Will was valid only to the extent of 1/3 share despite there being so many other properties on record ?*

4. The learned counsel for the appellant submits that the learned first appellate court by taking into consideration common

hotch-potch of the properties mentioned in the suit, should have allotted entire Block No.138/4 to the present appellant in view of the *Will* executed by Fakir Mahhmad.

5. As against this, the learned counsel for respondent No.1 strongly opposed the submissions made on behalf of the appellant. He submits that no substantial question of law is involved in this second appeal as everything is properly considered by the learned first appellate court and that too on the basis of evidence. He pointed out that there was no dispute between the parties in respect of other suit properties namely 1-B, 1-C and 1-D as those were already disposed by Fakir Mahhmad during his life time. He relied upon Section 118 of the Mohammedan Law and submits that the learned first appellate court has rightly held that the said *Will* executed by Fakir Mahhmad in favour of the present appellant was valid to the extent of 1/3 area in Block No.138/4 as there was no consent from the other legal representatives of deceased Fakir Mahhmad at the time of execution of the said *Will*. He pointed out that there was no pleading at all by the present appellant in his written statement about such consent. He pointed out that no objection as reflected from the evidence of DW-2, does not mean any such consent.

6. Heard rival submissions. Also perused the entire documents on record.

7. The only dispute between the rival parties is as to whether the *Will* dated 08/11/1995 executed by deceased Fakir Mahhmad in favour of the present appellant, was valid for entire suit land 1-A i.e. Gut No.138/4 or it was valid only to the extent of 1/3 area of the said land. Section 118 of the Mohammedan Law is very much clear and it is reproduced herein below for quick reference:

“118. Limitation of testamentary power :- A mohammedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator.”

8. On going through the aforesaid section, it appears that a mohammedan cannot dispose of more than 1/3 area of his estate by *Will* unless all his heirs consent thereto after his death. It is extremely important to note that there is no pleading by the present appellant in his written statement about such consent. Nothing is pleaded that the present respondents, who are plaintiff and defendant Nos.1 to 5, had given any specific consent to act upon the aforesaid *Will* for entire suit property 1-A. Further, the

parties have already excluded the other suit properties namely 1-B, to 1-D from partition as the same were already disposed of during life time of Fakir Mahhmad. Therefore, in absence of any reliable evidence about such consent by the other parties in respect of the *Will*, the present appellant is not entitled for retaining entire suit property 1-A on the basis of the *Will*. The learned first appellate court by considering the evidence on record in proper perspective, has concluded that the appellant and respondents are having their respective share according to law excluding the 1/3 share as per Section 118 of the Mohammedan Law in the suit property, which was bequeathed by Fakir Mahhmad to the present appellant. Thus, considering all these aspects, no substantial question of law appears to be involved in this second appeal as claimed by the learned counsel for the appellant. As such, the second appeal stands dismissed at admission stage and interim relief also stands vacated.

9. In view of dismissal of the second appeal, pending Civil Application No.2396 of 2022 also stands disposed of accordingly.

10. The learned Counsel for the appellant, after pronouncement of judgment, sought continuation of interim relief by which the delivery of possession is stayed.

11. However, this Court has found that there is no substantial question of law involved in this matter and by observing the facts of the case, the Second Appeal is dismissed at admission stage. In view of the same, the request for stay to delivery of possession, is rejected.

(SANDIPKUMAR C. MORE, J.)