

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 101 OF 2015

SHAIKH SHAHIN SHAIKH PASHA DIED LRS FARJANABEE
AND OTHERS
VERSUS
SHAIKH PASHA SHAIKH KHAIRUDDIN AND OTHERS

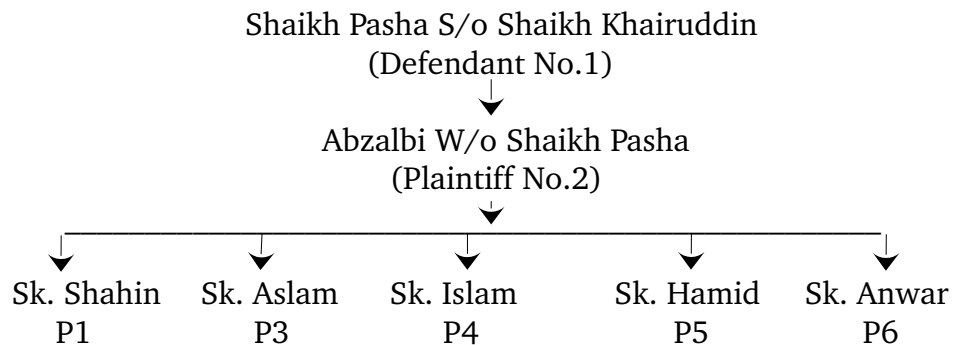
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Advocate for Appellants : Mr. Thigale Girish K. (Naik).
Advocate for Respondent Nos.2 to 4 : Mr. Tungar Hrishikesh V.
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CORAM : SHAILESH P. BRAHME, J.
DATE : 07.10.2025

FINAL ORDER :

1. Being aggrieved by concurrent findings of facts recorded by Courts below in dismissing the suit, the appellants/original plaintiffs have preferred this appeal. It is emanating from Regular Civil Suit No.26 of 1996 filed for declaration and perpetual injunction.

2. The genealogy showing relationship of the parties is as follows :



3. It is contended that land Gut No.101 belonged to father of the plaintiffs i.e. respondent No.1 Shaikh Pasha, defendant No.1. He partitioned the land in the year 1983 in favour of the plaintiffs and himself. Thereafter, in the year 1986, he sold different parcels from the suit land to defendant Nos.2 to 5 by four sale deeds. It is further contended that the alienation were made without their being any legal necessity and those sale deeds are not binding. In this background, relief of declaration and injunction is solicited in Regular Civil Suit No.26 of 1996.

4. Father/defendant No.1 filed written statement and supported the theory that he partitioned suit land in the year 1983 and application was submitted to the revenue officer for taking entry in the revenue record. It is stated that the plaintiffs were put in possession of their respective shares. It is further contended that the sale deeds executed in favour of defendant Nos.2 to 5 were absolute. He was required to alienate for furnishing security to the loan obtained from them.

5. Respondent Nos.2 to 5 contested the suit stating that they are absolute owner of the suit land and they acquired title

under the sale deeds. They also stated that defendant No.1 was in need of money and hence the land was alienated. The entitlement of the plaintiffs is challenged by them.

6. Plaintiffs examined two witnesses. Defendants examined one witness. Trial Court dismissed the suit. Being aggrieved, Regular Civil Appeal No.197 of 2006 was preferred and it was also dismissed.

7. Learned counsel Mr. Thigale submits that the judgment of the Lower Appellate Court is cryptic, unreasoned and perverse. All aspect of the matter has not been covered. Lower Appellate Court only dealt with application for amendment to plaint Exh.44 and order passed thereon. It is submitted that order passed below Exh.44 was challenged before Lower Appellate Court as it was permissible under Section 105 of CPC. The confirmation of the order below Exh.44 is perverse. It is submitted that the oral evidence supports the theory of execution of gift by defendant No.1 to the plaintiffs.

8. It is submitted that both Courts below have wrongly interpreted document at Exh.106 and 107 which is the substantial question of law in the matter. It is further submitted

that grounds enumerated in the appeal memo are substantial questions of law and appeal needs to be admitted.

9. Learned counsel Mr. Tungar repels the submissions of the appellants stating that the revenue record, application Exh.106 and 107 indicate that in 1983 partition was effected by defendant No.1. No tangible material is available to show that it was a gift by father to sons. It is submitted that respondent No.1 has specifically taken a plea in the written statement that it was a partition. It is contended that amendment proposed by application Exh.44 was changing nature of the suit and would have divested the defence raised by the respondents.

10. In Muslim law, there is no concept of joint family property, legal necessity or partition at the instance of father. A useful reference can be made to recent decision of the Supreme Court in the matter of ***Mansoor Saheb (Dead) and others Vs. Salima (D) by legal heirs and others ; MANU/SC/1364/2024.*** Following are the relevant extract :

“14. Tahir Mahmood, in his book ‘The Muslim Law of India’, 2nd Edition, Chapter 12 (Law of Inheritance) Para II, has provided for various concepts related to succession in Muslim Law which distinguish it from other personal laws :

“1. The Muslim law of succession is basically different from the parallel indigenous systems of India. The doctrine of janmswatvavada (right by birth), which constitutes the foundation of the Mitakshara law of succession, is wholly unknown to Muslim law. The law of inheritance in Islam is relatively close to the classical Dayabhaga law, though it differs also from that on several fundamental points. The modern Hindu law of succession (as laid down in the Hindu Succession Act, 1956) is, however, much different from both the aforesaid classical systems; it has a remarkable proximity, in certain respects, to the Muslim law of inheritance.

2. The division of heritage (daya) into sapratibandh ('obstructed') and apratibandh ('unobstructed')-self-acquired and ancestral- is equally foreign to Muslim law. Whatever property one inherits (whether from his ancestors or from others) is, at Muslim law, one's absolute property- whether that person is a man or a woman.

3. In Muslim law, so long as a person is alive he or she is the absolute owner of his or her property; nobody else (including a son) has any right, whatsoever, in it. It is only when the owner dies- and never before- that the legal rights of the heirs accrue. There is, therefore, no question of a would be heir dealing in any way with his future right to inherit.

4. The Indian legal concepts of 'joint' or 'undivided' family, 'coparcenary', karta, 'survivorship',

and 'partition', etc., have no place in the law of Islam. A father and his son living together do not constitute a 'joint family'; the father is the master of his property; the son (even if a minor) of his, if he has any. The same is the position of brothers or others living together.

5. *Unlike the classical Indian law, female sex is no bar to inherit property. No woman is excluded from inheritance only on the basis of sex. Women have, like men, right to inherit property independently, not merely to receive maintenance or hold property 'in lieu of maintenance'. Moreover, every woman who inherits some property is, like a man, its absolute owner; there is no concept of either stridhan or a woman's 'limited estate' reverting to others upon her death.*

6. *The same scheme of succession applies whether the deceased was male or a female. This is one of those salient features of Muslim law of succession which distinguish it from modern Hindu law of inheritance."*

(Emphasis supplied)"

"20. One may reasonably conclude, having referred to the primary texts and commentaries on Mohammedan Law, that partition while a person is alive between him and his heirs is impermissible. The manner in which partition is to take place after the death of the ancestor is set out in great detail in the sources of Mohammedan Law however, the same is beyond the scope of the present lis."

11. Interestingly, Supreme Court was dealing with a matter in which a plea of Hiba was pressed into service and for that purpose, reliance was placed in the revenue entry. In that case also, propositus Sultan Saheb was alleged to have partitioned his property during his life time amongst daughter, son and himself. Referring to principles of Muslim law, it is held that he could not have partitioned the property. It is further recorded that interpretation of the mutation entry would show partition only. The concept of partition and gift are distinguished by Apex Court.

12. In the present case, the pleadings of the plaintiff as well as plea of defendant No.1 in the written statement indicate that partition occurred in 1983. Sensing that said plea has no sanctity of law it is tried to be shifted to Hiba. Except stray reference of gift deed on a stamp in deposition, there is nothing on record to show that it was gift.

13. The burden was upon the appellants/ plaintiffs to lead evidence to make out case of Hiba. No material is placed on record to show that it was Hiba. On the contrary, mutation entry No.65 spells out a partition. Exh.106 is a photo copy of

application dated 20.12.1983 submitted to Talathi, Exh.107 is the notice and Exh.108 is the Jahirnama. Appellants could have produced original documents and convincing material. Trial Court considered these documents and came to conclusion that it was partition.

14. It is attractive submission that interpretation of the document at Exh.106 and 107 is substantial question of law. The documents at Exh.106, 107 and 108 are the photo copies but still those are read in evidence. It is not that more than one interpretation is possible from reading the documents. Its a wishful perception of appellant that those would be read to infer Hiba. There is no question of any interpretation of the document. The document must have a probative value and the foundation in the pleading. In the absence of any supportive material, interpretation of the document would be of no consequences. Only inference from the documents is that of partition. I do not find involvement of any substantial question of law in present appeal.

15. Following are the clinching material to indicate that in the year 1983, the partition took place.

- (i) Mutation entry 65.
- (ii) Complaint and the written statement of defendant No.1.
- (iii) Application Exh.106.
- (iv) Deposition of defendant witness Talathi.

16. It reveals from record that application Exh.44 was submitted by appellants in the Trial Court for amendment to complaint for converting the theory of partition into the oral gift. Certainly, it was not a clarificatory amendment. Appellants proposed to replace his theory which would have deprived the respondents/defendants or nullified their defence. It was rightly rejected by the Trial Court. The order of rejection was challenged in appeal. In the impugned judgment, Lower Appellate Court dealt with that aspect of matter and confirmed the order of rejection of application Exh.44. I do not find any error of jurisdiction committed by Lower Appellate Court.

17. The Lower Appellate Court has written a short judgment. The purport of application Exh.106, 107 and deposition of the witnesses are taken into consideration. The judgment cannot be described as cryptic and lacking reasons. Appellant has come up with a theory which has no foundation and which is against the Muslim Law. The after thought attempt to show

Hiba is also not supported by any material. I, therefore, find no merit in the submissions of learned counsel Mr. Thigale.

18. The sale deeds are executed long back. There is no reason to remand the matter to the Trial Court or to extend any opportunity to the appellants. Even the Lower Appellate Court could not have remanded the matter.

19. Learned counsel Mr. Thigale for the appellants relies on the judgment of ***Boodireddy Chandraiah and others Vs. Arigela Laxmi and others ; MANU/SC/3839/2007***. The scope of Appellate Court has been highlighted in the judgment. I have gone through paragraph Nos.11 and 12 of the judgment. I am bound by the principles laid down therein. In the case at hand, the construction of document is not well founded. I have already observed that the question posed by the appellants cannot be termed as a substantial question of law. This judgment will not help the appellants. Further reliance is placed on the judgment of ***G.N.R. Babu Vs.B. C. Muthappa and others ; MANU/SC/1115/2022***. As the Lower Appellate Court has already dealt with order passed below Exh.44, it cannot be said that its a case where Lower Appellate Court failed to exercise power under Section 105 of CPC.

20. Learned counsel Mr. Tungar relies on the judgment of Co-ordinate Bench in the matter of *Shridhar Bajirao Pawar and others Vs. Bajirao Dhondiba Pawar and others ; 2016(6) ALL MR 280*. The facts are distinguishable. In the present case, the suit of the appellants has not been dismissed on account of collusion in between the plaintiffs and defendant No.1. This judgment will not help the respondents.

21. For the reasons stated above, I pass following order :

ORDER

Second appeal is dismissed.

(SHAILESH P. BRAHME, J.)

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vmk/-