



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

MISC. CIVIL APPLICATION NO.1287/2014
IN
SECOND APPEAL NO.195/1998 (D)

Hasinabi Mohmadkha (Deleted as per Court's order dt. 17.1.2014)
Mehboobkha S/o Mohmadkha and others
...Versus...
Rashidkha S/o Hasankha (D)
Hamidabi wd/o Rashid Khan and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. V.P. Panpalia, Advocate for applicants
Mr. C.A. Joshi, Advocate for respondent Nos.1 (a to h) & 2 (i to v)
Mr. S.I. Jagirdar, Advocate for respondent No.3 (i to vi)

CORAM : ROHIT W. JOSHI, J.
DATE : 24/12/2025

1. The present application is filed by the appellants in Second appeal No.195/1998, who are the original defendants in Regular Civil Suit No.733/1990, which was filed for partition and separate possession. The parties are governed by Muslim Personal Law.
2. The contention of the applicants is that while deciding the appeal vide judgment and decree dated 28/07/2014 this Court has decided two applications filed by the applicants for permission to amend the written statement and permission to lead additional evidence, in view of amended pleadings, vide separate order passed on the same day i.e. 28/07/2014.
3. Mr. Panpalia, learned Advocate for the applicants contends that this Court has committed a procedural

irregularity, causing miscarriage of justice by deciding the application for permission to lead additional evidence first and rejecting the application for amendment of written statement, in view of rejection of the said application. He contends that application for amendment of written statement should have been considered first and thereafter the application for permission to lead additional evidence ought to have been decided. In support of his contention, he has placed reliance on the judgment of the Hon'ble Supreme Court in the matter of *Mahila Ramkali Devi and others Vs. Nandram (Dead) Through Legal Representatives and others*, reported in (2015) 13 SCC 132.

4. In the facts of the present case, in my considered opinion, it is not necessary to go into said aspect. As stated above, the parties are governed by Muslim Personal Law. Perusal of the application for amendment indicates that the applicants have stated that their grandfather Saheb Khan Kadar Khan and grandmother Maidabi, who were exclusive owners of the suit property had executed a Will dated 03/04/1947, bequeathing the entire suit property in favour of their son Mohammad Khan Saheb Khan, who is husband of the applicant No.1 and father of other applicants. It is stated that the applicants were not aware about the said Will and that they found the said Will accidentally while cleaning of the residential house during the month of Ramzan of 2012 i.e. August, 2012. It is stated that in view of the said Will, the suit for partition filed by the respondents must be dismissed.

5. The Will is with respect to entire suit property. It is well settled that a Will, executed by an individual governed

by Muslim Personal Law, when executed in favour of legal heirs is not valid, unless the other legal heir expressly consent to the Will after the demise of the testator. In the case at hand, it is the case of the applicants that the Will was found and seen for the first time in the month of August, 2012. The applicants do not have personal knowledge as to whether late Mohammad Khan Saheb Khan, the beneficiary of the Will, was aware about the Will or not, as also as to whether the other legal heirs of the testator i.e. brothers and sisters of Mohammad Khan Saheb Khan were aware about the Will. It is pertinent to state that in para 17-B of the proposed statement, the applicants have pleaded as under :-

“17-B. The other legal heirs of the Sahebkhani and Maidabi perhaps were aware of the Will and had implied consent to the exclusive ownership of Mohammad Khan Saheb Khan. Thus, even though the Sahebkhani was died in the year 1969, none of the legal heirs of the Sahebkhani claimed partition at any time before. Only after death of Hasankhani in the year 1990, one of the son of Sahebkhani, the present plaintiffs who are the legal heirs of Hasankhani after his death filed this suit with fraudulent intention in collusion with defendant no.1.”

6. Perusal of the said pleadings will indicate that even the applicants are not sure as to whether other legal heirs of the testator had accorded consent for the said Will. The applicants do not have any personal knowledge about the statements made in paragraph 17-B of proposed amendment. Therefore, even if it is assumed that the Will was executed by parents of deceased Saheb Khan, bequeathing the entire suit

property to him, in the absence of consent of other legal heirs, the Will will not be enforceable.

7. Legal position in this regard is no longer *res integra*, as can be seen from the following judgments.

(I) Thakorlal Vadilal Vs. Ambalal Bhikabhi Patel, reported in AIR 1942 Bombay 330.

(II) Narunnisa Vs. Shek Abdul Hamid, reported in AIR 1987 Karnataka 222.

(III) Sulaxani and another Vs. Sattar Ali and others, reported in (2022) 4 CGLJ 180

(IV) Zulekabi and others Vs. Mohammad Mustafa and others, MANU/KA/1645/2010.

8. In view of the aforesaid decisions, which categorically state that in case of a Will by a person governed by Muslim Personal Law in favour of his legal heirs, the same does not become enforceable unless the other legal heirs accord consent to the Will after the demise of testator and that there is no pleading or material to establish such consent by the other legal heirs, in my considered opinion, no fruitful purpose will be served even if the application for review is allowed and permission is granted to amend the written statement and lead evidence in order to prove the Will.

9. It must also be stated that the beneficiary of the Will so also his brothers and sisters i.e. other legal heirs of the testator are no more.

10. In that view of the matter, though the contention of Mr. Panpalia appears to be legally sound that this Court should have decided the application for amendment of written statement prior to dealing with the application for permission

to lead additional evidence, I am not inclined to entertain the application for review, since no fruitful purpose will be served even if the application is allowed and applicants are allowed to amend the written statement and lead additional evidence.

11. Misc. Civil Application is accordingly dismissed.

(ROHIT W. JOSHI, J.)

Wadkar