



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 357 OF 1994
WITH CIVIL APPLICATION NO. 11798 OF 2023

1. Mohammed s/o Mohiuddin Shaikh
(Since Deceased) Through L.R's.
- 1A. Jamadar s/o Mohammad Shaikh
Age : 65 years, Occ : Agril.,
R/o. Malkapur, Tq. Kallam,
Dist. Osmanabad.
- 1B. Hajubhai Mohammad Shaikh
Age : 62 years, Occ : Agril.,
R/o. Malkapur, Tq. Kallam,
Dist. Osmanabad.
- 1C. Shahibaba Mohammad Shaikh
(Since deceased) Through LR's.
- 1-C1. Rabana W/o Shahibaba Shaikh
Age : 45 years, Occ : Household,
- 1-C2. Yashin s/o Shahibaba Shaikh,
Age : 28 years, Occ : Agri,
- 1-C3. Yosin Shahibaba Shaikh,
Age : 22 years, Occ : Agri,
- 1-C4. Hina Shahibaba Shaikh,
Age : 24 years, Occ : Household,
- 1-C5. Aliyum Shahibaba Shaikh,
Age : 32 years, Occ : Household,
- 1-C1 to 1-C5 R/o Malkapur,
Post Yermala, Tq. Kallam,
Dist. Osmanabad.
- D. Khatunbee Habu Sayyed,
Age : 54 years, Occ : Household,
R/o. Bhatisinrpura, Tq. Kallam,
Dist. Osmanabad.
- E. Sugrabee Dagadu Shaikh,

Age : 52 years, Occ : Household,
R/o. Dhekri, Tq. Tuljapur,
Dist. Osmanabad.

F. Shakhharbee Yaquoob Shaikh
Age : 50 years, Occ : Household,
R/o. Dhotra, Tq. Barshi,
Dist. Solapur.

G. Laylabbee Ramzan Sayyed,
Age : 47 years, Occ : Household,
R/o. Malkapur, Tq. Kallam,
Dist. Osmanabad.

... APPELLANTS

VERSUS

1. Farid s/o Haseen Shaikh
(Since Deceased) Through LR's

1A. Doulatbi w/o Khajabhai Pathan
Age : 71 years, Occ : Household,
R/o. Shabbir Compound, Boysar,
Kajupada, Gamadevi Road,
Kandivali (E), Mumbai – 400 101.

1B. Dagdibi w/o Rajuddin Sayyed
Age : 66 years, Occ : Household,
R/o. Datta Nagar, Khandali,
Tq. Malsiras, Dist. Solapur

2. Fakir s/o Hasan Shaikh
(Since Deceased) Through LR's

2A. Rashid Fakir Shaikh
Age : 70 years, Occu : Labour,
R/o Dyes Plot, Near Noorani Masjid,
Gultekdi, Pune.

2B. Bande Nawaz Fakir Shaikh,
Age : 65 years, Occu : Labour,
R/o Dyes Plot, Near Noorani Masjid,
Gultekdi, Pune.

2C. Chand Fakir Shaikh,

Age : 60 years, Occu : Labour,
R/o Dyes Plot, Near Noorani Masjid,
Gultekdi, Pue.

... RESPONDENTS

Mr. R. N. Dhorde, Senior Advocate a/w Mr. Sanjay S. Dudhane i/b Mr. V. R. Dhorde, Advocate for the appellants
Mr. P. R. Katneshwarkar, Senior Advocate i/b Mr. Rahil Kazi, Advocate for the respondents

CORAM : R. M. JOSHI, J.

RESERVED ON : 12th FEBRUARY, 2025

PRONOUNCED ON : 17th FEBRUARY, 2025

JUDGMENT :-

1. This appeal filed by original defendant under Section 100 of the Code of Civil Procedure is directed against the judgment and decree passed by First Appellate Court in R.C.A. No. 139/1985, reversing the judgment and decree of dismissal of suit passed in R.C.S. No. 121/1980 and in turn decreeing the suit.

2. Parties are referred to as 'plaintiffs' and 'defendant' for the sake of convenience.

3. In order to appreciate the questions involved in this appeal it would be relevant to take note of certain admitted facts which are reproduced in brief as under:

(i) Immamsaheb had three sons, Haseen, Ibrahim and Mohiuddin. Haseen died in the year 1946, Ibrahim died in the year 1948, whereas Mohiuddin died in 1947. Ibrahim and Mohiuddin jointly purchased land survey No. 36 admeasuring 26A 21G of situated at

village Malkapur, Taluka Kallam under registered sale deed dated 29th Teer 1344 Fasli i.e. in May, 1935 from Maruti for a total consideration of Rs.500/-. They entered in the possession of the suit land as owners. Both of them were having half and divided share therein. Another suit property being Municipal house No. 89 situated at Malkapur originally belonged to their father came to the share of Ibrahim, in a partition effected between Haseen, Ibrahim and Mohiuddin. Ibrahim died issue less and left plaintiffs and defendant as his legal heirs.

(ii) Apart from above admitted facts, as per claim of plaintiffs, both sides inherited 1/3rd share each and became co-owners of the suit properties. Since the defendants refused to effect partition of the suit property, suit bearing R.C.S. No. 121/1980 was instituted. Plaintiffs apart from seeking partition, separate possession of the suit property, also asked for mesne profits and rent of the property.

(iii) Defendants by filing written statement at Exhibit 15 denied the contents of the plaint. He, however admitted genealogy and relationship between the parties. It is however not in dispute that survey No. 36 was purchased jointly by his father and Ibrahim. It is claimed that after death of Ibrahim father of defendant became owner and possessor of the entire suit land. It is claimed about for 34 years being in enjoyment of the suit land and without interference openly and continuously and that he has become owner thereof by adverse

possession. In respect of the house property it is claimed that he is residing there with his name being entered in the grampanchayat record in the year 1967. It is claimed that the plaintiff's father left Marathwada Region long back and went to settle in Warahd i.e. Vidharba region and therefore they had no concern with the suit property.

(iv) After Trial Court framed issues, on behalf of the plaintiffs plaintiff No.1 Farid entered the witness box at Exhibit 32. Plaintiffs also examined Eknath Lomte at Exhibit 35 and Sheshrao at Exhibit 36. Defendant Mohammed Shaikh deposed at Exhibit 46. He also examined Navnath Kakde Exhibit 48 and Umar Sayad at Exhibit 49.

(v) Learned Trial Court dismissed the suit on the ground that plaintiffs have failed to prove their shares in the suit property. Plaintiffs being aggrieved by the said judgment and decree preferred R.C.A. No. 139/1985. After hearing both sides First Appellate Court passed impugned judgment and decree dated 20th August, 1994 partly allowing the appeal holding that the plaintiffs is entitled to get 1/6th share in land and 1/9th share in the house No. 89. It was further directed to conduct an enquiry into the mesne profit of the share of the plaintiffs. Record indicates that the operative part of this judgment is corrected subsequently by First Appellate Court.

4. This Court by order dated 01/08/1995 passed in Civil Application No. 4509/1994 has directed the appellant/defendant to

deposit a sum of Rs.5000/- per annum.

5. By order dated 8th March, 2024 following substantial questions of law came to be framed by this Court.

“a) Whether Section 63 and 64 of Mohammedan Law are applicable when it is established that the disputed property is not ancestral property?

b) Whether the learned appellate court erred in granting share in the suit property to original plaintiffs despite that they did not have any share in the property ?

c) Whether the suit is barred by Article 144 of Limitation Act and that whether the learned appellate court failed to consider Section 708 of Mohammedan law in Chapter -14 Part-II ?”

6. Learned senior counsel for the defendant/ appellant submits that the First Appellate Court has committed error by not appreciating the pleadings and evidence on record properly. It is his submission that the First Appellate Court ought to have passed reasoned order while reversing the judgment and decree passed by the Trial Court. According to him as held in the case of *Santosh Hazari vs Purushottam Tiwari (Dead) By Lrs, AIR 2001 SUPREME COURT 965*. The judgment of the First Appellate Court must reflect application of mind and reappraisal of evidence is done it must be discussed accordingly. By drawing attention of the Court paragraph 25 of the judgment it is submitted that the judgment passed by the First Appellate Court is without any reasoning. It is his contention that the First Appellate Court had failed to take into consideration the fact that for almost 34 years, no action was taken by the plaintiffs to stake their claim in respect of the suit property

and as such it amounts to ouster of plaintiffs from the suit property and resultantly the plaintiffs would not be entitled to seek relief of partition. In support of his submission he placed reliance on the judgment in case of *Vasantha (dead) Through Legal Representative Versus Rajalakshmi Alias Rajam (dead) Through Legal Representatives (2024) 5 SCC 282* and *Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleshwarappa and another, AIR 1994 SC 337*.

7. Learned senior counsel appearing on behalf of the respondents/plaintiffs submits that admittedly suit property was purchased by Ibrahim and Mohiuddin. Mohiuddin died in 1947 and therefore there is no substance in the contention of the defendant that upon death of Ibrahim in year 1948, Mohiuddin has become the sole owner of the suit property. It is his submission that in any case there is no dispute about the fact that Ibrahim had one half share in the suit property i.e. the land survey No. 36 and it would devolve upon his heirs and the plaintiffs and defendant being legal heirs of Ibrahim are entitled to receive the share therein. It is his submission by relying upon the judgment of Division Bench of Jammu and Kashmir High Court in case of *Ahmad Dar Versus Mt. Mukhti, AIR 1951 J & K 21* to canvass that after the death of Ibrahim since several heirs are left behind by him, all of them shall become co-owners and property is held on behalf of all by defendant. In such circumstances the claim of defendant of becoming owner of the suit property by adverse possession cannot sustain. He

further argues that as rightly observed by the First Appellate Court the plea of ouster has not even been pleaded by the defendant and as such there was no question of applying in the said principle to the present case.

8. At this stage it is necessary to take note of the fact that the initially the First Appellee Court passed judgment and decree with following operative part;

"i) The appeal is partly allowed. The impugned Judgment and decree is hereby set aside and instead it has been ordered and decreed that the plaintiff 1/ appellant is entitled to get 1/6th share in the field sy.No. 36 admeasuring 26A 21G of village Malkapur, Taluka Kallam.

ii) The plaintiff is also held entitled to get 1/9th share in house No.89 of village Malkapur, Taluka Kallam, more particularly described in clause 2 of the prayer in the plaint and also shown by red in plaint map. (This description shall form of the decree).

iii) The preliminary decree for partition should be drawn up.

iv) The copy of the decree be sent to the Collector for effecting the actual partition of Sy.No. 36 of Malkapur and putting the plaintiff 1 in possession of his 1/3rd share.

v) So far as the house property i.e. House No. 89 is concerned, the Commissioner be appointed for preparing as scheme for partition of that house.

vi) On receipt of the report of the commissioner and hearing the objections, if any, raised by the parties, final decree in respect of the partition and separate possession of the suit house shall be passed.

vii) The enquiry into the Mesne Profits of the share of the plaintiff 1 be held, from the date of suit till the date of possession of plaintiff 1's share in the suit property.

viii) The respondent 1 to bear is own costs and pay those of

appellant/ plaintiff 1 through-out."

9. Admittedly, since there was error in operative part and application was moved for correction thereof and accordingly the First Appellate Court Corrected the operative part of the judgment which reads thus:

"Order

1. It is directed that in para II of the operative order of judgment Exh.19 and decree at Exh. 20 in RCA No. 139/85 dated 20/8/94 the words and figures about share of "1/9th" in house No. 89 be corrected as "1/3rd" share.

2. It is also directed that in para IV of the operative order of the judgment and decree which pertains to partition of Sy.No. 36, the words and figures about share i.e., "1/3rd share be corrected as "1/6th" share.

3. After removal of clerical mistake as aforesaid the original Record and Proceeding of RCA No. 139/85 along with RCS No. 121/80 be submitted to the Registrar, Hon'ble High Court of Judicature at Bombay Bench at Auarangabad."

10. In order to appreciate the submission of the leaned counsel appearing or the rival parties it would be necessary to take into consideration the facts which are not in dispute. So far as the suit property survey No. 36 is concerned, admittedly the said property is purchased by Ibrahim and Mohiuddin jointly. The house property belong to Immamsaheb i.e. father of Mohiuddin, Ibrahim and Haseen. Plaintiffs are sons of Hassen. Whereas the defendant is Mohiuddin's son. Haseen, Mohiuddin and Ibrahim died in year 1946, 1947 and 1948 respectively.

11. As far as house property is concerned, there is no dispute of

the fact that it was owned by father of these three brothers and it was partitioned between them. Since the the land survey no. 36 was jointly purchased by Ibrahim and Mohiuddin and as Mohiuddin pre deceased Ibrahim, this Court finds no substance in the contention of the defendant that on death of Ibrahim defendant's father became sole owner and possessor of the said land. In any case Ibrahim is mohammedan and the law of inheritance applicable to a person professing muslim religion, makes his heirs entitle to succeed to his estate. There is no dispute about the fact that the plaintiffs and defendant are legal heirs of Ibrahim who only can inherit the suit property. Thus conclusion that both plaintiffs and defendant are having 1/3rd share each in the suit property is inevitable. It is thus clear that when defendant claims possession of suit land and house, it must be considered to be for an on behalf of all co-owners. In such circumstances, it becomes immaterial as to the time for which defendant was holding the said land on behalf of all. Perusal of the written statement indicates that there was no specific plea of ouster raised by the defendant against the plaintiffs. In absence of any such specific plea is raised, it was not open for the Trial Court to consider the same for the purpose of dismissing the suit.

12. With regard to the plea of adverse possession, it is pertinent to note that in the written statement defendant has disputed the ownership of plaintiffs over the suit property. Unless the ownership of the plaintiffs is accepted by defendant over the suit property, it would not be

open for him to raise plea of acquisition of title by adverse possession. To claim title on plea adverse possession, acceptance of title/ownership of other side is *sine qua non*. Since the same is challenged by defendant, his plea for adverse possession must fail.

13. Though substantial question of law is framed as recorded above, about the suit property being not ancestral property, in considered view of this Court material on record shows that suit land is self acquired property of Ibrahim, whereas house is ancestral one. As per law of inheritance applicable to Mohammedans, each and every property that remains within the ownership of an individual can be inherited by his successor and irrespective of nature of property ancestral or self acquired, it can be inherited by them. Thus, no substantial question of law to that extent is involved in this appeal.

14. The point of limitation raised by defendant needs to be decided on the basis of pleadings and evidence led by the parties. Plaintiffs specifically pleaded about they seeking partition of the suit property from the defendant on 17/03/1980 and since it was refused by the defendant, cause of action accrued for them to file suit for partition. Plaintiff No.1 by entering into witness box has deposed about the refusal by defendant to partition the suit property. There is no contrary evidence brought on record by the defendant. Thus, in the facts of the case, suit is not barred by limitation.

15. Now coming to the issue sought to be raised by the learned senior counsel for defendant about the judgment of First Appellate Court not being reasoned one, the judgment in its entirety needs to be seen rather than to consider the paragraphs of the judgment in isolation. The Hon'ble Supreme Court in case of *Santosh Hazari* (supra) has held that order while reversing the judgment of Trial Court should be reasoned and not cryptic.

16. This Court, therefore, is required to see whether the judgment impugned passed by First Appellate Court satisfies the said test. Perusal of entire judgment demonstrates more than sufficiently that the Appellate Court after carefully considering pleadings and evidence on record, rendered findings of fact. In no case, the order impugned can not be termed as cryptic one.

17. As a result of the above discussion a substantial questions of law framed herein above deserve to be answered in negative. Defendant has failed to make out any case for causing interference in the impugned judgment and decree for want of any perversity in the findings recorded by the First Appellate Court. Hence, appeal stands dismissed. Pending application, if any, stands disposed of.

(R. M. JOSHI, J.)

Later on

18. After pronouncement of the judgment, learned senior counsel

for the appellants seeks continuation of order dated 21/09/2023.

19. Learned senior counsel for the respondents opposes the said request.

20. Since the interim relief is enforce for more than one year, the same is continued for a period of six (06) weeks from today.

(R. M. JOSHI, J.)

ssp