



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.255 OF 2011
WITH
INTERIM APPLICATION NO.8365 OF 2024

Fakruddin Hasanmiya Pardeshi
63 yrs, Occ : Agriculturist
R/at. Old Mangaon, Tal : Mangaon,
Dist : Raigad

...Appellant/
Applicant.

Versus

Ayeshabibi Hasan Khan Jummal
66 yrs, Occ : Household,
R/at. Goregaon, Tal :Mangaon, Dist : Raigad.

...Respondent.

SECOND APPEAL NO.256 OF 2011
WITH
INTERIM APPLICATION NO.8366 OF 2024

Fakruddin Hasanmiya Pardeshi
63 yrs, Occ : Agriculturist
R/at. Old Mangaon, Tal : Mangaon,
Dist : Raigad

...Appellant/
Applicant.

Versus

1. Ayeshabibi Hasan Khan Jummal
66 yrs, Occ : Household,
R/at. Goregaon, Tal : Mangaon, Dist : Raigad.

2. Mohd. Rafiq @ Rafi Ismail Jamdar,
32 yrs., Occ : Business,
R/at. Old Mangaon, Tal : Mangaon,
Dist : Raigad.

...Respondents.

*Adv. Mandar Limaye a/w Mr. Vaibhav P. Patankar i/b Patankar and Associate
for the Appellant/Applicant.*

Adv. M. S. Kadu for the Respondents.

**Coram : Sharmila U. Deshmukh, J.
Reserved on : May 9, 2024.
Pronounced on : June 11, 2024**

JUDGMENT :

1. Both the Second Appeals are at the instance of the original Defendant – Fakruddin Hasanmiya Pardeshi being aggrieved by the judgments of the Appellate Court dismissing the Appeals filed by the Defendants challenging the judgments of the Trial Court decreeing the two suits i.e. RCS No. 15 of 1996 and RCS No. 86 of 1996 filed by the original Plaintiff. As both the Appeals were admitted on similar question of law, the learned counsel for the parties advanced common submissions and both the Appeals are being disposed of by this common judgment.

2. Second Appeal No. 255 of 2011 arises out of the judgment dated 24th December, 2010 passed in Civil Appeal No. 131 of 2008 filed by the original Defendant in RCS No. 15 of 1996 against the judgment and decree dated 11th September, 2006 decreeing the suit for possession. Second Appeal No. 256 of 2011 arises out of Civil Appeal No. 130 of 2008 challenging the judgment and decree dated 11th September, 2006 passed in RCS No. 86 of 1999 decreeing the suit for possession, injunction and cancellation of the sale deed dated 16th December, 1996.

FACTUAL MATRIX :

RCS No. 15 of 1996 :

3. The Plaintiff filed the suit seeking recovery of possession of Grampanchayat Property No. 509 admeasuring 36X29.5 ft. and open space on the southern side admeasuring 38X8 ft. The case of the

Plaintiff was that the suit property was owned by the Plaintiff's father-Babamiya and after his death, the suit property was transferred in the name of the Plaintiff and her mother. As the Plaintiff's mother was in need of money, she sold her share of the suit property to the Plaintiff on 27th April, 1994 by registered sale deed. The Plaintiff thus became absolute owner of the suit property. The Plaintiff's mother on humanitarian grounds had permitted the Defendant to reside in the suit property. After purchasing the property, on 16th June, 1995, the Plaintiff cancelled the permissive use of the Defendant and called upon him to deliver the possession of the suit property. As the possession of the property was not handed over, the suit came to be filed.

4. The Defendant contended that the Plaintiff's father and the Defendant's father were full blood brothers. Group Grampanchayat House Property No. 509 and 552 were the common properties of the deceased father of the Plaintiff and Defendant's deceased father. House No. 552 was occupied by tenant and in house No. 509 the Plaintiff's father and Defendant's father were residing in two equal parts along with their family members. After the repair of House No. 552, the Plaintiff's parents started residing in the House No. 552. As the Plaintiff's father was the elder brother, the house Property Nos. 509 and 552 were entered in the name of the Plaintiff's father. After House No. 552 was repaired, the Plaintiff's father transferred the same in the name of his wife Soudabibi. In the year 1989, the Plaintiff's parents left the house for Haj pilgrimage and prior to that the possession of entire House No. 509 was given to the Defendant. The Plaintiff's father had retained House No. 552 with him and had given House No. 509 to the Defendant. Alternatively, it was pleaded

that the suit property is in possession of the Defendant since last 50 years and he has therefore become owner by adverse possession. Another alternate plea raised was that on 9th June, 1989, the Plaintiff's parents had executed registered Will by which half of House No.509 i.e. the eastern portion of House No. 509 was bequeathed to the Defendant's son Wasim and the western portion was bequeathed to the Defendant's other son Shabbir. It was contended that the Plaintiff's mother did not have any right to execute the sale deed in favour of the Plaintiff. The Plaintiff's mother as well as the sons of the Defendant are necessary parties and the suit is barred for non joinder of necessary parties.

RCS No. 86 of 1996 :

5. The suit was instituted seeking declaration that the sale deed dated 16th December, 1996 executed by the Defendant No. 1 in favour of Defendant No. 2 is illegal and in event, the Defendant no. 2 is found in possession of the property, the possession to be recovered and handed over to the Plaintiff. The suit property i.e. House Nos. 509 and 510 was stated to be the Plaintiff's ancestral properties and new CTS No. 2334 was allotted to the two houses admeasuring 836.2 sq. mtrs. The properties were owned by the Plaintiff's father Babamiya. Upon his death, the Plaintiff and her mother succeeded to the suit property. By sale deed dated 27th April, 1994, the Plaintiff purchased her mother's share of House Property No. 509 and Property No. 510 has been transferred by the Plaintiff's mother to the Plaintiff. Defendant No. 1 does not have any right in the suit property and has sold 34X27 ft. out of Grampanchayat Property No. 510 to the Defendant No. 2 for Rs. 10,000/- by registered sale deed without the consent of the Plaintiff.

6. The Defendant No. 1 resisted the suit contending that the suit properties are in the possession of the Defendant No. 1 since his ancestors. The Defendant No. 1 was born in House Property No. 509. The Plaintiff's parents had executed registered Will dated 9th June, 1989. The Defendant No. 1 has filed his written statement in RCS No. 15 of 1996 and the same be treated as a written statement in this suit also.

FINDINGS OF TRIAL COURT :

7. Evidence was led before the Trial Court in both the suits and by way of pursis, the Plaintiff and the Defendant sought the reading of evidence led in RCS No. 15 of 1996 and RCS No.86 of 1996 jointly, and thus, the Trial Court decided the suit by reading the evidence jointly.

8. As regards RCS No. 15 of 1996, the Trial Court held that the Plaintiff has proved her ownership of the suit property by virtue of the registered sale deed dated 27th April, 1994 and held that the Will was executed by the parents of the Plaintiff and the Plaintiff's mother is alive and thus, Defendant does not have any right title and interest as it is stated in the Will that the same will take effect after the death of the person. The Trial Court decreed the suit and directed the Defendant to deliver the possession of the suit property.

9. As regards RCS No. 86 of 1999, the Trial Court held that the Plaintiff is the owner of the suit properties. The Trial Court held that the Mutation Entry No. 292 on which the reliance was placed by the Defendant to show that the house property was kept in joint possession between the father of the Plaintiff and the Defendant's father does not make any reference to any house number or gat

number which will identify the property. The Trial Court held that the Defendant No. 1 was not having any legal right to sell part of House No. 510 to the Defendant No. 2 and thus, the transfer is illegal and in-operative.

FINDINGS OF APPELLATE COURT :

10. In Civil Appeal No. 131 of 2008, the Appellate Court re-appreciated the documentary evidence produced in respect of the suit property such as assessment list maintained by the Grampanchayat and record of rights which proved that the suit property was initially standing in the name of the Plaintiff's father and thereafter in name of the Plaintiff. As regards the Mutation Entry No. 292 effected upon partition between the Plaintiff's father and Defendant's father, the noting therein was that the house property remained joint and there was no specific house number and gat number mentioned to show which house property was kept joint. The Appellate Court noted the admissions of the Defendant that his father as well as he himself were in service and that House No. 509 was constructed in the year 1947 and was standing in the name of the Plaintiff's father. The Appellate Court noted that the Plaintiff's case is that House Nos. 509, 510 and 552 were constructed by her father and there is nothing to show that the Defendant's father had contributed towards the construction of the house. The Appellate Court noted that the electric meter installed in House No. 509 was in the name of the Plaintiff's father and subsequently transferred in the name of Plaintiff and her mother and that the Plaintiff's father was paying the Grampanchayat taxes during his lifetime. The Appellate Court noted that there is no material to show that the Defendant was regularly

paying the taxes. The Appellate Court further noted that House No. 552 is having five rooms out of which four were leased out and the Plaintiff's father was receiving rent during his lifetime and thereafter it was recorded in name of Plaintiff's mother. On the basis of the oral and documentary evidence, the Appellate Court held that the Plaintiff has established her title to the house property.

11. On the issue of the Will executed by the Plaintiff's father, the Appellate Court held that in the Will deed executed by Plaintiff's father, it is not specifically mentioned when the effect of Will deed will take place and as Plaintiff's mother has sold the property during her lifetime, the Will has become ineffective.

12. The issues in Civil Appeal No. 130 of 2008 dealt with the issue of ownership of Plaintiff over the suit property which was answered in favour of the Plaintiff in Civil Appeal No. 131 of 2008. As the ownership of Plaintiff was held proved, the Appellate Court held that the Defendant No. 1 had no saleable title and the sale deed dated 16th December, 1996 executed by Defendant No. 1 in favour of Defendant No. 2 is ineffective.

SUBSTANTIAL QUESTION OF LAW :

13. As similar findings were recorded by the 1st Appellate Court vide order dated 23rd January, 2013, both the Second Appeals came to be admitted on the following substantial question of law :

"Whether the Court below have committed an error apparent on the face of record as regards the provisions of Muslim Law as is applicable to the parties with reference to the succession of the interest of Ibrahim and execution of

Will by Babamiya and his wife who is the mother of the Plaintiff."

SUBMISSIONS :

14. Mr. Limaye, learned counsel for the Appellant submits that Soudabibi had no right to sell the suit property in view of the registered Will executed in favour of the Defendant's children. He submits that the Trial Court has wrongly cast the burden on Defendant to prove the sale deed executed by the Plaintiff's mother for denying the contents of the sale deed while holding that the Plaintiff had become the absolute owner of the suit property as the sale deed was the registered sale deed. He would further submit that the sale deed executed by the Plaintiff's mother was in respect of her 1/8th share, however, the Trial Court has held that the Plaintiff has become absolute owner of the suit property. He would further submit that the Will dated 9th June, 1989 executed by Babamiya and Soudabibi was mutual Will and after the death of Babamiya in 1993, the sale deed was executed by the Plaintiff's mother which she could not have executed by reason of the mutual Will. He would further submit that as the Defendant was the joint owner of the property, the Defendant was entitled to half share and thereafter by Will of 9th June, 1989 the Defendant has become the owner of the entire property. He submits that the Defendant's children who were the legatees under the Will were not impleaded as party. He would further submit that Mutation Entry No. 292 shows the name of the grand father of the Plaintiff and Defendant as the owner.

15. Pointing out the cross-examination of the Plaintiff in RCS No. 86 of 1999, he submits that Plaintiff has admitted that she was not aware

whether her father had built the property. He would further submit that the Plaintiff has admitted the execution of the Will, the mutation entry as well as the partition in the year 1955. He would further submit that the Plaintiff has admitted in the cross-examination that she is not aware as to whether the property house Nos. 509, 510 and 552 were belonging to her grand father. He would submit that even if it is held that the Plaintiff has a share, the entire property could not have been decreed to be delivered to the Plaintiff.

16. Drawing attention of the Court to the Mutation Entry No. 292 he submits that in the partition of the year 1955 the house property was shown to have been kept joint and there is no evidence on record to show that apart from the present property, there was another house property belonging to the parties. He would further submit that in RCS No. 15 of 1996, the Plaintiff has pleaded that the house property belongs to her father but the evidence shows that the same was not built by her father. He submits that the Defendant has half share in the property and have sold certain portion of the property.

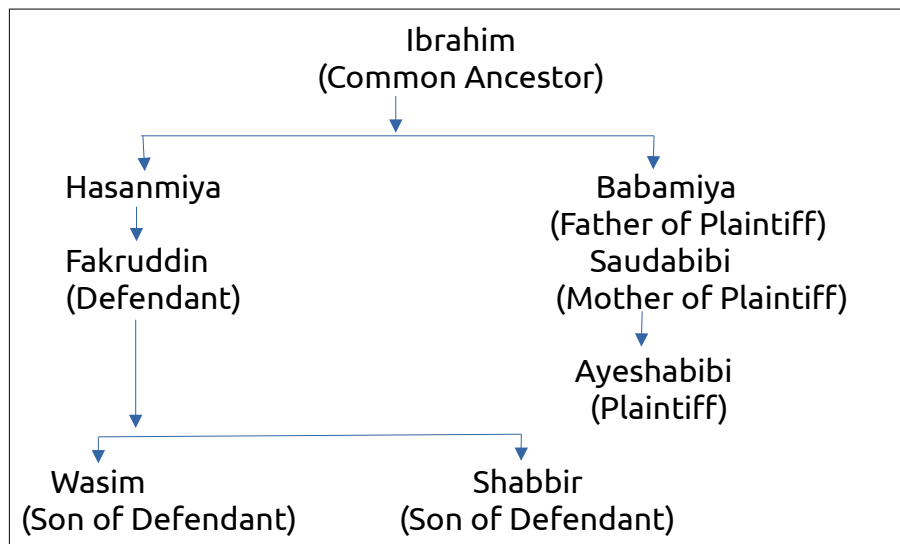
17. On the aspect of the Will he submits that as per Mohammedan Law, the Plaintiff's father could have bequeathed his 1/3rd share. He submits that Soudabibi could not have executed the Will. He would further submit that in case of intestacy wife takes 1/8th share and the balance is taken by the daughter.

18. *Per contra*, Mr. Kadu learned counsel for the Respondent would submit that there are concurrent findings of the Court and this Court may not in exercise of power under Section 100 disturb the findings in the absence of any perversity. He would further submit that as per principles of Muslim Law, Saudabibi had revoked the Will by selling the

property to her daughter. He submits that the Defendant has raised inconsistent pleas firstly that Babamiya had half share and thereafter raised the plea of having being bequeathed the property by Will of the year 1989 and had thereafter raised the plea of adverse possession, none of which the Defendant was able to establish. He would further submit that there is nothing to show that the property was ancestral property. He submits that as regards the Will there is challenge by the Plaintiff before the Trial Court in the independent suit which is pending.

REASONS AND ANALYSIS :

19. During the hearing of the Appeal, the genealogy was tendered to the Court which is reproduced hereinbelow for proper understanding of the relationship *interse*:



20. The genealogy reproduced above shows that Ibrahim was the common ancestor having two sons Hasanmiya and Babamiya. The Plaintiff is daughter of Babamiya and Defendant is son of Hasanmiya. The substantial question of law on which the Appeals had been

admitted is as regards the applicable principle of Muslim Law with reference to the succession of the interest of Ibrahim and the execution of the Will by the Plaintiff's parents.

21. The properties which forms subject matter of both the suits are House Nos. 509 and 510 which are claimed by the Plaintiff to be owned by her father. In the written statement, the case of the Defendant is that the House Property Nos. 509 and 552 are the joint properties of the Plaintiff's father and the Defendant's father. It is nobody's case that the house properties are the ancestral properties owned by Ibrahim. The evidence indicates that the rival claims of ownership by the Plaintiff and the Defendant have been premised on the ownership of the suit properties through their respective fathers and not through Ibrahim.

22. For purpose of showing ancestral nature of suit properties reliance is sought to be placed by Mr. Limaye on the admissions given in the cross-examination by the Plaintiff that the House Properties Nos. 509 and 510 were in existence in the year 1955, that her father had not purchased the house properties, that the properties were ancestral, and that she has no material to show that her father has constructed House Nos. 509, 510 and 552. Mr. Limaye would also emphasize on the Mutation Entry No. 292 which records the division of the properties between Babamiya and Hasanmiya and in which there is a reference to the house property which is common. Apart from the fact that the case of partition in the year 1955 reflected in the Mutation Entry No. 292 is evidence beyond pleading and thus cannot be considered, perusal of the Mutation Entry No. 292-Exhibit 65 discloses that the noting states that the house is Joint. There is no

mention of any house number or gat number. The Defendant in his evidence has deposed that the House No. 509 was constructed jointly by the Plaintiff's father and the Defendant's father. The Appellate Court on consideration of the oral and documentary evidence has rightly held that there is no specific house number or gat number mentioned in Mutation Entry No. 292 to have proper identification of the properties. The Appellate Court has considered the oral and documentary evidence produced on record and has arrived at a finding that the house properties were owned by the Plaintiff's father. The finding is based on evidence produced by the parties and constitutes finding of fact warranting no disturbance in exercise of power under Section 100 of CPC.

23. It is not the pleaded case nor is there any evidence brought by Defendant to establish that the suit properties are the properties of Ibrahim. No substantial question of law as regards the applicability of the Mohammedan Law with reference to succession to interest of Ibrahim arises for consideration.

24. On the basis of the oral and documentary evidence on record, the Appellate Court has held that the suit property was owned by Babamiya i.e. the father of Plaintiff. Once the ownership of Babamiya is proved, the other question of law to be answered is the right of the Defendant to the suit property under the Will dated 9th June, 1989 executed by Babamiya and Saudabibi as per the principles of Mohammedan Law.

25. The Plaintiff in her cross-examination has admitted the execution of the Will dated 9th June, 1989 by her parents Babamiya and Saudabibi. She has further deposed that she has no objection to

the Will executed by her parents. According to Mulla on Principles of Mohammedan Law 20th Edition, it is stated in §41 that the whole estate of Mohammedan if he has died intestate, or so much of it as has not been disposed of by Will, if he has left a Will devolve on his heirs at the moment of his death and the heirs succeed to the estate as tenants in common in specific shares. §118 states that 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.

26. As per the principles of Mohammedan Law, by testamentary disposition, Babamiya was entitled to bequeath 1/3rd of the suit properties which have been held by the Appellate Court to be the ownership properties of Babamiya. One of the submissions canvassed by Mr. Limaye is that the Defendant is entitled to 1/3rd share in the suit property under the Will and the Court could not have held the Plaintiff to be the absolute owner of the suit properties.

27. A registered Will dated 9th June, 1989 has been executed by Babamiya and Saudabibi in respect of house properties as well as landed properties. House No. 552 was standing in the name of Saudabibi which she has bequeathed to Plaintiff. Certain landed properties and House No. 552 are bequeathed to the Plaintiff whereas other landed properties and House no. 509 has been bequeathed to the sons of the Defendant. The Will states that it will take effect after the death of both the testators and if either of the testator dies the other will be considered as the legal heir of the deceased testator and the Will to take effect after death of both the

testators. The Will specifically provides that the survivor will be entitled to the benefit of the properties. Pertinently the Will retains the right to revoke the Will as per the wish of the testators.

28. The contents of the Will would indicate that as by virtue of the Will upon the death of one of the testators, the other was entitled to the benefit of the properties. The testators therefore fulfilled the roles of both the testator and the legatee and the Will was thus a joint mutual Will. The terms of the Will indicates that the Will was to take effect only upon the death of both the testators. What has to be considered is the intention of the testators. The Will was executed by the testators while leaving for Haj pilgrimage. The Defendant was bequeathed certain landed property and Defendant's son Wasim was bequeathed eastern portion ½ share of House Property No. 509 and other landed property and Defendant's other son Shabbir was bequeathed certain landed properties and western portion ½ share of House Property No. 509. It is further stated that the Will is not to take effect if one of the testators is surviving and upon death of one of the testator the surviving testator will be the legal heir and will be entitled to benefit of the properties. As per the Will, upon the death of Babamiya, Saudabibi being the surviving testator was entitled to benefit of the properties. The terms of the Will do not indicate that limited right or life interest was given to Saudabibi. The retention of right to revoke the Will would indicate that the intention of the testators was that the surviving testator would become the owner of the properties with right to revoke the Will. Saudabibi was thus having full authority to deal with the properties.

29. As per paragraph 118 of the Principles of Mohammedan Law,

Babamiya could not dispose of by Will more than a third of the surplus of his estate after payment of funeral expenses and debts. By the joint mutual Will dated 9th June, 1989 executed by Babamiya and Saudabibi i.e. the parents of Plaintiff, the legal third devolved upon Saudabibi as the surviving testator upon death of Babamiya along with right of revocation. Subsequently, the Will was revoked by Saudabibi by sending private notice as well as by publishing the notice of revocation and thus the Appellant could not claim any right in the suit properties under the Will dated 9th June, 1989.

CONCLUSION :

30. The suit properties i.e. House Nos. 509 and 510 have been proved to be ownership properties of the Plaintiff's father Babamiya. It is not the pleaded case of the Defendant that the suit properties are the ancestral properties of Ibrahim. The Defendant has deposed that the suit properties were jointly built by his father and Plaintiff's father which he has failed to establish. In the absence of any pleading about the suit properties being ancestral properties owned by Ibrahim, the Mutation Entry No. 292 or the Plaintiff's admissions in the cross-examination constitutes evidence beyond pleading and cannot be considered. No substantial question of law as regards the succession to the interest of Ibrahim arises for consideration.

31. Under the principles of Mohammedan Law, the Plaintiff's father could have disposed of a third of the surplus of his estate after payment of funeral expenses and debts. The Plaintiff's parents had executed a joint mutual Will dated 9th June, 1989. Under the Will upon death of one of the testator, the suit properties devolved upon the surviving testator and the right to revoke the Will was retained. Upon

death of the Plaintiff's father Babamiya, the suit properties devolved upon Saudabibi- the Plaintiff's mother who revoked the Will and sold the property to the Plaintiff. Upon revocation of the Will by Saudabibi, the bequest to Defendant's son did not survive. The Defendant did not acquire any right in the suit property and the Plaintiff being the owner of the suit properties as the sharer and purchaser of the share of her mother, the possession of the suit property was rightly directed to be handed over to the Plaintiff.

32. The substantial question of law is accordingly answered against the Appellant. Resultantly, both the Appeals stand dismissed.

33. In view of dismissal of Second Appeal, Civil/Interim Applications if any, does not survive for consideration and the same are disposed of.

34. At this stage request is made by learned counsel for the Appellant for extension of interim stay which is operating in their favour since long. The interim relief is extended for further period of 8 weeks from the date of uploading of this order on the official website.

[Sharmila U. Deshmukh, J.]